

Reserved On : 26/06/2025
Pronounced On : 04/07/2025

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

**R/CRIMINAL REVISION APPLICATION (AGAINST ORDER PASSED BY
SUBORDINATE COURT) NO. 836 of 2025**

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE L. S. PIRZADA

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Approved for Reporting	Yes	No
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CHIRAG DIPAKBHAI RATHOD
Versus
STATE OF GUJARAT

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Appearance:

MR ANAND BRAHMBHATT(6096) for the Applicant(s) No. 1
MR KISHAN N BRAHMBHATT(11382) for the Applicant(s) No. 1
MR NILESH S BRAHMBHATT(11421) for the Applicant(s) No. 1
MR. H K PATEL APP for the Respondent(s) No. 1

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CORAM:HONOURABLE MR.JUSTICE L. S. PIRZADA

CAV JUDGMENT

1. Rule. Learned APP waives service for the respondent
– State.
2. The present revision application has been preferred
by the present applicant - original accused under Section

438 read with Section 442 of the Bharatiya Nagarik Suraksha Sanhita Act, 2023, (For short "BNSS Act") directing against the order dated 13.05.2025 passed by the learned Special Judge POCSO, Court No.9, City Civil and Sessions Court, Ahmedabad City in Special POCSO Case No.252 of 2021 allowing the application preferred by the learned APP vide Exh.154, under Section 311 of the Cr.P.C. With the consent of the learned advocates for the respective parties, the matter has been taken up for final hearing.

3. The brief facts leading to the present revision application are as under:

3.1. One FIR is to be lodged by the original complainant against the present applicant - accused and one another accused before the Vivekanandnagar Police Station for the offences punishable under Sections 376 (D)(A) of the IPC as well as Sections 5(J)(2), 6, 8, 9(L), 10, 16 and 17 of the Protection of Children from Sexual Offences Act (For

short "POCSO Act") on 01.09.2021. Further, from the record, it transpires that the said Special POCSO Case No.252 of 2021, at the stage of the pronouncement of the judgment, an application vide Exh.154 was preferred by the learned APP to summon a responsible person from the Swaminarayana Vidhyadham, Hathijan, Ahmedabad, to remain present before the Court along with the school Leaving Certificate of the victim and the same was objected by the learned advocate for the applicant - originally accused as they are in judicial custody and subsequently, after hearing the learned advocates for respective parties, learned Sessions Judge has allowed the application vide Exh.154 by order dated 13.05.2025. Being aggrieved and dissatisfied by the said order, the present revision application has been preferred.

4. Heard the learned advocate Mr. K. N. Brahmabhatt for the original applicant - accused and he has submitted that the order passed by the learned Special Judge is against the settled principle of law and is required to be

set aside. Further, he submitted that so far the said POCSO Case No.252 of 2020 is concerned, the arguments for the prosecution side is that the argument of the learned advocate for the applicant - accused has already been completed and the matter was for pronouncement of the judgment on 14.02.2025 and on 14.02.2025, again the matter was adjourned for judgment on 27.02.2025, and on 27.02.2025, again, the matter was adjourned for pronouncement of the judgment on 13.03.2025 and on 13.03.2025, again, the matter was adjourned for pronouncement of the judgment on 21.03.2021 and on 21.03.2021, the matter was posted for adjournment for judgment on 04.04.2025 and again, the matter was adjourned to 09.04.2025 for the pronouncement of the judgment and on 09.04.2025, the application has been given vide Exh.154 by the learned APP under Section 311 of the Cr.P.C to summon the witness and the same was decided by the learned Trial Court on 13.05.2025. So, after the matter has already been argued by the learned APP and the learned advocate for the applicant - accused,

the matter was posted for the judgment, and at this belated stage, the said application under Section 311 of the Cr.P.C was preferred by the learned APP to the prosecution. However, it was submitted that the witness was summoned by the learned Trial Court pertained to the school Leaving Certificate of the Swaminarayana Vidyadham, Hathijan, Ahmedabad, for the purpose of proving the age of the victim. However, it was submitted that in the evidence before the learned Trial Court, there are two birth certificates of the victim which have been produced by the prosecution side and subsequently, it was coming on record that these two birth certificates which are concerned, are not genuine one and as there is no entry has been reflected in the register of the Ahmedabad Municipal Corporation and it has already been established by putting a question in the cross-examination to the Investigating Officer also that original complainant has submitted two forged or false birth certificates of the victim, and despite all these, sufficient opportunity has been given to the prosecution, but when

the matter has been posted for the judgment, after the arguments of the prosecution and the defendant side is over just to fill the lacuna, this application has been preferred. Hence, allowing the application under Section 311 of the Criminal Procedure Code by the learned Trial Court is against the mandate of the Section 311, and it is clearly established that the said application has been allowed to fill the lacuna as the age of the victim, which is very crucial for proving the case under the POCSO Act is concerned, is not established by the prosecution side, and to fill this lacuna, the application has been preferred by the learned APP and the learned Trial Court has not considered this and erred in allowing the application vide Exh.154. Hence, the order is required to be set aside. Further, in support of his argument, learned advocate Mr. K N Brahmabhatt has relied upon following authorities:

- (i) 2024 SCC OnLine Guj 1119 in the case of Azimuddin Vs. The State of Gujarat;
- (ii) (2001) 2 GLH 19 in the case of State of Gujarat Vs.

Chetan Himmatlal;

(iii) Judgment of the Hon'ble Apex Court in the case of Rajaram Prasad Yadav Vs. The State of Bihar and Another reported in (2013) 14 SCC 461;

5. On the other hand, learned APP Mr. H.K. Patel has vehemently opposed and submitted that the order passed by the learned Trial Court allowing application under Section 311 of the Cr.P.C to summon the witness is just and proper and does not require any interference. Further, it was submitted that the investigating officer has conducted the investigation very transparently as the complainant has produced two birth certificates of the victim but the said two birth certificates were cross-checked by the investigating officer by making a correspondence with the concerned department of the Ahmedabad Municipal Corporation and subsequently, found that the said entry has not been found in the register of the Ahmedabad Municipal Corporation. Hence, further, it was submitted that so far as the school Leaving

Certificate issued by Shri Swaminarayan Vidhyadham, Mahemadabad Road, Hathijan, Ahmedabad is concerned, the same was collected by the investigating officer during the investigation and the same was also been part of the investigation papers and also be part of the charge sheet, but because of some mistake and error on the part of the public prosecutor, they have not been able to produce these documents before the Court. Hence, the present application has been given. Further, he submitted that as per the case of the prosecution, the age of the victim is 20.02.2005, and at the time of commission of the offence, she was minor, and even in the complaint, it was specifically stated by the complainant that her daughter - victim's birth date is 20.02.2005, and she was studying in the Swaminarayan Vidhyadham, Hathijan Ahmedabad. Even two birth certificates produced before the Court, subsequently, found not genuine and in that also, the age of the victim has been shown as 20.02.2005, so, right from the beginning, the case of the prosecution is that the birth of the victim is 20.02.2005.

5.1. Further, it was submitted that the learned Sessions Court has rightly exercised the power under Section 311 of the Cr.P.C to find out the truth that said witness is very much necessary for the just decision of the case. Hence, there is no illegality has been committed by the learned Sessions Court, as the present revision application is required to be rejected. Further, learned APP, in support of his argument, relied upon the judgment of the Hon'ble Apex Court in the case of Zahira Habibullah Sheikh & Anr. Vs. State Of Gujarat reported in (2006) 3 SCC 374 and (2004) 4 SCC 158 in the case of Zahira Habibullah Sheikh & Anr. Vs. State Of Gujarat & Ors. and submitted that as per the dictum of this judgment, it is the duty casting upon the Court to find out the truth and for that purpose, discretionary power under Section 311 can be used. Further, it was submitted that in the order of the learned Trial Court also, the learned Trial Court has observed that if the witness has been examined then, there is no prejudice has been caused to the accused as

he has all the right to cross-examine the said witness. He can challenge the validity of this evidence also. So, no illegality has been committed by the learned Trial Court which requires any interference.

6. Heard the learned advocate for respective parties. Perused the impugned judgment and order passed by the learned Trial Court. As per the present case is concerned, it is an admitted position that the learned Trial Court has allowed the application under Section 311 of the Cr.P.C at the stage of pronouncement of the judgment.

“311. Power to summon material witness, or examine person present.

Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case.”

7. So far as the facts of the case is already been narrated above, in this regard, it is acquired to consider Section 311 of the Cr.P.C.

8. It is shown that the Court has been given widest power even to summon the witness or to be called for re-examining any witness already examined at any stage of the inquiry, trial or other proceedings. Further, from the plain reading of Section 311, it is found that the first part of the Section 311 is a discretion of the Court and the second part is a mandate in this regard. Now, considering the facts and circumstances of the present case, the present case in hand is concerned, accused has been facing charge under Sections 376 (D)(A) of the IPC as well as Sections 5(J)(2), 6, 8, 9(L), 10, 16 and 17 of the POCSO Act. It is also admitted position that when the first informant has given his FIR before the concerned police station, specifically, stated that age of the victim who is a daughter of the first informant is 20.02.2005.

9. Further, it is also stated in the FIR that the victim was studying in Swaminarayan Vidhyadham and at the time of incident, age of the victim was 16 years 6 months and 12 days. It is an admitted position that application under Section 311 of the Cr.P.C has been preferred by the learned Public Prosecutor and the arguments on behalf of accused has already been completed but, from the plain reading of Section 311, it is crystal clear that the application can be given at any stage and it is also mentioned to consider that the power should be exercised, if the evidence appears to be essential to the just decision of the case.

10. In the present case, the learned advocate for the applicant has submitted that the original complainant has produced two birth certificates of the original victim issued by the Ahmedabad Municipal Corporation, Vide Exhibit-56 and Vide Exhibit-58. It is also coming on the evidence that the said birth certificates have been issued by the Ahmedabad Municipal Corporation, but no entry

has been found in the birth register of the Ahmedabad Municipal Corporation. In both these birth certificates, birth date of the victim has been stated as 20.02.2005. However, from the record, it transpires that the prosecution wants to examine a witness from the concerned school i.e., Swaminarayan Vidhyadham School, which has issued school Leaving Certificate of the victim and as per the school Leaving Certificate also, the birth date of the victim is 20.02.2005. Considering all these, it is undisputed fact that the birth date of the victim is 20.02.2005. So, the birth date is concerned, it is not in dispute.

11. It is also pertinent to note here that at this stage from the record, it transpires that the said school Leaving Certificate issued by the Swaminarayan Vidhyadham has been collected by the investigating officer during the investigation but, somehow the prosecution side has not produced this document or no witness has been examined and at the later stage, they moved an application under

Section 311 of the Cr.P.C to examine the said witness. Learned advocate for the applicant has relied upon the judgment of the Hon'ble Apex Court in the case of Rajaram Prasad Yadav Vs. The State of Bihar and Another (Supra) and considering the judgment, the Hon'ble Apex Court has laid down the principles for dealing with an application under Section 311 of the Cr.P.C and the Hon'ble Apex Court has also laid down the following principle to kept in mind while dealing with an application under Section 311 of the Cr.P.C to examine the said witness.

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

17.1 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?

17.2 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.

17.3 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.

17.4 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.

17.5 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.

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

17.7 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.

17.8 *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.*

17.9 *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.*

17.10 *Exigency of the situation, fair play and good sense should be the safe guard, 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.*

17.11 *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.*

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

17.13 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.

17.14 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. “

12. So, considering the principle of Section 311 of the Cr.P.C, it is apparently clear that the discretionary power under Section 311 of the Cr.P.C should be exercised for just decision of the case, and considering the fact that by exercising power under Section 311 of the Cr.P.C, if it has not been allowed, then it could result into the end of

justice and the power under Section 311 of the Cr.P.C should be exercised with the object of finding out the truth or obtaining proper proof for such facts, which will lead to the just and correct decision of the case and its power should be exercised by the Court judicially, not arbitrarily and the Court has to exercise the power just to find out the truth.

13. So, considering these, the principles laid down by the Hon'ble Apex Court, the present case in hand is concerned, inadvertently, prosecution has not produced the school Leaving Certificate and in the case under the POCSO Act are concerned, the date of birth is very essential evidence to prove that the school Leaving Certificate is present in all the documents i.e. 20.02.2005. The date of birth of the victim is same in all the documents i.e., 20.02.2005, and the school Leaving Certificate has also been collected by the investigating officer during the investigation. So, it cannot be said that the said school Leaving Certificate which prosecution

want to produce and examine a witness is being subsequently obtained or it is an afterthought by the prosecution.

14. In this regard, now, it is required to consider the findings reported by the concerned learned Sessions Court, while dealing with the application under Section 311, has recorded finding in paragraph no.4.1 that earlier defense has given any application vide Exh.124 to take action against the investigating officer and the Court has issued notice to the concerned investigating officer. However, it has also been observed that the investigating officer during his investigation, has collected the evidence regarding the birth date of the victim, but the said has not been given on record, and for that purpose, bringing the evidence recording the birth date of the victim, and more particularly, the case under the POCSO Act is concerned, the said evidence is very essential evidence to be placed on record, and it has also been recorded by the learned Trial Court that if the said

witness has been called, even, it is not going to prejudice the right of the accused. Considering the revision of Section 311 of the Cr.P.C, application can be allowed at any stage of the trial. The said findings recorded by the learned Trial Court is found to be just and proper, and no illegality has been committed by the learned Sessions Court while allowing an application under Section 311 of the Cr.P.C.

15. Further, as discussed above, principles laid down by the Hon'ble Apex Court in the case of Rajaram Prasad Yadav Vs. State of Bihar & Anr. (Supra), the said power can be exercised by the Court judicially to find out the truth and if the evidence has been found materially for just decision of the case. The entire material was not brought on record due to any inadvertence. The Court should be magnetism in permitting such mistakes to be rectified. However, the learned Trial Court has also taken care of the fact that after the witness has been summoned by the Court and he has been produced the document in

the Court by giving his oral evidence, the accused has a fair opportunity to cross-examine the said witness so there is no prejudice has been caused to the accused. Considering the present facts of the case in hand is concerned, as it pertains to the powers under Section 311 of the Cr.P.C has been exercised by the concerned Trial Court for summoning the witness to prove the birth date of the victim, more particularly, if the POCSO Act are concerned, I do not find any illegality committed by the learned Trial Court. I do not find any merits in the present revision application and the case is not made out for any interference and the findings of the learned Trial Court does not warrant any interference and the present revision application is devoid of any merit. Hence, I pass the following order.

16. The present revision application is hereby rejected. The order passed by learned Special Judge POCSO, Court No.9, City Civil and Sessions Court, Ahmedabad City in Special POCSO Case No.252 of 2021 allowing the

application vide Exh.154 preferred by prosecutor on 13.05.2025 is hereby confirmed. Rule is discharged.

JCP

(L. S. PIRZADA, J)