

**JUDGMENT SHEET  
PESHAWAR HIGH COURT, PESHAWAR  
JUDICIAL DEPARTMENT**

Cr.R No. 139-P/2018.

Waheed Shah etc Vs Shahzad etc

Date of hearing 11.02.2019

Petitioner (by) Shabbir Hussain Qigyani Advocate

Respondents (by) Officer Ahmad Nayan Advocate &  
Waqar Ahmad Khan Addl: D. G.

**JUDGMENT**

MUSARRAT HILALI, I.- This revision petition is directed against the order dated 09.11.2018 passed by the learned Additional Sessions Judge-I, Mardan, whereby application of respondent/complainant for recording evidence of PW Ishtiaq through video link was accepted.

2. It is the petitioners' case that prosecution filed an application for recording evidence of PW namely, Ishtiaq through video link under Section 2 of Electronic Transactions Ordinance read with Article 2(e) of Qanun-e-Shahadat Order on the ground that the said witness is an eyewitness of the occurrence and his

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statement is necessary to be recorded in the present case.

Record further reveals that the witness was abroad for earning his livelihood and had come to Pakistan for recording his statement but owing to strikes and also due to non-availability of defence counsel, his statement could not be recorded and he had to go back to Saudi Arabia for his work. The application was contested by the petitioners. The learned trial Court after hearing the parties allowed the application for recording statement of PW, Ishtiaq through video link vide order dated 09.11.2018, impugned herein.

3. Learned counsel for the petitioner vehemently contended that the impugned order has been introduced on alien way of recording evidence through video link which is neither provided in Code of Criminal Procedure nor in the provisions of Qanun-e-Shahadat Order, 1984; He submits that the scheme of Electronic Transactions Ordinance 2002 provides for dealing with documentary evidence and not oral; further that the court proceeding of Saudi Arabia is totally different from the one in Pakistan including time. Learned counsel

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concluded his arguments by stating that the impugned order being without any legal backing be set aside.

4. As against that, learned AAG assisted by learned counsel for the respondents submitted that earlier there was oral communication and the Courts used to hear the statement/testimony of witnesses and decide upon the matter; he further submits that thereafter paper was discovered and the Court of law started recording and documenting the evidence; that the Criminal Procedure Code is an ongoing statute, therefore, it must change with the changing social concepts. Learned counsel added that even otherwise under Article 2(e), Article 164 of Qanun-e-Shahadat Order, 1984 and Section 2 of Electronic Transactions Ordinance, 2002, recording evidence through video conference is permissible. He further added that despite the fact that there was no amendment made in the Criminal Procedure Code, the Indian Courts adopted the methodology of Internet facility and started the video connectivity in almost all the cases. Reliance was placed on case titled *Mian Nawaz Sharif Vs. The State through Chairman*

*NAB and another (PLD 2018 Islamabad 148)* and case titled *Twentieth Century Fox Film Vs. Nri Film Production Associates (AIR 2003 Kant 148, 2003 (5) KarLJ 98)* delivered by High Court of Karnataka. Learned counsel further submits that in the instant case witness is an important witness of the occurrence and is laborer working in Saudi Arabia, therefore, cannot come to Pakistan and, therefore, the order of recording statement through video link be maintained.

Arguments heard and record perused.

5. Basic question that has been raised for consideration is whether evidence can be recorded by way of video conference. Before I proceed to consider this question, it would be appropriate to examine the relevant provisions of law.

Under Article 2(1) (c) of Qanun-e-Shahadat Order,

1984, evidence includes:-

*(i) All statements which the Court permits or requires to be made before it by witness in relation to matters of fact under inquiry. Such statements are called oral evidence and;*

*(ii) All documents produced for inspection of the Court, such documents are called documentary evidence.*

Similarly, under the provision of Section 353 Cr.P.C, it is mandatory that evidence shall be recorded in presence of accused. For ready reference, Section 353 Cr.P.C is reproduced as under:-

*353. Evidence to be taken in presence of accused. Except as otherwise expressly provided, all evidence taken under Chapter XX, XXI, XXII and XXIIA shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in presence of his pleader.*

The section of law quoted hereinabove laid down the general principle that the evidence on which the prosecution proposes to rely for the purpose of framing of charge as well as for recording conviction must be recorded in presence of accused or in his absence it shall be recorded in presence of his counsel. In the instant case, the complainant moved an application under Section 2 of Electronic Transactions Ordinance, 2002 read with Article 2(e) of Qanun-e-Shahadat Order, 1984, seeking recording evidence of PW Ishtiaq through video conference. It was contended that the witness is an eye

witness of the occurrence and his statement is necessary to be recorded. It was further stated that the witness is abroad and had come to Pakistan for recording his statement but owing to strike and non-availability of defence counsel, his statement could not be recorded, and now due to his work commitments, the witness cannot come to Pakistan for recording his evidence.

6. Victim and eye witnesses play a crucial role in criminal trials. He or she tells the Court what they have seen or know about the incident. Needless to point out that the presence of the accused in criminal trial is must for obvious reasons that the plea of accused in shape of cross examination of the witness has to be recorded as is mandated by Section 353 Cr.P.C. So, therefore, under the provisions of the Criminal Procedure Code ordinarily evidence against an accused shall be recorded in his presence in open Court and in presence of a Judicial Officer so that a fair opportunity is provided to the accused to cross examine the witness. However, judicial departure from the established procedure in cases having special facts and circumstances and due to

compelling reasons such as in rape cases where the girl under the age of 18 years allegedly subjected to rape or any other sexual offence, in case of child complainant and in ATC case, the Courts have taken appropriate measures to ensure that the woman, child and witness is not confronted face to face with the accused. The worthy Additional Advocate General during the course of his arguments has referred to a judgment rendered by Hon'ble Islamabad High Court in case titled *Mian Nawaz Sharif Vs. The State through Chairman NAB and another (PLD 2018 Islamabad 148)*, wherein the learned Accountability Court on the application of NAB, allowed recording the statement of two witnesses namely Robert W. Radley and Akhtar Raja through video link/Skype etc. The Hon'ble Islamabad High Court while maintaining the order of learned Accountability Court, directed to make arrangement and an authorized representative/counsel be facilitated so to attend the proceedings at the time and on the date fixed by Accountability Court. However, in the said case, the

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witnesses ordered to be examined were witnesses of documents. They were not witnesses of facts.

Another case on which reliance was placed by worthy Additional Advocate General is the case titled *Twentieth Century Fox Film Vs. Nri Film Production Associates (AIR 2003 Kant 148, 2003 (5) KarLJ 98)* delivered by high Court of Karnataka (India), wherein, in a suit between Indian citizen and a United States Company based in California requested to record the evidence either by way of Commissioner or audio-video link was sought which was rejected, however, the same was allowed by the high Court Karnataka and the witnesses were directed to be examined by way of audio-video link. The said judgment is of no help to the respondents as the same not only pertains to documentary evidence but also that it has been rendered in a civil case.

As regards the plea of worthy AAG that under Article 2(e), Article 164 of Qanun-e-Shahadat Order, 1984 and Section 2 of Electronic Transactions Ordinance, 2002 recording evidence through video



conference is permissible, has no relevance as the same relates to documentary evidence and not oral.

7. It may also be noted that in India, in the year, 2009 by an amendment in Criminal Procedure Code, a proviso was added to subsection (1) of Section 275 of Cr.P.C which reads as follows:-

*“Provided that evidence of a witness under this subsection may also be recorded by audio, video electronic means in the presence of the advocate of person accused of offence”.*

From the above amendment in the provision, taking evidence through video conference is made permissible in India.

8. What view has been taken by Courts in other countries or amendments made by them in the law is irrelevant. This Court has to see whether any amendment has been made in the Criminal Procedure Code as the legislature alone has the power to change the procedure by enacting a law amending it and when the procedure is changed it would become procedure established by law. The procedure laid down in the Code at present is a

procedure established by law which cannot be modified or altered by any Court whose job is to interpret the law and not to make the law.

9. In view of the above, this Court is of the view that the impugned order dated 09.11.2018 passed by learned trial Court is contrary to the law and deserves to be set aside.

10. Consequently, this petition is allowed and order dated 09.11.2018 passed by the learned Additional Sessions Judge-I, Mardan is set aside.



JUDGE

**Announced**  
**11.02.2019**

**(SB) Hon'ble Justice Musarrat Hilali**

Noor Shah, PS