

IN THE SUPREME COURT OF PAKISTAN
(ORIGINAL JURISDICTION)

PRESENT:

MR. JUSTICE EJAZ AFZAL KHAN
MR. JUSTICE SH. AZMAT SAEED
MR. JUSTICE IJAZ UL AHSAN

C. M. A. NO. 3986 OF 2017

IN

C. M. A. NO. 2939 OF 2017

IN

CONST. P. NO. 29 OF 2016 ETC.

(Application by Hussain Nawaz Sharif)

In attendance: Kh. Harris Ahmad, Sr. ASC.
Mr. Wajid Zia, Head of JIT.
Mr. Aamir Aziz, Member JIT.
Mr. Bilal Rasool, Member JIT.
Mr. Irfan Naeem Mangi, Member JIT.
Brig. M. Nauman Saeed, Member JIT.
Brig. Kamran Khurshid, Member JIT.
Mr. Ashtar Ausaf Ali, A. G. for Pakistan.
Rana Waqar, Addl. A. G.

Date of Hearing: 14.06.2017 (Order Reserved).

ORDER

EJAZ AFZAL KHAN, J.- This CMA has been moved on behalf of Hussain Nawaz Sharif one of the respondents for issuance of an appropriate order directing the JIT to stop the video recording of the proceedings relating to examination and interrogation of witnesses and to constitute an independent Commission of a retired or sitting Judge of this Court to inquire into the circumstances leading to the leakage of his image.

2. The learned Sr. ASC appearing on behalf of the applicant contended that where Sections 161 and 162 of the Cr.P.C. have prescribed a manner for examination of witnesses supposed to be acquainted with the facts and circumstances of the case, any other manner of their examination would be against the law. He next contended that where even signing of such statement by its maker has been prohibited by the legislature, on the ground that it tends to bind the witness and impair his freedom to speak the truth in the Court, recording of such statement by

audio-video electronic means which is more circumscribing than signing such statement, cannot be permitted. To support his contentions the learned Sr. ASC placed reliance on the cases of P. Sirajuddin, etc. Vs. State of Madras, etc (1970 (1) Supreme Court cases 595), Ch. Razik Ram. Vs. Ch. Jaswant Singh Chouhan and others (1975) 4 Supreme Court Cases 769), Tahsildar Singh and another. Vs. State of U.P. (AIR 1959 Supreme Court 1012 (V 46 C 137) and Pakala Narayana Awami. Vs. Emperor (AIR 1939 Privy Council 47).

3. The learned Attorney General appearing on behalf of the Federation of Pakistan contended that modern electronic devices have liberated man from exhausting physical labour and made the things easier but where a statute requires a thing to be done in a particular manner that be done that way or not at all. Even otherwise, the learned Attorney General added, the Court cannot read in a statute what is not there. Recording of police statement by audio-video electronic means, the learned Attorney General maintained, would thus be out of question.

4. We have considered the submissions of the learned Sr. ASC for the applicant and those of the learned Attorney General for Pakistan.

5. Before we answer the question it is worthwhile to refer to Sections 161 and 162 of the Cr.P.C. which read as under :-

"161. Examination of witnesses by police. (1) Any police officer making an investigation under this Chapter or any police officer not below such rank as the Provincial Government may, by general or special order, prescribe in this behalf, acting on the requisition of such officer, may examine orally any person supposed to be acquainted with the facts and circumstances of the case:

(2) Such person shall be bound to answer all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.

(3) The police officer may reduce into writing any statement made to him in the course of an examination under this section, and if he does so he shall make a separate record of the statement of each such person whose statement he records.

162. Statements to police not to be signed; use of statements in evidence.

(1) No statement made by any person to a police officer in the course of an investigation under this Chapter shall, if reduced into writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose (save as hereinafter provided) at any inquiry or trial in respect of any offence under investigation at the time when such statement was made:

Provided that, when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid the Court shall on the request of the accused, be furnished with a copy thereof, in order that any part of such statement, if duly proved, may be used to contradict such witness in the manner provided by 'section 145 of the Evidence Act, 1872. When any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination:

Provided, further that, if the Court is of opinion that any part of any such statement is not relevant to the subject matter of the inquiry or trial or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in public interests, it shall record such opinion (but not the reasons therefor) and shall exclude such part from the copy of the statement furnished to the accused.]

(2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of section 32, clause (1) of the Evidence Act, 1872 [or to affect the provisions of section 27 of that Act]."

6. A reading of Section 161 Cr.P.C. would reveal that a police officer investigating the case may examine any person supposed to be acquainted with the facts and circumstances of the case. Such person shall be bound to answer the questions relating to the case except the questions whose answers tend to expose him to a criminal charge, penalty or forfeiture. While reading of Section 162 Cr.P.C. would reveal that no statement made by any person to a police officer in the course of an investigation shall, if reduced to writing, be signed by the person making it nor shall any such statement or any record thereof whether in a police diary or otherwise or any part of such statement or record, be used except

for the purpose of contradicting its maker in terms of Article 140 of the Qanoon-e-Shahadat Order. Signing of such statement by its maker is prohibited because it tends to bind its maker and impair his freedom to speak truth in the Court. Recording of such statement by audio video electronic means could be treated at par with a statement which has been signed by its maker, inasmuch as it hampers his freedom to testify in the Court. But in any case use of audio or video devices to facilitate the recording of such statement cannot be said to have been prohibited by any interpretation of the provisions reproduced above when the finished product to be used in the Court to confront the witness is the statement reduced to writing and not its audio or video recording. Since the statement so transcribed or reduced to writing cannot enlarge its scope or its probative worth it could possibly have on its proof. The concerns voiced by the applicant being paranoiac appear to be more of form rather than substance. In the case of **State of Rajasthan. Vs. Teja Ram and others ((1999) 3 Supreme Court Cases 507)** the Supreme Court of India after examining a string of judgments went so far as to hold that even the signature of the witnesses on such statement cannot contaminate or vitiate its worth in the words as under :-

"If any investigating officer ignorant of the said provision secured the signature of the person concerned in the statement, it does not mean that the witness's testimony in the Court would, therefore, become contaminated or vitiated, the Court will only reassure the witness that he is not bound by such statement albeit his signature finding a place thereon."

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

in sub-Section 2 after the word 'answer' and insertion of the proviso to sub-Section 3 of Section 161 of the Code of Criminal Procedure, 1973 of India, providing for recording of such statement by audio-video electronic means is an illuminating example on the subject. Alright, audio or video recording cannot be admitted into evidence for the proof of such statement till the law is amended, as it has been amended in India and the other countries, but its use to facilitate recording of such statement cannot be discouraged on the basis of so pedantic an interpretation of Sections 161 and 162 of the Cr.P.C. The cases of P. Sirajuddin, etc. Vs. State of Madras, etc, Ch. Razik Ram. Vs. Ch. Jaswant Singh Chouhan and others, Tahsildar Singh and another. Vs. State of U.P. and Pakala Narayana Awami. Vs. Emperor (supra) being related to admissibility of the statement signed or recorded through audio-video electronic means do not appear to have any relevance at this stage.

8. In view of what has been discussed above, we don't feel persuaded to countenance the request thus made. The other prayer of the applicant cannot be attended to at this stage as the response of the learned Attorney General for Pakistan has not been received so far viz-a-viz the inquiry report as to the leakage of the image.

JUDGE

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Announced in Court at Islamabad on _____

JUDGE