

IN THE PESHAWAR HIGH COURT, PESHAWAR
[Judicial Department]

Cr. A. No.1143-P/2019

Muhammad Israr son of Siraj alias Wali Muhammad, R/o Marghuz, District Swabi.

Appellant (s)

VERSUS

The State etc

Respondent (s)

For appellant: - Mr. Shabbir Hussain Gigyani, Advocate

For State: - M/s. Shumail Ahmad Butt, Advocate
General & Muhammad Nisar Khan,
Assistant Advocate General

Amicus Curae: Mr. Ali Gohar Durrani, Advocate

Respondent-1 by: Mr. Asad Yousafzai, Advocate

Date of hearing: 11.03.2020

JUDGMENT

ROOH-UL-AMIN KHAN, J:- Through this common judgment we proposed to decide the instant criminal appeal whereby the appellant was convicted and sentenced to life imprisonment by the learned Judge, Model Criminal Court, Swabi, vide judgment dated 12.09.2019 in case FIR No. 353 dated 21.06.2007 under section 302 Police Station Zaida, District Swabi, and **Cr. R No.245-P/2019** titled **“Juma Said..vs.. Muhammad Israr”** filed by the complainant against the same judgment for enhancement of

sentenced of the appellant from life imprisonment to normal sentence of death. The appellant Muhammad Israr has also filed **Cr. A No.1142-P/2019** titled “**Muhammad Israr..vs..The State**”, wherein, he was convicted to one year R.I by the learned Judge, Model Criminal Court, Swabi, in case FIR No. 396 dated 12.06.2016 under section 15 AA, Police Station Zaida, Swabi and **Cr. A No.1329-P/2019** titled “**Hafiz Naveed Ahmad..vs..The State**”, **Cr. A No.1336-P/2019** titled “**Rehmat Khan & Others..vs..The State**” and **Cr. R No.302-P/2019** titled “**Faisal Khan..vs.. Rehmat Ali & others**” being emanating from the judgments of learned Additional Sessions Judge-I/Judge Model Criminal Trial Court, Hangu dated 29.10.2019 in case FIR No.198 dated 22.04.2006 under section 302/324/427/148/149 PPC of Police Station Hangu as in all the above noted cases, an important common legal question raised by the counsels for appellants which warranting an appropriate order by this court:-

“Whether evidence of prosecution witness(s) in criminal trial(s) can be recorded by the Court through a video call, viber, Skype, IMO, WhatsApp, Facebook Messenger, Line Caller and Video Conference including such other modern devices and

applications; if yes, whether such statement(s) would be legal under the law on the face of section 353 of the Code of Criminal Procedure 1898, which is couched in a language that except as otherwise expressly provided, all evidence taken under Chapters XX, XXI, XXII and XXII-A) shall be taken in presence of the accused, or, when his personal attendance is dispensed with, in presence of his pleader. And finally what would be the admissibility of such evidence under the provisions of the Qanun-e-Shahadat Order, 1984, particularly its Article 164 ?

2. During arguments in the case in hand, the above formulated question raised in the matrix of the following facts:-

According to FIR, on 21.06.2007, complainant Juma Said, in company of dead body of his brother, namely; Abdullah deceased, reported in Police Station Zaida to the effect that on the eventful day he along with his brothers, Abdullah, Bahadar and son Saeedullah, after finishing their *Tandoor* work in Marguz Bazzar, was on the way to home and when reached near the house of one Nizar, accused Muhammad Israr, duly armed with firearm, emerged there and opened fire at the deceased, as a result, he got hit and died at the spot. Besides him, the occurrence

is stated to have been witnessed by PW Bahadar Jamil and his son Saeedullah. A dispute over the cooking of bread between the deceased and the accused/appellant has been advanced as motive behind the crime.

After completion of investigation, initially challan under section 512 Cr.P.C was submitted against the appellant before the learned trial court, where he was declared as proclaimed offender vide order dated 10.03.2008. On 09.06.2016, the appellant was arrested; as such supplementary challan was submitted against him before the learned trial court, where he was formally charge sheeted to which he pleaded not guilty and claimed trial, hence, evidence of the prosecution was invited. Since, PW Saeed Ullah was in Saudi Arabia in connection with earning his livelihood, hence, on 09.07.2019, his statement was recorded by the learned trial court as PW.9 via video call on IMO. In cross-examination, the said PW while replying to a question stated that he is present in his residential room at Saudi Arabia when his statement is being recorded. Similarly, in connected cases, statement of Faisal Khan complainant, an eyewitness has been recorded as (PW.6) through video call from Dubai.

3. The case was earlier fixed for 05.11.2019, wherein during arguments, learned counsel for the appellant-convict, at the very outset, raised a challenge mainly on the ground that recording evidence on any kind of video device from a foreign State, when a witness admitting the factum of his presence in his personal residential room, would not meet the requirement of section 353 Cr.P.C., according to which all evidence shall be taken in presence of the accused or when his personal attendance is dispensed with, in presence of his pleader. He argued that physical presence of a witness at the time of recording evidence is necessary before the court for the purpose of ensuring decorum of the court and to avoid any untoward situation. He further contended that in case of recording evidence through video call, if a witness intentionally offends or interrupt proceedings before a Public Servant sitting in the judicial proceedings, his action cannot be controlled by the presiding officer of the court and this shall not only violate the sanctity, decorum and prestige of a court, but the disobedient and disdainful witness would also be beyond the punitive provisions of the law. He pointed out that apart from above, there may be every possibility of such witness being coached or tutored while giving evidence, and in that case, the witness will not be

under the control of the Court. He emphasized that the advantage of the proceedings having been conducted in open court as required under section 352 PPC, in an evidence recorded through mobile device or video link, as the public would have no access to attend the proceedings like they could have in open Court.

4. When the learned AAG for the State and learned counsel for the complainant were confronted with the submissions of learned counsel for the appellant, they requested for time to meet the arguments addressed by learned counsel for the appellant. Their request was acceded to, hence, the case was posted to 07.11.2019. On the said date, learned counsel for the respondent/complainant requested for further time to assist the court. Mr. Gohar Ali Advocate, present in the court was also appointed as Amicus Curie to assist the court with research based studies on the issue.

5. Today arguments of learned counsel for the parties along with Mr. Ali Gohar Durrani, Advocate, amicus curae heard and research work on the point perused which reflects that except Pakistan and Australia, in all the developed countries of the world no endeavor is made to provide a specific provision for recording evidence via

video link or modern electronic devices. The International Law provides certain provisions, according to which a witness not able to appear before the court, is allowed to record his statement through video link. Instance of the International Criminal Court (ICC) may be quoted here, which allows a witness, who is absent from the courtroom, to record testimony through video link subject to submission of application with reason of inability to personally appear before the court and the rules and regulations are to be followed. Article 69(2) of Rome Statute, Rule 65 of the ICCs Rules of Procedure and Evidence, Rule 61 of ICCs, Regulation of the Office of Prosecutor and Regulation 45, 46 and 47 of the ICCs, are statutory provisions regulating the procedure and arrangement for allowing and recording evidence via video or audio link.

In April 1997, the Prosecution brought a Motion (application) before the Trial Chamber of International Tribunal for Former Yugoslavia in case titled, **“Prosecutor Vs Zejnil Delalic”** for allowing the recording of certain prosecution witnesses by means of video link. The Tribunal after scanning all the ICCs Laws regulating

the provision of allowing appearance and examination of witnesses through video link, observed that:-

“Video-conferencing is, in actual fact, merely an extension of the Trial Chamber to the location of the witness. The accused is therefore neither denied his right to confront the witness nor does he lose materially from the fact of the physical absence of the witness. It cannot, therefore, be said with any justification that testimony given by video link conferencing is a violation of the right of the accused to confront the witness. Article 21(4)(e) is in no sense violated.”

The Trial Chamber of ICC in the above titled case relied upon the earlier decision on the subject matter rendered in **Tradic** case, wherein law was set forth to the effect that the evidentiary value of the testimony provided by video link would be practicable and reliable subject to fulfillment of the required guideline enumerated in Para No.22 of the decision:-

“The Trial Chamber acknowledges the need to provide for guidelines to be followed in order to ensure the orderly conducted of the proceedings when testimony is given by video link. First, the party making the application for video link testimony should make arrangements for an

appropriate location from which to conduct the proceedings. The venue must be conducive to the given of truthful and open testimony. Furthermore, the safety and solemnity of the proceedings at the location must be guaranteed. The non-moving party and the Registry must be informed at the every stage of the efforts of the moving party and they must be in agreement with the proposed location. Where no agreement is reached on an appropriate location, the Chamber shall hear the parties and the Registry and make a final decision”.

6. The Courts, in various foreign jurisdictions, have employed the use of technology for the purpose of recording of evidence. The United State of America (US) allows the video conferencing and its Federal Court of Claims have provided guidelines for the use of video conferencing.

Similarly, the Supreme Court of Florida, while dilating upon the issue of recording evidence by means of video conferencing, in case titled, “**David Harrell Vs State of Florida**” (Fla. 1998) made the following observations:-

“We also acknowledge that possible audio and visual problems can develop with satellite transmission. It is incumbent upon the trial judge to monitor such problems and to halt the procedure if these problems threaten the reliability of the cross-examination or the observation of the witness’s demeanor.

Our court is mindful of the importance of today’s decision. Yet, we are also mindful that our society and indeed the world, is in the midst of the information Age. Computers are the norm in American households and business; an infinite amount of information is available at our finger tips through the internet and satellite technology allows us to travel the world without ever leaving our living rooms.

The legal profession has also benefitted from these technological innovations. Legal research that once took hours or days is now available in seconds through computer and internet databases. Clients can reach their attorneys anywhere in the world through the use of cellular and video innovation. The list goes on and on.

Indeed, our very own court takes pride in the recent technological advancements that have been made. Oral arguments before the court are broadcast

live via satellite throughout the state. These same arguments can be viewed online, along with the parties briefs. The Florida Supreme Court Website has received world wide acclaim for opening up the court house doors to the general public. All of these steps provide greater access to the judicial system, which in turn increases public trust and awareness.

That being said, it becomes quite clear that courtrooms of this state cannot sit idly by, in a cocoon of yesteryear, while society and technology race towards the next millennium. Fortunately, the courtrooms of this state have not been idle nor are they speeding at a reckless pace. Recent changes in the courtroom have included the use of audiotape stenographers as well as video transmission of first appearance, arraignments, and appellate oral arguments, just to name a few.

We recognize that there are generally costs associated with change. Nevertheless, technological changes in the courtroom cannot come at the expense of the basic individual rights and freedoms secured by our constitutions. We are confident that the procedure approved today, when properly administered, will advance both the access to and the efficiency of the justice system, without compromising the expectation of the safeguards that are secured to criminal defendants.”

In Minnesota Court of appeals (US) in a case titled, **“State vs Sewell**, the appellant, namely, Jaffery Edward Sewell challenged his conviction for second degree felony murder on the grounds that the trial court’s allowance of testimony through Interactive Television (ITV) impaired his constitutional right of confrontation and prosecutorial misconduct during final arguments deprived him of a fair trial. The appeal was heard and finally the Court concluded that the testimony of a witness recorded through ITV did not violate the Confrontation Clause Rights under the sixth Amendment to the United States Constitution or Article 1, section 6 of the Minnesota Constitution when the use of ITV was an extension of Minn.R.Crim P.21. The statements made by the prosecutor, during closing argument, did not prejudice appellant or deny him a fair-trial. The use of video link/skype/video conference in Court proceedings and for recording of evidence of witnesses is in practice all over the world. In the United States of America in case titled, **“Maryland Vs Craig (497 U.S. 836(1990))** which is a leading case on the subject, the Supreme Court of United States has held that recording of evidence by video conferencing did not offend the Sixth Amendment (Confrontation Clause) and accepted child witness

testimony via a one-way video. In case titled, **“David Harrell Vs State of Florida” (709 So.2nd 1364 (Fla.1998),** the Florida Supreme Court sustained a robbery conviction based on largely on the two-way video testimony of complainants testifying from Argentina. In **United States Vs Gigante (166 F.3rd 75, 84 (2nd Cir.1999),** the U.S. Court of appeals concluded that video-conferencing did not violate the U.S. confrontation clause. This case involved the testimony of a witness procured through video conferencing technology because the witness was too ill to testify at trial. The Court decided that two-way video technology adequately met the central concerns of the Constitution because the witness was sworn; he was subjected to full cross-examination; he testified in full view of the jury, Court, and defence counsel, and gave his testimony under the eye of Gigante-the defendant himself. In Ireland, section 13 of the Criminal Evidence Act, 1992 enacts that any person other than the accused whether he be within or outside the State can give evidence through television link. Such evidence is also required to be video recorded. Similarly, in Australia, section 47-C to 47-E of the Federal Court of Australia Act, 1976, deal with recording of evidence through video/audio links or other appropriate means.

New South Wales has enacted Evidence (Audio and Visual Links) Act, 1998 No.105 (NSW) to facilitate the taking of evidence, and the making of submissions, by audio links and audio video links. In the United Kingdom, the Access to Justice Act, 1999, allow video conferencing to be used for civil hearing. On the other hand, section 51 of the Criminal Justice Act, 2003, enables the Court to allow witnesses (other than the defendant) in the United Kingdom to give evidence by live link if the court is satisfied that giving evidence in this way is in the interest of efficient or effective administration of justice. Moreover, under Youth Justice and Criminal Evidence Act, 1999, evidence of vulnerable, intimidated or other witnesses can be recorded through video links. In Canada, rule 1.08(1) of the Rules of Civil Procedure permits trial evidence by telephone or video-conference then it is open to the Court on motion or on its own initiative to make an order directing a video-conference on such terms as are just. In South Africa, Section 158(2) of the Criminal Procedure Act, 1977 (Act No.51 of 1977), as amended by the Criminal Law (Forensic Procedures) Amendment Act, 2010, specifies the instances in which a court may allow evidence to be taken through close-circuit television or similar electronic medium.

7. In yet another instance, the Federal Court of Australia also allows recording of evidence through video-conferencing, either in case of absence or protection of witnesses. The Federal Court Act, 1976 of Australia has left the recording of evidence through digital video link at the discretion of the court. According to the Act *ibid*, any proposal for recording evidence shall be decided by the court, after hearing parties to the proceedings. It further provides that the law for enabling a person to place proposal before the Court for recording testimony via video sources or the court or judge may allow evidence on own initiative keeping in view the benefits of use of video links. Likewise the Federal Court Rules 2011 have been framed which provide elaborate guidelines for video conferencing in the court proceedings. Besides, complementary legislation has been enacted in Australia and New Zealand which enable both the courts in each country to take evidence via video conferencing from a witness in the other country. In addition, the **Hague Convention of March 18, 1970 on the taking of evidence abroad, in civil or criminal matters** provides for a frame work may be used to facilitate the taking of evidence via video conferencing in countries that have acceded to that

convention, subject to certain prohibitions or restrictions existing in the acceding countries.

On 14th September, 2005, the Attorney General Australia tabled a Bill for amendment in the Crime Act 1914 to create new video link evidence provision applicable to the proceedings for terrorism and other related offence and proceeds of crime proceedings relating to those offences. The Bill received Royal assent and it was enacted under the name and style of “Law and Justice Legislation Amendment (Video Link evidence and other Measures) Bill 2005, which allowed evidence by using video link from overseas witnesses who are unable to travel to Australia to be put before the court using video link technology. For monitoring the conduct and demeanor of the witness, the presence of an Australian observer at the witness end was held to be necessary. The Bill also amended the foreign Evidence Act, 1994 to reflect in corresponding terms that admissibility of foreign evidence, such as video tapes and transcript for terrorism offences, where video link itself is not possible, again changing the onus on the defendant to prove a substantive adverse effect on the right to fair hearing. In essence, the Australian State generally provides for the witness to record evidence on

video link in order to reduce movement to the court and even to the access to minimize the threat or danger to life in terrorism cases.

8. In the Indian legal system, evidence is collected under the Indian Evidence Act, 1872, whereas in criminal cases the Criminal Procedure Code specifies the procedure of collecting and recording evidence, so much so the court has the power to compel a person to appear before it for giving evidence. Indian statute does not have specific provision for recording evidence via video link, however, through judicial pronouncements, the amendment made in Evidence Act by insertion of sections 65-A and 65- a special provision as to admissibility of Electronic Recording was introduced and stretched, rather broadly interpreted that the frame work and parameter for the use or admissibility of Electronic evidence also include the evidence recorded through video conferencing. Initially, question recording evidence through video facility befell before the court of Magistrate as a trial Court at Mumbai India, in a complaint case registered against **Dr. Praful B. Desai** by Mr. PC Singh. During trial, the prosecution submitted an application for examining of Dr.Greenberg (settled in USA) through video link, which was accepted

by the trial court. The respondent challenged that order before High Court which was allowed and by setting aside the order of trial court, the application for examining the witness through video link was rejected. The complainant, as well the State approached the Supreme Court of India through Special Leave Petition (Criminal (SP)). The Supreme Court on scanning the Criminal Procedural law, Evidence Act and judgments of various courts allowed the application for recording testimony of witness via video link vide judgment dated 01.04.2003, reported as **“the State of Maharashtra Vs Dr. Prafulla B. Desai” (AIR 2003 SC 2053)**. On disposal of the appeal the Supreme Court set-aside the impugned judgment of the High Court and the trial Court/Magistrate was allowed to have the evidence of Dr. Green berg recorded by way of video conference.

9. In Pakistan, Article 164 of the Qanun-e-Shahadat Order, 1984 (**“the Order 1984”**) deals with the production of evidence that has become available because of modern devices, etc, and by adding/inserting proviso to the said Article, conviction on the basis of modern devices or techniques may be lawful. For the sake of convenience and ready reference, Article 164 of the Order, 1984 (ibid) is reproduced below:-

“164. Production of evidence that has become available because of modern devices, etc. In such cases as the Court may consider appropriate, the Court may allow to be produced any **evidence** that may have become available because of modern devices or techniques.

Provided that conviction on the basis of modern devices or techniques may be lawful”.

The word **“evidence”** provided in the above quoted Article is defined in Article 2(1) (c) of the Order, 1984, which includes:-

- i. All statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry, such statements are called oral evidence; and
- ii. All documents produced for the inspection of the Court, such documents are called documentary evidence.

Similarly, under Article 2 (b) of the Order, 1984, **“document”** means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of record that matter.

Illustrations

A writing a document;

Words printed, lithographed or photographed are documents.

A map or plan is a document;

An inscription on a metal plate or stone is a document;

A caricature is a document.

Article 2(1)(c) of the Order, 1984 speaks about the **“evidence”** but it is interesting to note that the Legislature has not defined meaning of the evidence rather has mentioned that evidence *“includes”* a statement that the court **“permits or requires”** to be made and/or all documents produced. It is settled principle of law that the word **“include”** is always used in **“interpretation clause”** in order to enlarge the meaning of the word and phrase occurring in the body of a statute. Similarly, the words **“etc”** inserted in Article 164 of the Qanun-e-Shahadat Order, 1984, also enlarge the meaning of the Statute to the extent of the modern device which will include all modern scientific devices of the present age. Reading of the above quoted provision of the Qanun-e-Shahadat article well make it abundantly clear that production of evidence through modern devices has been left to the discretion of the trial court. Such evidence may only be allowed if the

court considers it appropriate. Article 130 of Qanun-e-Shahadat Order, 1984 though aims to regulate procedure for production and examination of witness in court, but in absence of any such provision in Criminal or Civil Procedure Code, the court shall exercise its discretion and may adopt any appropriate procedure for recording of evidence.

10. Chapter-XXV of the Code of Criminal Procedure, 1898 **“the Code”** particularly, section 353 thereof, lay down a mechanism of taking and recording of evidence in the inquires and trials in criminal case, however, it does not provide specifically for taking of evidence through video conferencing, but at the same time, there is no provision in the Code which prohibit taking and recording of evidence in this manner. For the sake of convenience and ready reference, section 353 of the Code is reproduced below:-

“353. Evidence to be taken in presence of

accused: Except as otherwise expressly provided, all evidence taken under Chapters XX, XXI, XXII and XXII-A) shall be taken in presence of the accused, or, when his personal attendance is dispensed with, in presence of his pleader.”

11. The procedural law of the country is silent about examination of witness under Criminal or Civil Procedure Code via video link, however, it cannot be controverted or denied that the Criminal Procedure Code is ongoing status and renowned jurist “Francis Bennion” has set out the principal of interpretation on such like statute in his commentative titled “Statutory interpretation” 2nd Edition Page 617, which is reproduced below:-

“It is presumed the parliament intend the court to apply to an ongoing act, a construction that continuously updates it, wording 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 set thought necessarily embedded in its own time, is nevertheless to be constructed in accordance with the need to treat it as a current law”

From the above quoted golden principle of interpretation of statute, it is manifest that the law cannot be left standstill, rather it shall continue to respond to the needs of socially changed situation. In other words, the law must be constantly on the move, adopting itself to the fast changing society and not lag behind. The provision of article 164 of

Qanun-e-Shahadat Order, 1984, allow the evidence collected through modern devices, wherefrom inference can be drawn that by development of technology and digitalization of courts throughout the world, the courts are needed to set out the broad approach for delivering fair and expeditious justice to the needies. The matter came before the Division Bench of the Honorable Karachi High Court in case titled, **“Shaikh Aijazur Rehman Vs the State (NAB) through Director-General (NAB) and another (PLD 2006 Karachi 629),** wherein it was held that the Code is an ongoing statute and while approving Bennion’s exposition, the Honorable Court ruled that it shall be interpreted in a dynamic way so that it may serve the needs of the society. The worthy High Court observed that section 353 of the Code which prescribes that all evidence must be taken in the presence of the accused (*or when his personal attendance is dispensed with, in presence of his pleader*) should be given a progressive meaning. The terms **“presence”** used in the said section should be interpreted to include constructive presence to allow recording of evidence through video conference. Similarly, in case **“Muhammad Hanif and others Vs Karachi Electric Supply Company Limited and another (2013 CLC 571),** the learned single Bench of the same High Court while

construing section 20(1)(c) of the Electricity Act, 1910, accepted that “*interpretation of statutes*”, especially those dealing with technical matters, should be that they are “always speaking”. Their meaning should be adopted and developed (if possible) to take into account subsequent developments.

12. The Supreme Court of India has also approved the aforementioned principle of updating construction and has applied the same in a number of cases. In case titled, **“State (through CBI/New Dehli) vs S.J. Choudhary” (1996 AIR SCW 1128)** while holding that the Evidence Act, 1872, is ongoing statute, the court ruled that the word “*handwriting*” in section 45 of the Act (ibid), would include “*typewriting*”. Similarly, in case titled, **“SIL Import USA Vs Exim Aides Silk Exporters” (AIR 1999 SC 1609)**, the Supreme Court of India has further held that;

“The word “*notice in writing*” in section 138 of the Negotiable Instruments Act, were to be construed to include a “*notice by fax*”. Applying the same principle, the Supreme Court of India has construed over a period of time various terms and phrases. For instance, it has interpreted “*stage carriage*” to include “*electric*

tramcar” “*steam tricycle*” to include “*locomotive*”, “*telegraph*” to include “*telephone*”, “*bankers book*” to include “*microfilm*”, “*to take note*” to include “*use of tape recorder*”, “*documents*” to include “*computer databases*”. In case titled, “*Aubrey Vs the Queen (2017) HCA 18*”, the High Court of Australia applied the “always speaking” approach in interpretation of section 25(1)(b) of the Crime Act, 1900 (NSW). As a consequence, it held that a person having sexual intercourse with another causing him/her to contract a grievous bodily disease could amount to infliction of grievous bodily harm. It further held that “the approach in this country allows that, if things not known or understood at the time an Act came into force fall, on a fair construction, within its words, those thing should be held included”.

The Supreme Court of India in case titled, “**National Textile Workders’ Union Vs P.R. Ramakrishnan (1983) 1 SCC 228, at page No.256**” has observed that:-

“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 case away the law which stands in the way of it growth. Law must therefore constantly be on the move adapting itself to the fast changing society and not lag behind”.

In another case titled, **“Sri Krishan Gobe Vs State of Maharashtra (1973) 4 SCC 23)**, while emphasizing production of all available evidence, it observed as under:-

“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”.

13. Collating the contemporary criminal procedural law of the two countries of South Asia, one find that the India’s Criminal Procedure Code, 1973, is analogous to

the Code of Criminal Procedure, 1898 of Pakistan. It also does not contain any specific provision for recording of evidence through video conferencing. For the sake of convenience and ready reference section 273 of Criminal Procedure Code of 1973 of (India), analogous to section 353 of Criminal Procedure Code, 1898 of Pakistan, is reproduced below:-

“273. Evidence to be taken in 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 the presence of his pleader”.

As discussed in the preceding Para (8)

In case titled, **“State of Maharashtra Vs Dr. Pruful B.Desai (AIR 2003 SC 2053),** the Supreme Court of India came across the question **“whether a witness, namely, Dr. Greenberg, must be compelled to come to India to give evidence?”**. In response to it the Court held that the Criminal Procedure Code, 1973, was an ongoing statutory instrument and that doctrine *contemporanea exposition est optima et fortissimo in lege* (the language of a statute must be understood in the sense in which it was understood when it was passed), has no application while

interpreting the Code. It further held that video conferencing was an advancement in science and technology which enabled one to see, hear and talk with someone far away with the same ease as if he was present before oneself. It was reiterated that recording of evidence by video conferencing also satisfies the object provided in Section 273 of Cr. PC viz the evidence be recorded in presence of the accused. The accused and his counsel could see the witness as clearly as if he was actually sitting before them. In fact, the accused could see the witness better than he would have if he was standing in the dock in a crowded court room. The Court may observe his or her demeanor and could even review it with a playback facility. Further, the witness could be confronted with documents or other material or statements in the same manner as if he/she was in the Court.

In case titled, “Rama Naidu and another vs Smt. Vs Ramadevi) the Andhra High Court has observed that:-

“Recording of evidence even in a criminal case by way of video conferencing is permissible. So long as the accused and/or his pleader is present when the evidence is recorded by the said way it is recording of evidence in the presence of the accused as per the requirements of section 273

Cr.P.C. as per the procedure established by law.

The terms presence **does not means physical presence as it includes even virtual presence in court by video and audio linkage between both ends**". (emphasis supplied).

From bare reading of the above quoted Paras from the landmark judgment (supra), coupled with delialic case (ibid) it is justly and justifiably held that the video conferencing is, in actual fact, merely an extension of the trial chamber to the location of the witness. The accused is, therefore, neither denied his right to confront the witness, nor does he lose materially from the fact of physical absence of the witness. It cannot, therefore, be said with any justification that the testimony given by video link is a violation of the right of accused to confront the witness as provided under Section 353 Cr. PC. In essence, the physical presence as provided by Section 353 Cr. PC is not sine qua non for recording of statement of witness through video link.

14. In Pakistan, Article 164 of the Qanun-e-Shahadat Order 1984, (*reproduced above*) empowers the Court to admit any evidence that may have become available because of technological advancement and by adding/ inserting the proviso to the effect that conviction on the basis of modern devices or techniques maybe lawful.

Admittedly, the modern devices or techniques have not been defined in the Qanun-e-Shahadat Order, 1984 or in the Code. However, according to Black's Law dictionary Video conferencing has been defined as **“Real-time two way transmission of video and audio signals over a LAN or the internet. Also known as video teleconferencing”**. By now we are breathing in 21st Century which has seen technological revolution and has enthralled not only Pakistan but the entire world. The use of computers is not limited to establish organizations or institutions but available to every individual at swipe of a finger. Information Technology has eased out almost every humanized action. Video conferencing is an advancement of science and technology which permits seeing, hearing and talking with someone who is not physically present, with the same facility and ease as if they were physically present. Increasing reliance on electronic means of communications, e-commerce and storage of information in digital form has most certainly caused a need to transform the law relating to information technology and admissibility of electronic evidence both in civil and criminal matters in Pakistan.

15. Section 10 of the Punjab Witness Protection Act, 2018, provides recording of evidence by video links, which for the sake of convenience and ready reference is reproduced below:-

10. Video link.– (1) When so directed by the court, the Unit shall take special measures so that the court may examine a witness through video link at a location outside the court.

(2) Where it is not possible to have a video link in the court room, the court may move to the place, as determined by the Government in consultation with the High Court, where such facility is available.

Explanation.– For purposes of this section, the video-link means a live television link or other arrangements whereby a witness, while away from the court room or other place where the proceedings are being held is:

- a)** able to see and hear a person there and to be seen and heard by the persons specified in section 9; and
- b)** able to be seen and heard by the accused and the public unless the court directs otherwise.

At this juncture, we will also refer to section 21 of the Anti Terrorism Act, 1997, i.e. relating to the protection of judges, counsel, public Prosecutor, witnesses and persons concerned with the Court proceedings as inter alia, it also provides about recording of proceedings through camera. For the sake of convenience and ready reference, the same is reproduced hereunder:-

**“21. Protection of Judges, Counsel,
Public Prosecutor, witnesses and persons
concerned with Court proceedings:-**

(1).....

(2) For purpose of protection of the Judges, accused, witnesses, prosecutor and defence counsel and anyone concerned with the court proceedings, the Government may adopt such other measures as may be appropriate or may be prescribed (and the Armed Forces shall also provide comprehensive protection and securing to the Judges, members, accused, witnesses, prosecutors, investigators, defence counsel and all those concerned in the Court proceedings.

These measures may include the following,
namely:-

- a. Screens may be used during trial to shield witnesses, Judges and Prosecutors from public view;
- b. **Trial may be held in jail premises or through video link;**
- c. Witness protection programmes may be established by the Government through law or rules (emphasis supplied).

16. In case, titled, **“Salman Akram Raja and another Vs Government of Punjab through Chief Secretary and others (2013 SCMR 203)”**, the Honourable Supreme Court of Pakistan directed that in appropriate cases evidence of rape victims should be recorded through video conference so that the victims, particularly, the juvenile, may not have to come to the Court. Relevant para of the above quoted judgment is reproduce, which read,

“Trials in rape cases should be conducted in camera and after regular courts hours. During a rape trial, screens or other arrangements should be made so that the victims and vulnerable witnesses do not have to face the accused person. Evidence of rape victims should be recorded, in appropriate cases, through video conferencing so that the

victims, particularly, juvenile victims, do not need to be present in Court”.

Besides, in the Province of Punjab all the trial Courts have been directed to record the evidence of Magistrates through modern devices.

17. In a recent judgment rendered in case titled, “Application by Hussain Nawaz Sharif” CMA No.3986 in CMA No.2939 of 2017 in Constitutional Petition No.29 of 2016 etc decided on 20th June, 2017 (**PLD 2019 SC 196**) the Hon’ble Supreme Court has emphasized on the use of modern technology in the following words:-

“In the age of computer where almost everything was communicated and even business of every type was transacted online, emphasis on the form of doing a thing as it used to be done in the year 1898, would amount to putting at naught the dynamics of scientific and technological advancements which had not only liberated man from exhausting labour but also made things easier. Law in many countries of the East and the West has been changed and even re-enacted.”

Likewise in case titled, “Mian Muhammad Nawaz Sharif Vs the State” (PLD 2018 Islamabad High Court 148), the

worthy Islamabad High Court Islamabad, allowed recording of evidence at High commission at London, of a witness via video link/skype from United Kingdom in the presence of authorized attorney/counsel or representative of the accused. The relevant part of the judgment is reproduced below:-

“Statements of above said two witnesses shall be recorded through the video link. Witnesses shall remain present in Office of High Commission London. High Commissioner of Pakistan there shall ensure that the witnesses are not under any pressure, coercion or influence at relevant time and their identity shall also be verified by him.”

18. There are yet other instances of use of video link technology in Pakistan. In the year 2018, an Accountability Court at Islamabad allowed two witnesses of National Accountability Bureau (NAB) to record their statements via video link in a Reference against the former Prime Minister on the application of the prosecution in the Landon Avenfield Apartment case, on the ground that the witness could not visit Pakistan due to security reasons and heavy engagements. The trial Court allowed the two witnesses to record their statements through video link at Pakistan High

Commission Landon. The Court while allowing the request of prosecution ordered to make arrangements by installing devices in the court for recording statements.

In May 2019, the august Supreme Court of Pakistan in collaboration with the National Database and Registration Authority (NADRA) had established a live video link between the principal seat at Islamabad and its four branch registries/Benches at Karachi, Lahore, Peshawar and Quetta, whereby the lawyer and litigants instead of travelling to principal seat, stay at their local cities and participate in the case proceedings via video conferencing from their nearest registry.

19. In view of the above omnibus discussion, we are firm in our view to hold that laws of various countries allow courts to record evidence through video conferencing, but the witness while making statement on video link has been kept under supervision of a judicial or executive officer for the purpose of maintenance of court decorum and to supervise the conduct, demeanor and attitude of witness. Certainly, the person giving evidence on video link is to be governed by the same law as applicable to a witness physically appearing before the trial court for recording his/her testimony. In case of whatsapp call or any other

independent mode of call, the witness may be considered present in the court, albeit without any strong supervision at the witness end, there would be always difficult and awkward situation for the trial court, particularly if witness commits contempt of court or perjures himself and it immediately noticed that he has perjured himself. The identification of witness and administering oath to the person to be examined on video link could be another state of inconvenience for the court and prosecution. To shun such contingencies, as a matter of prudence, the evidence of a person should be recorded in open court, if the witness is inside the country. Nevertheless if a witness is unable to attend the trial court due to serious reasons, the prosecution is to submit an application at the earliest for examining of such witness through video link from the court of corresponding jurisdiction or Session Judge of the District or Tehsil where the witness resides or having temporary abode.

In Khyber Pakhtunkhwa, all the courts in District Judiciary have been equipped with all kind of modern digital and technological facilities. Fiber optic equipments have been set out almost in all the courts, so in case of recording evidence of a witness in any district would hardly create a

difficulty if the witness is directed to appear in the Court of Session Judge of the district where he resides

If the witness is outside the province, an arrangement may be made through Registrar of High Court of the province where the witness has a permanent residence or temporarily settled, but where the witness is abroad i.e. in a country or place out of Pakistan, the Registrar of High Court in collaboration with foreign ministry shall arrange a video conference for the witness in the office of Pakistan Embassy, High Commission or Consulate in the country where the witness is to be examined. The establishment of Virtual Court Room under the supervision of an officer from Embassy/Consulate or alongwith a qualified technical personal in video link operation shall be ensured by the Foreign Ministry. The responsible officer of Embassy or of the High Commission for the purpose of supervision of conduct and demeanor of the witnesses and maintaining decorum of the Court would be vested with the power of trial court.

20. At the cost of repetition, we shall reiterate it that the use of modern technology, most particularly the tool of video conferencing cannot be over sighted or ignored as it will push the judicial system in the dark alley. To the

contrary, it will not only give boost to the justice system, but also save a lot of time, money, unnecessary movement of litigants and congestion in the court rooms and its precinct. It would be more beneficial to prosecution for producing their witnesses as well as to accused for expeditious disposal of his case. Mostly, the criminal statutes provide a specific time for resolution of the cases and it is also primary concern of the court and public regarding the expeditious disposal of the cases. One amongst few, the major cause of delay in disposal of the cases is non appearance of witness due to their non availability. In most of the cases we have noted that the police official/prosecution witnesses avoid appearing before the courts for recording statement, because of their transfer from one station to another or from one province to another province. Likewise, in cases involving medico legal or postmortem, if a medical officer proceeded abroad in connection with his/her higher studies, the courts ordinarily wait till his/her return. Not only these, but many other alike and artificial hurdles can be removed by adopting the innovative technological devices in the justice delivery system, though with necessary safeguard and precautions. There was need to make statutory changes in the Criminal and Civil Procedure Codes to develop a better approach

towards criminal and civil trial and to minimize the burden on investigation/prosecution and courts, but all such errands and functions, have been performed by courts in Pakistan and also in most of the developed countries. These days, courts in this province have become more and more lenient in recording the evidence through modern devices and even to hear arguments of counsels via video link, but unfortunately without saying proper guidelines, Standard Operating Procedure (SOP) or statutory procedure by any authority, therefore, in case of recording evidence through electronic devices, the following protocol/ guidelines shall be observed by the trial courts in the province of Khyber Pakhtunkhwa.

(1) Guidelines for conducting proceeding between trial court and court where witness shall appear.

For the purpose of these guidelines, reference to the “**trial court**” shall mean, where the trial is pending and witness attendance required, whereas the “**witness end**” shall be the place / court, where witness appears for recording his statement via video link.

- i. In appropriate cases, the trial court may direct or allow a witness to be examined on video link.

- ii. At any time, on application of a party or on its own initiative, the trial court may make direction in open court or in chamber for recording any testimony of a witness intra province, inter provision or oversees Pakistan.
- iii. The direction of the court for recording evidence of witness on behest of parties be sought through a proper application at the earliest, showing reasonable ground for inability of the witness to personally appear before the trial court. Notice of such application be given to the other party or counsel on the same date of filing application and the trial court may discuss it with the party under notice. In case of consensus between the parties the trial court shall proceed further, however in case of contest of application, the trial judge after hearing the parties shall pass an appropriate order in writing, granting leave or otherwise.
- iv. The proceedings by way of video conference shall be conducted as judicial proceedings and the same courtesies and protocol shall be observed at both end viz trial court and court where witness is appearing for making statement. All the relevant provision of procedural and penal Code including the provision of Qanoon-e-Shahadat Order shall apply to the recording of evidence by video

technology; however, these guidelines shall not be applicable to proceedings under section 164 of Cr. PC.

2. There shall be coordinator at both sides i.e trial court as well as at the witness end. The trial judge shall act as coordinator at trial court side while at the witness end, the coordinator may be any of the following officials.

a. Where the witness is to be examined intra province, the judicial officer of equal jurisdiction of the trial court or the Session Judge of District at witness end or any judicial officer not below the rank of Additional Session Judge shall be coordinator.

b. Whereas the witness is to be examined is in other province including Azad Kashmir and Gilgit Baltistan, and Islamabad, the judicial officer of the equal jurisdiction or the Session Judge of the district where the witness is permanently or temporarily settled subject to availability of video link facility at that District shall be coordinator.
In case of non availability of internet/video

link facility at the witness end, the coordinator shall be nominated by the Registrar of the concerned High Court in any other nearest districts.

- c. Whereas the witness to be examined is abroad and overseas, the trial court through Registrar of the High Court shall coordinate with the Foreign Ministry to nominate the official of Embassy/ /High Commissioner/ Consulate of Pakistan to be a coordinator as well to arrange all necessary requirements including virtual court at witness end. The responsible officer Embassy/High Commissioner/Consulate shall be deputed for supervision, identification and administering oath etc to the witness. The officer shall be vested with the power of trial court for purpose of recording of statement.
- d. Whereas the person to be examined is a convict or otherwise in a jail in connection with any offence, the concerned jail superintendant shall produce him before the Session Judge of the District where the

convict/prisoner is lodged. For production of the witness, the Superintendent Jail shall adhere to the order of District & Session Judge at the witness end. In case the witness is juvenile lodged at Borstal House or a lady with residence at shelter home/ Dar-ul-Aman etc, the concerned Incharge shall be under obligation to follow the directions of Sessions Judge at the witness end.

- e. Whereas the witness is to be examined is hospitalized in any Provincial or Federal hospital or public sector hospital, the coordinator (Sessions Judge of concerned District) shall of its own or appoint any judicial officer as commissioner to visit the hospital for recording the statement of patient/witness. The Coordinator shall make correspondence with the Medical Officer or Incharge of the hospital for providing necessary internet facilities at the premises of patient/witness. The Medical Superintendent/Incharge of the Hospital

shall associate the Sessions Judge or his nominee at the witness end.

- f. In case of any other person/witness, as may be ordered by the Sessions Judge at witness end.

3. The Sessions Judge or his/her nominee at the witness end shall ensure the attendance of witness through all means prescribed by the provisions of Procedural, Penal Codes and Qanoon-e-Shadat Order 1984. The prosecutors shall assist the court at trial court as well as at witness end.

4. In case, the person is witness of record, the prosecution shall be under obligation to provide the attested copies of entire record to witness to enable him/her in recording of his/her examination in Chief/Cross examination/re-examination or to confront him with any document etc. The trial court, at the time of allowing witness to be examined on video link, shall record the direction, of the prosecution in the case to make all necessary arrangements for ensuring the production of witness and availability of record at witness end.

5. In case of any difficulty in understanding the court language by the witness, the prosecutor shall bring in to the notice of trial court, at initial stage, on his application. The District Prosecutor, at witness end, shall arrange a translator/interpreter, who, on closing of the statement of witness, shall furnish a certificate to that effect, duly signed digitally.

6. Whereas the witness is beyond Pakistan i.e overseas, the prosecution shall provide the record of the witness while the coordinator at witness end i.e Ambassador/Counselor/High Commission shall be appraised through foreign ministry of Pakistan to make necessary arrangements for translator/Interpreter as prescribed in preceding Para-5.

7. Where the person is to be examined as court witness, the prosecution and where a person is to be examined as defence witness, the defence counsel will be under obligation to confirm to the court the exact location and willingness of witness to be examined by video link at the witness end. In case the witness is an accused and his attendance is dispensed with by the trial court during trial, the counsel for defence will confirm his location and availability of video link facility at that side.

8. Where the person is an accused in the case and trial court allowed him/her to record his statement on video link, and where the defence counsel requested that in the course of recording statement on video link some privileged communication would be required between the counsel and accused, the trial court will pass an appropriate order and directions in that regard.

9. At the request of a person to be examined on video link, or the trial court on its own motion, taking in to account the best possible interest of the person to be examined and arrival at just and proper conclusion subject to relevant provision(s) of Procedural, Penal Codes and Qanoon-e-Shahadat Order, 1984, shall pass appropriate direction to protect the privacy of witness keeping in mind his age, gender and physical condition.

10. The record of proceedings, including typing and preparation of hard copy of statement(s) of the witness(s), marking all exhibits on documents at judicial file shall be made and prepared by the trial court. In case signature of the witness or coordinator or Sessions Judge or witness is required to be taken on statement or document, the soft copy shall be transmitted to the Sessions Judge at witness end through electronic means including Fax, scan or E-

Mail, where it will be converted in to hard copy and after doing the needful, it will be returned in the same mode to the trial court.

11. If possible, the Audio Video record may be saved in the computer data at the trial court. The saved statement of Audio and Video record may be kept intact till decision of the case/appeal.

12. Any expenses incurred on recording of statement via video link shall be borne by the party, on whoes application or behest the statement is to be recorded. In case the person to be examined is a court witness, or the trial court, on its own motion, in the interest of witness, has ordered to allow recording statement on video link, the cost of expenditure shall be paid by the party at trial court, in whose favor such statement is recorded.

13. Recording of statement of conclusion at video link shall ordinarily take place during the local hours at Pakistan. Where the witness is overseas, the trial court may pass suitable direction with regard to timing as the circumstances dictate.

14. The Information Technology (IT) expert shall be allowed to be present during recording statement of a

witness, if he/she is not cited as witness in the case. The (IT) expert shall establish and regulate the connection disconnection and reconnection of links between the trial court and court or place at witness end. He/she shall further ensure and satisfy the trial court and judge/coordinator at witness end, about clear visibility and loud audible voice at both ends.

15. Before starts of the video link, the witness shall disclose his/her identity before the judge/coordinator at witness end and likewise picture/photograph of his/her national identity card/passport/domicile shall be pasted at screen for the purpose of identification in the trial court. As soon as the identification process is completed, oath would be administered to the witness by the judge/coordinator at witness end, loudly audible and clearly visible at trial court end.

16. The learned judge/coordinator shall ensure that the witness is not coached, tortured or prompted by any person. The witness, if willing, shall be allowed to engage a counsel for his assistance or to remain present with him/her at the witness end, when the evidence is being recorded.

17. The trial court and judge/coordinator at witness end will ensure that once the process of recording of statement on video link commences, as far as practicable and possible, it shall be kept continued to proceed without any break, interruption and without any adjournment at any cause or cost.

18. The Session Judge/coordinator, if needed or observed, may record any remark or observation as is material regarding the demeanor, attitude or conduct of the witness end and will transmit it to the trial court through electronic mode of transmission.

19. The Registrar of this court shall ensure, at least, to equip all the District courts with minimum required electronic/digital appliances i.e computer set, laptop, video cameras microphone and speaker, display unit, documents visualizers, scanner, setting arrangement in the court rooms at both sides, printer and uninterrupted fast internet connection.

20. These guidelines, are just directory and also not all inclusive and comprehensive, therefore the court while recording statement on video link may resort to legally permissible steps not in conflict to these guidelines though

and befitting the facts and circumstances of a particular case. Any such matter with respect to which no express provision has been made in these guidelines, the trial court may adopt any permissible and convenient mode to meet the end of justice..

21. For what has been discussed above, we have reached to an irresistible conclusion that statement of Saeed Ullah as (PW.9) in the instant case through video call i.e. IMO from Saudi Arabia has not been recorded in accordance with the above formulated guidelines. Similar is the case of statement of Faisal Khan (PW.6) in the connected criminal appeals. In this view of the matter, conviction and sentence of appellant-convict Muhammad Israr in the instant case recorded vide judgment dated 12.09.2019, and conviction and sentences of appellant Hafiz Naveed Ahmad and Rehmat Khan, recorded vide judgment dated 29.10.2019, are hereby set aside. The cases are remanded to the respective learned trial courts for recording the statements of the above named PWs either on their physical presence before the Court and, if it is not possible, then it may be recorded through video links/conferencing by following the guidelines (supra) and then to decide the cases on merits in accordance with law.

During this period the appellants-convicts shall remain as under trial prisoners. Resultantly, the instant appeal and the connected Cr. A. No.1329-P of 2019 and Cr.A. No.1336-P/2019, are disposed of accordingly. On setting aside the conviction and sentences of the appellants-convicts, the connected Cr. R. No.245-P/2019 and Cr. R. No.302-P/2019, filed by Juma Said and Faisal Khan, for enhancement of sentences of the convicts having become infructuous, are hereby dismissed. However, Cr. A. No.1142-P/2018, filed by Muhammad Israr against his conviction under section 13/15 KP Arms Act, is adjourned and shall remain pending before this Court till decision of the main case by the trial court.

22. The Additional Registrar (Judicial) of this Court shall circulate copy of this judgment amongst all District & Sessions Courts of the Province of Khyber Pakhtunkhwa for guidance and shall also send a copy thereof to the worthy Secretary of Law and Parliamentary Affairs, Pakistan Islamabad and Law secretary, Khyber Pakhtukhwa, for the purpose of proper legislation on the subject at their respective ends in the relevant laws of the country.

23. Before parting with the judgment, we thankfully record our appreciation for the valuable assistance rendered by the worthy Advocate General Khyber Pakhtunkhwa assisted by Mr. Muhammad Nisar Khan, Assistant Advocate General. We also appreciate the enormous research work done by Mr. Ali Gohar Durarni, Advocate who appeared and assisted the court as **amicus curae** and Mr. Syed Shakir Hussain Shah, Assistant Research Officer, High Court Library, Peshawar High Court Peshawar and also the valuable argument advanced by M/s. Jala-ud-din Akbar Azam Khan Gara, Ghulam Mohy-ud-Din Malik, Shabir Hussain Gigyani & Asad Yousafzai, Advocates.

Announced:
11.3.2020

M. Siraj Afridi PS

JUDGE

JUDGE

**(DB) of Hon'ble Mr. Justice Rooh-ul-Amin Khan and
Hon'ble Mr. Justice Ishtiaq Ibrahim.**