

(2011) 05 GUJ CK 0088
In the Gujarat High Court

Case No : Criminal Revision Application No. 687 of 2008

State of Guajrat

APPELLANT

Vs

Shivkant alias Munna alias Ramkaran Krishnadatt Tripathi

RESPONDENT

Date of Decision : 11-05-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 311, 397, 401

Citation : (2011) 4 Crimes 481

Hon'ble Judges : S.R. Brahmbhatt, J

Bench : Single Bench

Advocate : K.P. Raval, app, for the Appellant; Hemant K. Makwana, for the Respondent

Judgement

S.R. Brahmbhatt, J.—The applicant State of Gujarat has preferred this Revision Application u/s 397 of Code of Criminal Procedure challenging the order dated 20/8/2008 passed by Learned Addl. Sessions Judge and Presiding Officer, Fast Track Court No. 2, Dahod, below application exhibit-39 in Sessions Case No. 205 of 2007; rejecting the application made by the prosecution for calling one person namely Manoj Ashvin Ninama, son of the victim. Said application was moved u/s 311 Code of Criminal Procedure Said application was resisted by oral submissions on behalf of the defence that the witness Sanjay who also happened to be elder son of deceased had been examined, and as it emerged from his testimony that he was not residing with the deceased when the incident occurred, to fill-in lacuna in the prosecution case, now an attempt is made to procure Manoj as witness and therefore, this attempt cannot be permitted and hence application for calling Manoj as witness be rejected.

2. The Court vide order dated 20/8/2008 accepted this submission but rejected the same on the sole ground that when Sanjay was required to be called, this witness i.e. Manoj was not requested to be called. Provision of Section 311 Code of Criminal Procedure is only for enabling the truth to surface and not for enabling the prosecution to remove the lacuna in their case against the accused.

On these basis the Court was of the view that this was an attempt to remove the lacuna in their case and therefore prosecution's request was not liable to be accepted.

3. Learned APP who had record & proceedings with him pointed out by reading the same that Manoj and Sanjay both were minor. Manoj happened to be younger one and hence at the relevant time Sanjay was called, and calling of Manoj is nothing but an attempt to unearth the truth an in the process of unearthing the truth the defence would certainly availing all the opportunities for defending the case in an appropriate manner. That, the Trial Court ought not to have brushed aside the application and rejected the same on the ground that it was an attempt to filling the lacuna.

4. Learned advocate Shri Makwana appearing for the Respondent contended that the strong likelihood of witness being tutored at the end of prosecution can not be ruled out in such situation when the prosecution failed in getting the testimony helping them in proving the case against the accused and another chance is taken for calling Manoj, the younger son, who also happens to be minor. Manoj's name emerged in the testimony of Sanjay and when the presence of Manoj is said to be there at the time of incident right from the beginning, nothing prevented the prosecution to name him as a witness right at the beginning. The attempt of the prosecution to bridge the gap in their case has rightly been deprecated and rejected by the trial Court and this Court in exercise of jurisdiction u/s 397 read with Section 401 Code of Criminal Procedure may not condone such attempts and therefore the petition be rejected.

5. This Court is of the view that the real purport of Section 311 is unfortunately missed by the trial Court. The parties before the Court are not permitted to plead prejudice when the Court is specifically called upon to examine the request in view of Section 311 Code of Criminal Procedure. The prejudice is, if permitted, should be such as it is going to the root of the matter and indicating that the application made u/s 311 Code of Criminal Procedure was with a view to score undue advantage or for causing irreparable harm. In the instant case the fact remains to be noted that the request for calling Manoj who is minor, has arisen as during testimony of Sanjay, who happened to be his elder brother, had emerged that he with Manoj was residing with the deceased and therefore his testimony may help in unearthing the truth. Examination of Manoj in no way would prejudice the defence as the defence would get all the opportunities under the law. The apprehension expressed by learned advocate for the Respondent accused is misconceived an does not merit any acceptance.

6. In view of this, the order dated 20/8/2008 passed by Learned Addl. Sessions Judge and Presiding Officer, Fast Track Court No. 2, Dahod, below exhibit-39 application in Sessions Case No. 205 of 2007 is required to be quashed and is hereby quashed. Prosecution's prayer for permitting to call Manoj as witness is granted. Revision application is disposed of. Rule made absolute.