

# Ashu Chauhan vs State Of U.P. And 3 Others on 1 April, 2025

**Author: Rajeev Misra**

**Bench: Rajeev Misra**

HIGH COURT OF JUDICATURE AT ALLAHABAD

?Neutral Citation No. - 2025:AHC:45338

Court No. - 70

Case :- APPLICATION U/S 528 BNSS No. - 6762 of 2025

Applicant :- Ashu Chauhan

Opposite Party :- State Of U.P. And 3 Others

Counsel for Applicant :- Pranshu Dwivedi,Ram Prakash Dwivedi

Counsel for Opposite Party :- G.A.,P.K. Singh

Hon'ble Rajeev Misra,J.

1. Heard Mr. R.P. Dwivedi, the learned counsel for applicant, the learned A.G.A. for State-opposite party-1 and Mr. P.K. Singh, the learned counsel representing first informant-opposite party-2.

2. Perused the record.

3. This application under Section 528 BNSS has been filed by applicant-Ashu Chauhan, who is a charge sheeted accused and facing trial before Court below with the following prayer;-

"It is, therefore, most respectfully prayed that this Hon'ble Court may graciously be pleased to allow the present criminal misc. application U/s 528 BNSS and set aside the order 22.01.2025 passed by the Court of Additional District & Sessions

Judge/Special Judge POCSO ACT), Court No.28, Agra in respect of list of defence witnesses mentioned at serial nos. 5,7, 8, 9 & 10 in Paper no. 31 (kha), dated 22.01.2025, and direct the learned trial court to summon the defence witnesses mentioned at serial nos. 5,7, 8, 9 & 10 in Paper no. 31 (kha), dated 22.01.2025 in Special Trial No.652/2025, arising out of Case Crime No.43/2024, (State Vs. Ashu chauhan) under Sections 376 (2) (n), 506 IPC and Section 5L/6, Sections 13/14 of POCSO Act and Section 67b of IT. Act, Police Station-Sadar Bazar, District Agra, so that justice be done.

It is further be pleased to stay the further proceedings of effect and operation of the order 22.01.2025 passed by the Court of Additional District & Sessions Judge/Special Judge POCSO ACT), Court No.28, Agra in respect of list of defence witnesses mentioned at serial nos. 5,7, 8, 9 & 10 in Paper no. 31 (kha), dated 22.01.2025 in Special Trial No.652/2025, arising out of Case Crime No.43/2024, under Sections 376 (2) (n), 506 IPC and Section 5L/6, Sections 13/14 of POCSO Act and Section 67b of I.T. Act, Police Station- Sadar Bazar, District- Agra, so that justice be done;

It is furthermore be pleased to stay the further proceedings of Special Trial No.652/2025, arising out of Case Crime No.43/2024, under Sections 376 (2) (n), 506 IPC and Section 5L/6, Sections 13/14 of POCSO Act and Section 67b of I.T. Act, Police Station- Sadar Bazar, District- Agra, so that justice be done;

And/or to pass such other order or direction as this Hon'ble Court may deem fit and proper in facts and circumstances of the case to secure the ends of justice."

4. It transpires from record that after the statement of accused-applicant was recorded in terms of Section 313 Cr.P.C., an application dated 22.01.2025 (purported to under Section 315 Cr.P.C.) was filed on behalf of accused-applicant with the prayer that certain witnesses are sought to be adduced on his behalf in proof of his innocence. It was thus prayed by means of this application that the witnesses mentioned in the application be summoned for doing justice to the accused-applicant. Aforementioned application was opposed by the prosecution. However, Court below, upon evaluation and examination of the prayer made in above-mentioned application in the light of the facts and circumstances on the record and also the attending circumstances, came to the conclusion that the said application is liable to be partly allowed. It, accordingly, vide order dated 22.01.2025, partly allowed the said application.

5. Thus feeling aggrieved by above order dated 22.01.2025, in so far as, it negates the prayer made by the applicant in the application dated 22.01.2025, accused-applicant has now approached this Court by means of present application under Section 528 BNSS.

6. Mr. R.P. Dwivedi, the learned counsel for accused-applicant contends that the order impugned in this application is manifestly illegal and in excess of jurisdiction. As such, the same is liable to be set aside by this Court. Court, while exercising jurisdiction in terms of Section 315 Cr.P.C. cannot sit in appeal over the merits or demerits of the documentary evidence or the oral evidence sought to get

summoned by an accused in support of his innocence. On the above conspectus, he, therefore, contends that Court below has erred in law in partly rejecting the application aforementioned filed by accused-applicant.

7. In furtherance of aforesaid submission, the learned counsel for applicant has then taken the Court to the document occurring at page 128 of the paper book, which is the photo copy of the extract of the birth and death register and with reference to above, he submits that date of birth of the prosecutrix recorded in aforesaid register is 10.10.2005. He has then taken the Court to the document occurring at page 124 of the paper book, to show that the record, which is received from the hospital is destroyed after expiry of a period of 7 years. Since the prosecutrix was born out of a cesarean operation conducted upon her mother, therefore, the relevancy of the statement of the Doctor i.e. Dr. Neelam Singh, who had operated the mother of the prosecutrix, becomes relevant. However, Court below without considering the aforesaid aspect of the matter has negated the prayer of accused-applicant to summon Dr. Neelam Singh, which is wholly illegal. It is thus urged by the learned counsel for applicant that the present application is liable to be allowed.

8. Per contra, the learned A.G.A. representing State-opposite party-1 and Mr. P.K. Singh, the learned counsel representing first informant-opposite party-2 have vehemently opposed the present application. They submit that the birth and death register is a public document. The procedure for proving a public document is to file the certified copy of the extract or copy of said document and further produce the witness from the office from where the said document was issued. In case, the said burden is discharged by applicant then the burden shall shift upon the prosecution to dislodge the entry occurring in the birth and death register. In view of above, there is no relevancy of the statement of Doctor, who had conducted cesarean operation upon the mother of prosecutrix. On the above premise, they, therefore, submit that no illegality or infirmity has been committed by Court below in passing the order impugned.

9. Having heard Mr. R.P. Dwivedi, the learned counsel for applicant, the learned A.G.A. for State-opposite party-1, Mr. P.K. Singh, the learned counsel representing first informant-opposite party-2 and upon perusal of record, this Court finds that in view of the law laid down by Apex Court in the case of Jarnail Singh Vs. State of Haryana, (2013) 7 SCC 263, the age of the victim has to be determined with reference to the provisions contained in Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015. Therefore, while deciding the age of the prosecutrix in the light of aforementioned provisions, the Court shall also be guided by the principles relating to proof of public documents as provided in Section 35 of the Indian Evidence Act. As such, it is the entry occurring in the birth and death register, which alone is required to be proved and not the fact that PW-1 is the mother of the prosecutrix. In view of above, this Court does not find any infirmity to the order impugned.

10. As a result, the present application fails and is liable to be dismissed.

11. It is, accordingly, dismissed.

Order Date :- 1.4.2025 Vinay