

# PRODUCTION OF INMATES TO COURT THROUGH VIDEO CONFERENCING

## CONTEXT

In 2008, the Code of Criminal Procedure (Amendment) Act, 2008 amended Section 167 (2) (b)<sup>1</sup> of the Code of Criminal Procedure 1973 (CrPC) and introduced electronic video-linkage as an alternative method for production of an accused in court. . Through the initiation of the e-court project by the e-courts committee and their constant monitoring over the years, video conferencing facilities are now available in most central and district jails as well as district and sub-divisional courts across the country. In the last few years with petitions on non-production of inmates in courts, incidents of inmate's fights and escapes and misuse during transit, the insistence on production through video conferencing has gained favor. At the outset, it seems a pragmatic solution and it would aid and assist the agencies of the ailing system. However, there are certain concerns when the situation is assessed from the lens of an accused who is deprived of his liberty.

The presence of an accused during his trial is a fair trial right guaranteed under various human rights instruments as well as under the constitutional and statutory framework in India. The right to be tried in one's presence is implicit in the right to adequate defence. The absence of the accused vitiates the entire proceeding whether the proceeding is merely a continuation of remand or a substantive hearing. Similarly, an accused has to be physically produced before the court for it to decide whether the accused needs to be further remanded to custody. Every single day of detention must be justified in the eyes of law. Physical presence of accused in court gives them the opportunity to challenge the status of detention. Section 167(2)(b) of the CrPC lays down the relevant procedures on production of accused in court.

Even though video conferencing enables the Magistrate to be face to face with the electronically transmitted image of the accused, without appropriate safeguards in place, the benefits of using video conferencing over physical production are trumped by violations of an accused's right to fair trial. The Supreme Court as well as various High Courts have time and again reiterated the role of magistrates at the time of production to ensure that all checks are followed during the early stages of the trial.<sup>2</sup> It is thus the prime responsibility of the criminal justice system to also ensure that fair trial principles of the accused are not being violated. .

## VIDEO CONFERENCING: RISKS & SAFEGUARDS

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<sup>1</sup> "No Magistrate shall authorise detention of the accused in custody of the police under this section unless the accused is produced before him in person for the first time and subsequently every time till the accused remains in the custody of

<sup>2</sup> Arnesh Kumar v State of Bihar and Others (2014); M.A. Dharman, Son Of Appukuttan vs State Of Andhra Pradesh 1991 (1) ALT (315)

Prisons inherently are opaque institutions and therefore the possibilities of violations are high. When persons are in judicial custody, they are the responsibility of the magistrate. The magistrate is duty bound to safeguard their rights, both with regards to the proceedings as well as their rights against any form of violation. Given below are safeguards for some potential risks or rights violations when using video conferencing: -

## **I. Communication between the magistrate and the accused**

### **a. Challenges/Risks**

The high number of cases for production on a daily basis means that magistrates can usually only spare a few seconds for each case and the remands often become 'mechanical'. However the Supreme Court and high courts have time and again reminded district courts that productions should not be mechanical and there should be an application of mind before deciding each remand. In those few seconds, it is extremely difficult for the accused to be able to communicate to the magistrate about any grievances or pleas. Similarly, the magistrate in carrying out its responsibility to ascertain any infraction of law (juvenility, access to lawyer) is expected to speak to the accused. While this communication is anyway limited in open court hearing, the possibility of the same to take place in closed video conferencing rooms would be negligible. Also given the weak socio-economic demographics of prisoners and lack of familiarity with technology, video-screens would act as a barrier, further shrinking the possibility of conversation between the accused and the magistrate.

### **b. Safeguards/Solutions**

1. The accused must be given a sufficient opportunity to understand the equipment and the courtroom procedure prior to hearing. This orientation should be given either by the prison officer, the legal aid authorities or the paralegal volunteers; and the court, before initiating the proceedings, should ask the accused whether he understands the process or not.
2. The responsibilities of the magistrates on production through video conferencing should be clearly laid down. They are the same as those the magistrate has in his court but with additional concern for the fact that he and the accused are at different locations and communicating via a screen.
3. Court documents, that the parties or judge will require prior to or during the course of the hearing, must be sent to the judge prior to commencement of the hearing. The Bombay High court in its 2004 judgement<sup>3</sup> in this regard suggested- "*No accused shall be remanded by Video Conferencing without a copy of the remand application being made available to him.*" The remand applications could be forwarded to the court and the jail through email or courier specially appointed for this purpose, the court mentioned.

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<sup>3</sup> Rajendra S. Bidkar v The State of Maharashtra and Ors. Criminal Writ Petition (PIL) NO. 386 OF 2004

4. Any person participating in the proceedings off-camera being held through video-conferencing should be identified for the record.

## II. Productions not undertaken by the magistrate

### a. Challenges/Risks

It is observed that in several district courts the practice of extending remands is left in the hands of the court clerk. This has been observed also in production via video conferencing. This is a malpractice, entirely against the criminal procedure code and should not be condoned.

### b. Safeguards/Solutions

1. Orders to be issued by the High Court directing the magistrate courts to hear all cases, both via physical production and video-linkage production in the presence of the accused. The presence of the magistrate must not mean mere physical presence but active participation in the proceedings. Similarly, the presence of other actors does not mean mere image on a screen but means that they must be fully aware of the proceedings and the roles of each person in the proceedings, and the accused must be able to communicate to the court directly or through his lawyer and be free to do so without let or hindrance under the guidance and protection of the court.

2. Biometric checks may be put in place to ensure that magistrates convene the video-conferencing session themselves

## III. Lack of opportunity to air grievances

### a. Challenges/Risks

During video linkage productions, since the view of the accused and his surrounding is partial it is difficult to know if he is under any kind of **duress or intimidation or if he is injured** or otherwise constrained from freely participating in the court proceedings. Given that the 'appearance' is completed within a few minutes there is no opportunity for the accused to put forth **any complaints, applications or request** to the Magistrate. The Bombay High in 2004<sup>4</sup> remarked "*the accused is free to complain about jail conditions through Video Conferencing*". Through this direction, while the court acknowledged that accused may have complaints with the prisons, by not formulating any mechanism that would shield the accused from any repercussions, the direction has been rendered redundant. The complaints of the accused may range from quality of medical or food conditions, hygiene, corruption, mistreatment to blatant torture. How would the accused be "free" to communicate such concerns to the magistrate inside the prison premises? Without the assurance that the person would not be further reprimanded, this would eventually ensure that the inmates would not be able communicate their concerns to the court.

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<sup>4</sup> Rajendra S. Bidkar Petitioner v The State of Maharashtra and Ors. Criminal Writ Petition (PIL) NO. 386 OF 2004

### **b. Safeguards/Solutions**

1. The judicial officer should assure that any person who is permitted to be a part of the court room and is speaking to the court during a video-conferenced proceeding is within camera view and microphone range, so that the person can be seen and heard by other persons at the remote location, as well as by individuals in the courtroom.
2. The video linkage cameras should be setup in a manner that magistrates can check for any injuries or harms to the accused. Not just the face, but the entire body should be visible to the magistrate.
3. Safeguards should be in place to ensure that the accused can be a part of the hearing without any threat, force or coercion. Such orientation programmes for inmates and the prison authorities must be conducted periodically by representatives from the legal aid authority.
4. There must be a provision to seek for in person/ in camera production in cases where accused seeks to file complaint against custodial violence or any other grievance. The lawyer should be able to approach the court for any such greivances.

## **IV. Lack of opportunity to consult lawyer**

### **a. Challenges/Risks**

In productions through video conferencing, the accused has **no opportunity for immediate or confidential legal consultation with his representative**. If the lawyer is present in the jail, he will miss any direct contact with the judge. However, the presence of the lawyer in the jail with the accused is critical for three reasons. Firstly, the presence of the lawyer reduces the possibility of any intimidation to the accused. Secondly, the lawyer can assist the accused in familiarizing him about the video conferencing process. Thirdly, it is no secret that lawyers, both private and legal aid, do not visit inmates in prison. Their only form of communication is during court hearings. Any information or consultation, confidential or otherwise would not be possible if the lawyer is on the video conferencing room in the court and not with the prisoner. While the presence of two nominated legal aid lawyers inside the prison would address the first two concerns, if lawyers are rotated regularly, but the consultation of the prisoner with his lawyer would still remain a challenge.

### **b. Safeguards/Solutions**

1. Appointment of legal aid lawyers by the legal services authorities to be present in each jail during remands by video-linkage.<sup>5</sup>

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<sup>5</sup> The Bombay High court in *Rajendra S. Bidkar v The State of Maharashtra and Ors.* Criminal Writ Petition (PIL) NO. 386 OF 2004 gave two directions in this regard, firstly “*Advocate for the accused is entitled to remain present in the Video Conferencing room in Court or jail.*” And secondly “*At least two advocates from the Maharashtra State Legal Services Authority be kept present in every jail for all remands by Video Conferencing on a particular date*”.

2. The video conference proceeding must be preceded by private, confidential communications between the accused and his lawyer. A means of confidential communications between the accused, who is in a jail, and the lawyer in the courtroom, must be provided and must be available during the video proceeding. Where appropriate, the magistrate may allow suspension of the audio transmission and recording or allowing counsel to leave the conference to communicate with the client in private.

3. The lawyers may also be informed to reach the video conferencing room in court at least one hour in advance to communicate with their clients and on the other hand, prison in-charge must ensure that their clients are available at the other end. This will facilitate free communication between them before the video conferencing proceeding.

## **V. Challenges with technology, infrastructure and need for constant technological assistance**

### **a. Challenges/Risks**

Production via video linkage is completely dependent on the smooth functioning of the video conferencing equipment, the internet connectivity, the audio-video-linkages need to function properly at both the prison and the court. Even after installation of such expensive equipment, any technical shortfall may halt the production process for periods ranging from minutes to weeks. For instance, the video-conferencing facility in Jodhpur was non-functional for more than a year just because a technical glitch with the equipment in the Jodhpur Central Jail. Also technical glitches while the video productions are going on, would impact the quality of the hearing and may possibly jeopardise the liberty of an individual. Studies have shown that the quality of images and the manner of recording also has impacts on the belief on truthfulness or falsehood of the statements of the accused. Poor transmission impacts on the magistrates impressions of the accused and obscures his ability to observe demeanour injuries and possible off camera coercion in the proximity of the accused. The clarity has to be equal and better than the Magistrate has as if the accused was in court.

### **b. Safeguards/Solutions**

1. Clerk or the court room officer shall be responsible for ensuring that the videoconferencing equipment is ready and functioning properly in advance of any hearing, so that there will be no interference with the punctual commencement of a hearing.

2. Technical assistance throughout the proceedings is necessary. The quality and continuity of digital transmissions to and from prisons and courts must be subject to regular maintenance checks and monitoring.

3. The judicial officer conducting the proceeding should have discretion to discontinue any proceeding in which there are technical issues which detract from the fairness of the proceeding, or if there are matters which occur during the proceedings which would warrant conducting the

proceeding with the defendant's personal appearance in the courtroom. However, in such situations the production should be scheduled within 2 days.

4. Cameras and microphones should be sufficient in number to allow video and audio coverage of all participants, prevent crowding of participants, facilitate security, and protect confidential communications. The cameras should be operated in a manner showing split images i.e. all the views of the place at which the prisoner is physically present.

5. Audio and visual recordings must be synchronized and undistorted and all hearing participants should speak directly into their microphones.

6. To optimize viewing, while the video conferencing room must be well lit, the monitors should be placed in a darkened area of the room and be of sufficient size and number to allow convenient viewing by all participants.

7. In order to ensure accountability, a daily checklist for quality check of instruments should be maintained and submitted to the District Judge every month.

## **VI. Basis/Rationale of deciding the mode of production**

### **a. Challenges/Risks**

Installation of video conferencing facilities is intended to make video –linkage productions as an additional mode of producing inmates and not to substitute physical productions completely. This would mean some inmates would be produced through video-linkage while others physically. In the absence of any set guidelines, the magistrate has full discretion to determine the mode of production. The Bombay High Court in its 2004 judgement said that the jails should ensure that warrants must reach the court prior to the video conferencing and *“The Court Clerk shall indicate on every production warrant the next date of remand and whether the accused is to be produced physically in court or by Video Conferencing.”* Thus on every hearing, it would be at the discretion of the magistrate to decide whether in the next hearing, the accused should be produced physically in court or through video conferencing. The rationale for basing this decision does not find any mention.

### **b. Safeguards/Solutions**

1. The basis for the determination of the mode of production needs to be formulated by the High Court in each state. Security concerns, the nature of the case, the history of offender, the request/consent of the accused, the earlier mode of productions could be some of the parameters.

2. The reasons for deciding production through video linkage should be mentioned in the warrant.

3. Lawyers whose clients would be produced through video-conferencing must be informed at least two days in advance. For this purpose, a list of video conferencing cases for each day must be put up on the notice board outside the court room and a court-wise list for all video conferencing cases must be prepared and made available along with the cause list. The same list must be sent to the

concerned prison at least one day in advance from the date of video conferencing. Emails can be used for promptly sending such information.

4. A list must be prepared by the office of the District & Session Judge, mentioning the video conferencing time for each district court on a daily basis in order to cater to the requirement of all district courts and smooth functioning of the video conferencing facility.

## **VII. Difficulty in ascertaining identity**

### **a. Challenges/Risks**

In video-linkage productions even the **accused's identity** must be taken on faith when assurance of identity is a fundamental first step before any proceedings can go forward. Therefore the production via video linkage should be the exception and not the rule.

### **b. Safeguards/Solutions**

Provisions should be made for proper identification of the prisoner concerned prior to the commencement of the proceedings in order to avoid any discrepancy, especially in cases concerning individual with similar physical features. Biometrics can be used to ascertain the identity of the accused in each case. The responsibility of the identification must lie with the prison authorities.

## **VIII. Lack of opportunity to meet family**

### **a. Challenges/Risks**

Another consequence of substituting video-conferencing for real life physical production is the access of an undertrial to the outside world, the **opportunity to communicate with his family** is severely curtailed. While this might not qualify as a risk but the issue warrants discussion. In many cases families chose to meet the accused in court, as it is centrally located as compared to a prison which might be located in another district or far off place. Also visits in prison are often held behind wire meshed windows through which you can hardly see the other persons face. Also there are restrictions on how many and who all can meet a person in prison, but not in the court. Thus, interactions in court allow families to maintain better contact with the accused, which is of prime importance to obtain the overarching goal of rehabilitation & reformation of offenders.

### **b. Safeguards/Solutions**

The opportunity to meet family members in prison with minimum barriers should be encouraged. While taking into account security considerations, as far as possible, efforts should be made to ensure physical contact of the inmate with the family members especially children. As such there must be provision for accused to seek physical production on grounds of meeting with children/family members, especially when the inmates are lodged away from the family and meeting at the court is the only practical chance to communicate.