

HIGH COURT OF CHHATTISGARH, BILASPUR

CRR No. 946 of 2017

Shakeel Khan S/o Tasvar Khan, Aged About 22 Years R/o Village
Mudagaon, P.S. Lailunga, District Raigarh, Chhattisgarh

---- Applicant

Versus

State Of Chhattisgarh Through S.H.O. Of The Police Station
Lailunga, District Raigarh, Chhattisgarh

---- Respondent

For applicant - Shri Abhishek Saraf, Advocate.
For respondent/State- Shri Anupam Dubey, Dy.G.A.

Hon'ble Shri Justice Goutam Bhaduri

Order

10/10/2017

Heard.

1. Instant revision is against the order dated 21/08/2017 whereby the application filed by the accused under Section 311 Cr.P.C. to call the Head Master of the Primary School, Raghunathpur to prove date of birth of Karan S/o Gajendra Khadiya who is brother of the prosecutrix has been dismissed.
2. Learned counsel for the applicant submits that in statement of father of the prosecutrix he has deposed that age of brother of the prosecutrix Karan is 13/10/1997 but actually it is recorded in the dakil karij register to be that of 30/02/1995 and the prosecutrix is said to be two years younger to Karan. Consequently, if the age of the brother of the prosecutrix is enhanced then automatically it will have effect to the age of the prosecutrix. If such ambiguity exist, the benefit should be given to the accused. It is further submitted that if such closer of

evidence is made at this stage, then applicant shall be deprived to lead evidence for all the time to come in the case. It is submitted that still case is at the defence stage, therefore no prejudice can be caused to the prosecution and same may be allowed.

3. Learned State counsel vehemently opposes the same.

4. Perused the order and the respective application under section 311 of Cr.P.C alongwith the reply filed by the State. Reply of the State would reflect that it was admitted that Gajendra Khadiya the father of prosecutrix has stated that date of birth of prosecutrix has been deposed by him was on the basis of presumption. So a doubt has been created. Consequently, even if date of birth of prosecutrix is been written in the marksheet and dakil karij register to be 3/05/1995 same can always be subject to challenge by the accused to rebut the same in view of statement of father of prosecutrix.

5. Hon'ble the Supreme Court in a case law reported in **2013 AIR SC Weekly 4179** between **Raja Ram Prasad Yadav Vs. State of Bihar** has laid down the principles of Section 311 with respect to the power of the Court to summon, recall or re-examine any person. The following principles which are enumerated in para 23 are quoted herein below:

“23. From a conspectus consideration of the above decisions, while dealing with an application under Section 311 Cr.P.C., read alongwith Section 138 of the Evidence Act, we feel the following principles will have to be borne in mind by the Courts:

a) Whether the Court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 is noted by the Court for a just decision of a case?

b) The exercise of the widest discretionary power under section

311, Cr.P.C., should ensure that the judgment should not be rendered on inchoate, inconclusive speculative presentation of facts, as thereby the ends of justice would be defeated.

c) If evidence of any witness appears to the Court to be essential to the just decision of the case, it is the power of the Court to summon and examine or recall and re-examine any such person.

d) The exercise of power under section 311, Cr.P.C., should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.

e) The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the Court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.

f) The wide discretionary power should be exercised judiciously and not arbitrarily.

g) The Court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.

h) The object of section 311, Cr.P.C., simultaneously imposes a duty on the Court to determine the truth and to render a just decision.

i) The Court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.

j) Exigency of the situation, fair play and good sense should be the safeguard, while exercising the discretion. The Court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified.

k) The Court should be conscious of the position that after all the trial is basically for the prisoners and the Court should afford an

opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The Court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.

l) The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

m) The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.

n) The power under section 311 Cr.P.C., must therefore, be invoked by the Court only in order to meet the ends of justice for strong and valid reasons and the same must be exercised with care, caution and circumspection. The Court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right.

6. Taking into facts of this case when accused made prayer to examine the witness i.e Head Master of the Primary School, Raghunathpur to prove age of the Karan who is brother of the prosecutrix to be of certain date and in the eventuality the same date of brother of prosecutrix is proved it will certainly would have a bearing with the age of the prosecutrix then same cannot be ignored. If right to lead evidence is closed at this stage, it will consequently prejudice right of the accused in the given set of facts on the principles as has been laid down in case of **Raja Ram Prasad Yadav Vs. State of Bihar** (supra).

7. Consequently, taking into stage of trial that still case is fixed for evidence of defence witness, order dated 21/08/2017 is set aside.

Application under Section 311 Cr.P.C. to summon the Head Master of Primary School, Raghunathpur to prove age of Karan S/o Ganjendra Khadiya and to summon him with dakil karij register is allowed. On payment of PF necessary summon be issued to the defence witness to come alongwith the necessary document to place it before the court as evidence.

8. In view of the aforesaid observation, petition stands allowed.

Sd/-

(Goutam Bhaduri)

JUDGE