

Court No. - 70

Case :- APPLICATION U/S 528 BNSS No. - 3445 of 2025

Applicant :- Ashish Mani Tripathi

Opposite Party :- State of U.P. and Another

Counsel for Applicant :- Akash Deep Srivastava, Manish Tandon

Counsel for Opposite Party :- G.A.

Hon'ble Rajeev Misra, J.

Heard Mr. Manish Tandon, the learned counsel for applicant, the learned A.G.A. for State/opposite party-1 and Mr. Shashi Shekhar Maurya, the learned counsel representing first informant/opposite party-2, who has put in appearance by filing his vakalatnama in Court today, which is taken on record.

Perused the record.

Supplementary affidavit filed by the learned counsel for applicant in Court today is taken on record.

Applicant- Ashish Mani Tripathi, who is a named as well as charge sheeted accused and also facing trial before Court below has now approached this Court by means of present application under sections 528 BNSS with the following prayer:

"It is therefore most respectfully prayed that this Hon'ble Court may graciously be pleased to stay the entire proceeding of Session Trial No. 117/2009 (State Vs. Rakesh Mani and others) pending in the court of Learned Additional Session Judge, Court No. 06, Gorakhpur, as well as stay the order dated 17.12.2024 passed by Learned Additional Session Judge, Court No.06, Gorakhpur in Session Trial No. 117/2009 (State Vs. Rakesh Mani and others) in Case Crime No. 1871 of 2008 under Section 147, 148, 149, 302, 307, 504, 506 I.P.C. and 7 Criminal Law Amendment Act P.S. Pipiganj, District Gorakhpur, It is further prayed that this Hon'ble court may graciously be pleased to quash the order dated 17.12.2024 passed by Learned Additional Session Judge, Court No. 06, Gorakhpur in Session Trial No. 117/2009 (State of U.P. Vs. Rakesh Mani and others) in Case Crime No. 1871 of 2008 under Section 147, 148, 149, 302, 307, 504, 506 I.P.C. and 7 Criminal Law Amendment Act P.S. Pipiganj, District Gorakhpur, pending in the court of Learned Additional Session Judge, Court No. 06, Gorakhpur and may further be pleased to direct the learned trial court to summon the Witnesses Constable Ramesh Singh (1708), Constable Harendra Prasad (1364), Dr. H.H. Nag and Dr. Y. Kumar (Doctors at Department of Surgery, B.R.D. Medical College, Gorakhpur) on the application filed by the applicant before the learned trial court or may pass such other or further order as this Hon'ble Court may consider deem fit and proper under the circumstances of the case,

otherwise applicants shall suffer an irreparable loss and injury."

Present application came up for admission on 21.4.2025 and this Court passed the following order:

"1. Heard Mr. Manish Tandon along with Mr. Akash Deep Srivastava, the learned counsel for applicant and the learned A.G.A. for State-opposite party-1.

2. Perused the record.

3. By means of this application under Section 528 B.N.S.S. applicant-Ashish Mani Tripathi, who is a named and charge sheeted accused and facing trial before Court below, has approached this Court with the following prayer:-

"It is, therefore most respectfully prayed that this Hon'ble Court may graciously be pleased to stay the entire proceeding of Session Trial No.117/2009 (State Vs. Rakesh Mani and others) pending in the court of learned Additional Session Judge, Court No.06, Gorakhpur, as well as stay the order dated 17.12.2024 passed by learned Additional Session Judge, Court no.06, Gorakhpur in Session Trial No.117/2009 (State Vs. Rakesh Mani and others) in Case Crime No.1871 of 2008 under Sections 147, 148, 149, 302, 307, 504, 506 I.P.C. and 7 CrI. Law Amendment Act, P.S. Pipiganj, District Gorakhpur.

It is further prayed that this Hon'ble Court may graciously be pleased to quash the order dated 17.12.2024 learned Additional Session Judge, Court No.06, Gorakhpur in Session Trial No.117/2009 (State Vs. Rakesh Mani and others) in case crime no. 1871 of 2008 under Section 147, 148, 149, 302, 307, 504, 506 I.P.C. and 7 CrI. Law Amendment Act, P.S. Pipiganj, District Gorakhpur, pending in the court of learned Additional Session Judge, Court No.6, Gorakhpur and may further be pleased to direct the learned trial court to summon the Witnesses Constable Ramesh Singh (1708), Constable Harendra Prasad (1364), Dr. H.N. Nag and Dr. Y.K. Kumar (Doctors at Department of Surgery, B.R.D. Medical College, Gorakhpur) on the application filed by the applicant before the learned trial court or may pass such other order further order as this Hon'ble Court may consider deem fit and proper under the circumstances of the case, otherwise applicants shall suffer an irreparable loss and injury."

4. It transpires from the record that during pendency of trial after the statement of accused-applicant was recorded under Section 313 Cr.P.C. an application dated 17.12.2024 under Section 311 Cr.P.C. was filed by accused-applicant before court below with the prayer that certain witnesses be examined as court witnesses to establish the fact that the injury sustained by the injured were on account of an accident and not on account of gun shot. This application filed by the applicant was opposed by the

prosecution. Ultimately aforementioned application came to be rejected by court below by means of the order impugned dated 17.12.2024

5. Feeling aggrieved by the above order dated 17.12.2024 accused-applicant has now approached this Court by means of present application under Section 528 B.N.S.S.

6. Learned counsel for applicant submits that court below has rejected above mentioned application filed by applicant on the stereotype findings. He therefore, submits that order impugned is manifestly illegal. Consequently, the same is liable to be set aside by this Court. Learned counsel for applicant has then referred to the judgment of Supreme Court in Rajaram Prasad Yadav vs. State of Bihar and Anr. 2013 14 SCC 461 wherein in Apex Court has laid down parametres which are required to be looked into for judging the bona fide of an applicant in filing an application under Section 311 Cr.P.C. With reference to above, the learned counsel for applicant submits that no attempt was made by court below to examine the bona fide of applicant in filing aforementioned applicant in the light of parameters laid down in above mentioned judgment.

7. Reference was then made to the judgment of Supreme Court in Varsha Garg Vs. State of M.P. & Ors. 2022 SCC Online SC 986, wherein Apex Court has observed that the trial before the court below is the trial of accused. As such, same should be a free and fair trial. The ultimate object of the trial is to find out the truth. The application under Section 311 filed by accused-applicant before the court below was an aid to the court to find out the truth of the matter. The court below however, in ignorance of above and on the basis of stereotype finding rejected above mentioned application. On the cumulative strength of aforesaid submissions, the learned counsel for applicant thus submits that present application is liable to be allowed by this Court.

8. Per contra, the learned AGA for State-opposite party-1 has opposed the present application. However, he could not dislodge the factual and legal submission urged by the learned counsel for applicant with reference to the record at this stage.

9. Having heard, the learned counsel for applicant, the learned A.G.A. for State-opposite party no.1, and upon perusal of record, this Court finds that matter requires consideration.

10. Notice on behalf of State-opposite party-1 has been accepted by the learned A.G.A.

11. Issue notice to first informant opposite party 2.

12. Notice issued to first informant/opposite party-2 shall be made returnable on 12.05.2025. Notice shall further indicate that matter shall re-appear for admission as fresh on 12.05.2025.

13. All the opposite parties may file their respective counter affidavits on or before the date fixed in the notice.

14. Put up for admission as fresh on 12.05.2025.

15. Considering the facts and circumstances of the case and also the submissions urged by the learned counsel for applicant in support of this application as noted herein above as an interim measure, it is hereby provided that court below shall defer the proceedings of trial to any date after 12.05.2025. "

Subsequent to above order, first informant/opposite party-2 has put in appearance. However, the learned A.G.A. representing State/opposite party-1 and the learned counsel representing first informant/opposite party-2 submit that they do not wish to file any counter affidavit in present application.

In view of above, and also with the consent of the parties, the present application is being disposed of finally at the admission stage without formally admitting it and further without calling for counter affidavit from the opposite parties.

It transpires from record that during the pendency of trial, an application (paper no. 106 kha) was filed by accused/applicant whereas another application (paper no. 107 kha) was filed by co-accused Rakesh Mani. The said applications were filed under section 311 Cr.P.C. with the prayer that constables Ramesh Singh, Harendra Prasad, Dr.H.H. Nag and Dr. Y.Kumar be summoned as Court witness so that justice be done.

Aforesaid application filed by accused before Court below was opposed by the prosecution i.e. DGC, Criminal. However, it appears that no written objections to the said application were filed. Ultimately, Court below upon appraisal and appreciation of the material on record concluded that the matter is an old one, case relates to a heinous offence, like murder, the prosecution evidence is over and the trial is at the stage of section 313 Cr.P.C, the prosecution has already adduced such witness on which it desired to rely upon, no sufficient reason has emerged to get examined the additional witness. On the above findings, Court below rejected aforementioned application (paper No. 106 kha) by means of order impugned dated 17.12.2024.

Thus feeling aggrieved by the above order dated 17.12.2024, passed by Court below, applicant who is an accused and facing trial before Court below has now approached this Court by means of present application under section 482 Cr.P.C.

Mr. Manish Tondon, the learned counsel for applicant, submits that order impugned in present application is not only illegal, unjust but also arbitrary. Consequently, the same is liable to be quashed by this Court. With reference to the judgement of Supreme Court in the case of **Varsha Garg Vs. State of M.P., 2022 SCC Online SC 986**, the learned counsel for applicant submits that trial before Court below is that of accused/applicant. As such, the same ought to be a free and fair trial. Section 311 Cr.P.C. is an enabling provision which enables the Court to find out the truth. It is in view of above that no limitation is provided in the code i.e. Cr.P.C. for filling an application under section 311 Cr.P.C. As such, the same can be filled at any stage of the proceedings. The issue between the parties is whether the death of the deceased is on account of an accidental death or on account of gunshot injuries alleged to have been sustained by deceased, which fact has emerged for the first time in the reference slip of the deceased. The said description has been made in different hand writing in black pen, whereas the reference slip was filled up with a blue pen. As such, the recital occurring in reference slip that injured has sustained firearm injury was seriously disputed particularly with reference to previous documents relating to the treatment of injured. On the above premise, the learned counsel for applicant contends that interest of justice demanded that Court below ought to have allowed the application under section 311 Cr.P.C. filed by applicant.

It is next contended by the learned counsel for applicant that the document pertaining to treatment of injured(deceased) were sought to be summoned by Court below by moving an application on behalf of accused before Court below. However, the said application was rejected and ultimately the accused approached this Court by means of an Application U/S 482 No. 23913 of 2013 (Ashish Mani Tripathi Vs. State of U.P. And Another), which was allowed by this Court vide order dated 5.9.2013.

On the above premise, the learned counsel for applicant submits that police constable who took the injured for medical treatment and the Doctor who treated the injured (deceased), are the best persons to prove in evidence as to whether any gun shot injury was found on the body injured/deceased before the injured was referred, inasmsuch as the disputed recital that the injured has sustained fire arm injury has crept in the reference slip for the first time. In the light of above, the learned counsel for applicant submits that bonafide of applicant in filing the application under section 311 Cr.P.C. cannot be doubted. To buttress his submission

he has relied upon the judgement of Supreme Court in **Raja Ram Prasad Yadav Vs. State of Bihar and another reported in 2013 (14) SCC 461**, wherein the Apex Court has laid down the parameters which are requested to be looked into for judging the bonafide of an applicant in filing an application under section 311 Cr.P.C.. On the above premise, the learned counsel for applicant contends that since bonafide of the applicant in filing the application under section 311 Cr.P.C. is apparent on the face of record, the order impugned cannot be sustained and is therefore, liable to be quashed by this Court.

Per contra, the learned A.G.A. representing State/opposite party-1 and Mr. Shashi Shekhar Maurya, the learned counsel representing first informant/opposite party-2 have vehemently opposed the present applicant. They submit that in view of the objections raised by DGC, Criminal to the aforesaid application before Court below which is evident from the recital occurring in the second paragraph at page 28 of the paper book, no illegality or infirmity can be attached to the order impugned. Applicant who is an accused has no right to get certain persons summoned as Court witness at the stage of section 313 Cr.P.C. On the aforesaid premise, they therefore contend that no interference is warranted by this Court in the present application. As such, present application is liable to be dismissed.

Having heard the learned counsel for applicant, the learned A.G.A. for State/opposite party-1, Mr. Shashi Shekhar Maurya, the learned counsel representing first informant/opposite party-2, and upon perusal of record, this Court finds that Court below has rejected the application under section 311 Cr.P.C. filed by accused-applicant only on the basis of superficial and stereotype findings. Court below has simply recorded a bald conclusion to the effect that prosecution has adduced such witness on which it relied and no reason has appeared to get examined the other witness other than those who have already deposed before court below. It is thus apparent that the Court below has not examined the application filed by accused in the light of the facts and circumstances of the case as well as the law laid by by Apex Court in the Case of **Varsha Garg (Supra)** and **Raja Ram Prasad Yadav (supra)**. No attempt has been made by Court below to consider the issue as to whether the summoning of additional witnesses is essential for finding out the truth, nor an attempt has been made to examine the bonafide of the applicant in filing the aforesaid application in the light of parameters laid down by Apex Court in the case of **Raja Ram Prasad Yadav (Supra)** either. It is an undisputed fact that

the parties are at issue as to whether the death of deceased is an accidental death or homicidal. As the Doctor who had prepared the injury report clearly supported the stand of the accused applicant that the death of the deceased was prima facie an accidental death, yet inspite of above court below has rejected the application under section 311 Cr.P.C. filed by accused applicant, which is wholly arbitrary. However, as the object of the trial is ultimately to find out the truth, interest of justice demanded that the witness sought be summoned as Court witness ought to have been summoned by Court below. Court below has omitted to consider the aforesaid aspect of the matter which has vitiated the order impugned.

In view of the discussions made above, the present application succeeds and is liable to be allowed.

It is accordingly allowed.

The order impugned dated 17.12.2024, passed by Additional Sessions Judge, Court No.6, Gorakhpur in Sessions Trail No. 117 of 2009 (State Vs. Rakesh Mani and Others) in Case Crime No. 1871 of 2008, under sections 147, 148, 149, 302, 504, 506 IPC and 7 Criminal Law Amendment Act, P.S.- Pipiganj, District Gorakhpur, shall stand quashed.

The application dated 17.12.2024, under section 311 Cr.P.C. (paper no.s 106 kha) filed by applicant before Court below shall stand allowed. Court below shall summon Constables Ramesh Singh, Harendra Prasad, Dr. H.H, Nag and Dr. Y. Dumar as Court witness, forthwith.

In the facts and circumstances of the case, the parties shall bear their own costs.

Order Date :- 12.5.2025

Arshad