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MANJU DEVI

v.

STATE OF RAJASTHAN & ANR.

(Criminal Appeal No. 688 of 2019)

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APRIL 16, 2019

**[ABHAY MANOHAR SAPRE AND
DINESH MAHESHWARI, JJ.]**

C *Code of Criminal Procedure, 1973: s. 311 – Power to summon material witness, or examine person present – On facts, accused facing trial for offences u/ss. 302, 304B and 498A IPC due to death of his wife under unnatural circumstances in Nigeria – First post mortem of the victim carried out by the doctor in Nigeria – Application u/s. 311 by mother of the victim seeking summoning of the said doctor through High Commission of Nigeria or to record his evidence through video conferencing after issuing a commission for the purpose – Rejected by trial court as also High Court – On appeal, held: Testimony of the Nigerian doctor who conducted the first post-mortem in Nigeria is germane to the questions involved in this matter; and for a just decision of the case with adequate opportunity to both the parties to put forward their case, the application u/s. 311 allowed – Length/duration of a case cannot displace the basic requirement of ensuring the just decision after taking all the necessary and material evidence on record – Trial court to take all the necessary measures for ensuring the examination of the witness concerned by issuing commission and/or recording his statement through video-conferencing.*

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Allowing the appeal, the Court

HELD: 1.1 The discretionary powers like those under Section 311 of the Code of Criminal Procedure, 1973 are essentially intended to ensure that every necessary and appropriate measure is taken by the Court to keep the record straight and to clear any ambiguity in so far as the evidence is concerned as also to ensure that no prejudice is caused to anyone. [Para 9.1][76-F]

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1.2 The copy of the post-mortem report prepared by the doctor in Nigeria has, been placed on record wherein, the cause of death is stated as “*asphyxia secondary to strangulation*”. Though the dead-body of the daughter of appellant was brought to India on 29.01.2010 and Medical Board was constituted for conducting the post-mortem but then, the Board found that no definite opinion could be given regarding the time and cause of death. The investigating agency, for the reasons best known to it, did not cite the said doctor, who conducted the first post-mortem in Nigeria as a witness. It is also not the case on behalf of the accused that the copy of the post-mortem report dated 16.01.2010 prepared in Nigeria was not disputed and/or he would not be seeking to cross-examine the said doctor, if he is examined as a witness in this matter. In the given set of facts and circumstances, it is evident that the testimony of the said doctor who conducted the first post-mortem in Nigeria is germane to the questions involved in this matter; and for a just decision of the case with adequate opportunity to both the parties to put forward their case, the application under Section 311 CrPC ought to have been allowed. [Para 10][76-E-H; 77-A]

1.3 The peculiar facts and circumstances of the case have either been ignored or have been cursorily dealt by the trial court with the observations that the effect of non-availability of the original post-mortem report would be considered at the time of the final disposal of the matter. In fact, the principal reason weighing with the trial court in declining the prayer for examination of the said witness had been that the case was pending since the year 2010. The High Court, on the other hand, chose not to exercise its powers under Section 482 CrPC, with the only observation that the discretion so exercised by the trial court was not to be interfered with. [Para 11][77-B-C]

1.4 Though it is expected that the trial of a sessions case should proceed with reasonable expedition and pendency of such a matter for about 8-9 years is not desirable but then, the length/duration of a case cannot displace the basic requirement of ensuring the just decision after taking all the necessary and material evidence on record. In other words, the age of a case,

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- A by itself, cannot be decisive of the matter when a prayer is made for examination of a material witness. [Para 12][77-D]

- 1.5 In the given set of facts and circumstances, where the witness Dr. Y is residing in Nigeria, for the purpose of recording of his statement, the trial court could have unquestionably taken
 B recourse to the provisions of Sections 284 and 285 CrPC so as to avoid the delay in the matter and inconvenience to the parties and the witness. On the question of inconvenience likely to be caused in the event of summoning of the said witness from Nigeria, noticeable it is that the appellant made a prayer that the
 C doctor concerned being not available in the country, the order may be passed for taking his evidence by issuing commission under Sections 284 and 285 CrPC. In the instant case too, where the witness Dr. Y is residing in Nigeria, in order to avoid inconvenience to the witness as also to the parties, issuing of commission and recording his evidence through video-
 D conferencing appears to be a viable alternative; and the trial court need to take all the requisite steps so as to ensure that his evidence comes on record with least inconvenience and/or burden to the parties and the witness. [Paras 13, 13.1, 13.3][77-E-F; 78-G-H; 79-A; 80-E-F]

- E *State of Maharashtra v. Dr. Praful B. Desai* (2003) 4 SCC 601 : [2003] 3 SCR 244 – referred to.

- 1.6 The trial court disposed of the application under Section 311 CrPC on entirely irrelevant considerations and the High Court also failed to exercise its jurisdiction under Section 482 CrPC
 F while overlooking and ignoring the material and relevant aspects of the case. The impugned orders are set aside and the application moved in this matter under Section 311 CrPC is allowed. The trial court shall now take all the necessary measures for ensuring the examination of the witness concerned by issuing commission and/or recording his statement through video-conferencing and
 G shall also ensure expeditious proceedings so as to conclude the matter at the earliest. [Para 14, 16][80-F-H; 81-B]

Mohanlal Shamji Soni v. Union of India 1991 Supp (1) SCC 271 : [1991] 1 SCR 712 ; *Zahira Habibulla H. Sheikh v. State of Gujarat* (2004) 4 SCC 158 : [2004] 3

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SCR 1050 ; *Mina Lalita Baruwa v. State of Orissa and Others* (2013) 16 SCC 173 : [2013] 16 SCR 788 ; *Rajaram Prasad Yadav v. State of Bihar and Ors* 2013 (14) SCC 461 : [2013] 7 SCR 420 ; *Natasha Singh v. CBI (State)* 2013 (5) SCC 741 : [2013] 5 SCR 539 – referred to. A
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Case Law Reference

[1991] 1 SCR 712	referred to	Para 9.1	
[2004] 3 SCR 1050	referred to	Para 9.1	
[2013] 16 SCR 788	referred to	Para 9.1	C
[2013] 7 SCR 420	referred to	Para 9.1	
[2013] 5 SCR 539	referred to	Para 9.1	
[2003] 3 SCR 244	referred to	Para 13.2	

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 688 of 2019. D

From the Judgment and Order dated 02.08.2018 of the High Court of Judicature for Rajasthan at Jodhpur Bench in S.B. Criminal Misc. (Petition) No. 2282 of 2018.

Rahul Mohod, Raju Sonkar, Arun Adlakha, Karunakar Mahalik, Advs. for the Appellant. E

Anish Roy, Milind Kumar, T. Harish Kumar Advs. for the Respondents.

The Judgment of the Court was delivered by
DINESH MAHESHWARI, J. F

1. Leave granted.

2. In Sessions Case No. 05 of 2015 in the Court of Additional Sessions Judge Ratangarh, District Churu (Rajasthan), the accused-respondent No. 2 is facing trial for offences under Sections 302, 304-B and 498-A of the Indian Penal Code ('IPC') due to the death of his wife under unnatural circumstances in Nigeria. The appellant, mother of the deceased, moved an application under Section 311 of the Code of Criminal Procedure ('CrPC') in the said case, seeking summoning of one Dr. I. G

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A Yusuf (who had conducted first post-mortem of the dead-body of the appellant's daughter in Nigeria) through High Commission of Nigeria or to record his evidence through video-conferencing, after issuing a commission for the purpose.

2.1. By its order dated 31.05.2018, the Trial Court rejected the application so moved by the appellant, essentially for reasons that the trial was pending for almost 8 years; and that it was not necessary to record the statement of Dr. I. Yusuf because a copy of the post-mortem report prepared by him had already been exhibited. The appellant attempted to question the order so passed by the Trial Court before the High Court of Judicature for Rajasthan at Jodhpur in Criminal Miscellaneous Petition No. 2282 of 2018. However, the High Court dismissed the said petition by its impugned order dated 02.08.2018 with the observation that there was no reason to interfere in the exercise of discretion by the Trial Court. Aggrieved, the appellant has preferred this appeal by special leave.

D 3. The background aspects, so far relevant for the present purpose, could be noticed, in brief, as follows:

3.1. The prosecution case is that the deceased daughter of the appellant was married to the accused-respondent No. 2 on 21.04.2008 at Rajaldesar; she was residing in her matrimonial home alongwith father and mother of her husband; and later on she had shifted to Bangalore and then to Nigeria with her husband but was regularly harassed with demand for dowry. It is alleged that on 14.01.2010, the appellant's daughter, while living with her husband (the accused-respondent No. 2) in Nigeria, died under unnatural circumstances when she was found hanging from the ceiling fan in her room. An FIR bearing No. 10 of 2010 was lodged at Police Station Rajaldesar, District Churu by the husband of appellant (father of the deceased), alleging, *inter alia*, that his daughter was harassed with persistent demands for dowry and she was subjected to cruelty to the extent that it ultimately led to her death in Nigeria.

G 3.2. The first post-mortem of the dead-body of the appellant's daughter was conducted by Dr. I. Yusuf in Aminu Kanu Teaching Hospital, Nigeria on 16.01.2010 who, upon examination, stated his opinion that the cause of death was "*asphyxia secondary to strangulation*". Thereafter, the dead-body of the appellant's daughter was brought to India where a Medical Board was constituted for further post-mortem

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but the Medical Board stated that no definite opinion could be formed regarding the time and cause of death of the daughter of the appellant. After investigation, charge-sheet was filed against the respondent No. 2 for the offences under Sections 302, 304-B and 498-A IPC.

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3.3. In the trial, the prosecution led its evidence and various witnesses were examined but as the members of the Board were unable to give any definite opinion as to the cause of death, an application under Section 311 CrPC was moved by the appellant, for issuance of summons to the said Dr. I. Yusuf, Department of Pathology, Aminu Kanu Teaching Hospital, Nigeria, who had first conducted the post-mortem of the dead-body of the appellant's daughter in Nigeria, so that he may be examined as a medical witness. It was also submitted in the alternative that the evidence of the said doctor may be recorded through video-conferencing.

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4. As noticed, in its impugned order dated 31.05.2018, the Trial Court rejected the said application while observing that the matter was pending since the year 2010 and, as the photocopy of the post-mortem report prepared in Nigeria was available on record, it was not necessary to record the statement of Dr. I. Yusuf. The Trial Court also observed that the effect of want of original post-mortem report shall be examined at the time of final decision of the matter.

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5. Against the order aforesaid, the appellant filed a criminal miscellaneous petition under Section 482 CrPC before the High Court of Judicature for Rajasthan at Jodhpur while contending, *inter alia*, that Dr. I. Yusuf was a material witness in the case and the prosecution had illegally omitted to cite him as a witness. However, the petition was dismissed by the High Court by way of its impugned order dated 02.08.2018 while observing that in the overall facts and circumstances of the case, the discretion exercised by the Trial Court called for no interference.

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6. Assailing the order aforesaid, the learned counsel for the appellant has strenuously argued that the Trial Court and the High Court have failed to appreciate the relevance of the evidence of Dr. I Yusuf, who conducted the first post-mortem of the dead-body of the daughter of appellant; and his testimony is essential to arrive at the just decision in this case. The learned counsel would submit that the order of the Trial Court rejecting the application on the ground that the trial was pending for last about 8 years is not of a judicious approach to the case; and that

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- A the Trial Court should ensure that the material evidence comes on record so as to arrive at just conclusion.

7. *Per contra*, learned counsel for the accused-respondent No. 2 has duly supported the order impugned with the submissions that the appellant only seeks protraction of the trial with the baseless application under Section 311 CrPC. According to the learned counsel, the Trial Court has consciously exercised its discretion in rejecting the application and the High Court has rightly declined to interfere.
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8. Having given thoughtful consideration to the rival submissions and having examined record with reference to the law applicable, we find it difficult to approve the orders impugned; and it appears just and proper that the application moved in this matter under Section 311 CrPC be allowed with direction to the Trial Court to ensure that the testimony of the doctor conducting first post-mortem comes on record.
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9. Section 311 CrPC reads as under:-

- D ***“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 as a witness, or examine 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”
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- 9.1. It needs hardly any emphasis that the discretionary powers like those under Section 311 CrPC are essentially intended to ensure that every necessary and appropriate measure is taken by the Court to keep the record straight and to clear any ambiguity in so far as the evidence is concerned as also to ensure that no prejudice is caused to anyone. The principles underlying Section 311 CrPC and amplitude of the powers of the Court thereunder have been explained by this Court in several decisions¹. In *Natasha Singh v. CBI (State) : (2013) 5 SCC 741*, though the application for examination of witnesses was filed by
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¹ Vide *Mohanlal Shamji Soni v. Union of India*: 1991 Supp (1) SCC 271, *Zahira Habibulla H. Sheikh v. State of Gujarat*: (2004) 4 SCC 158, *Mina Lalita Baruwala v. State of Orissa and Others* : (2013) 16 SCC 173 and *Rajaram Prasad Yadav v. State of Bihar and Ors* : 2013 (14) SCC 461 and *Natasha Singh v. CBI (State) : 2013 (5) SCC 741*.

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the accused but, on the principles relating to the exercise of powers under Section 311, this Court observed, *inter alia*, as under:-

“ 8. Section 311 CrPC empowers the court to summon a material witness, or to examine a person present at “any stage” of “any enquiry”, or “trial”, or “any other proceedings” under CrPC, or to summon any person as a witness, or to recall and re-examine any person who has already been examined if his evidence appears to it, to be essential to the arrival of a just decision of the case. Undoubtedly, the CrPC has conferred a very wide discretionary power upon the court in this respect, but such a discretion is to be exercised judiciously and not arbitrarily. The power of the court in this context is very wide, and in exercise of the same, it may summon any person as a witness at any stage of the trial, or other proceedings. The court is competent to exercise such power even suo motu if no such application has been filed by either of the parties. However, the court must satisfy itself, that it was in fact essential to examine such a witness, or to recall him for further examination in order to arrive at a just decision of the case.

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15. The scope and object of the provision is to enable the court to determine the truth and to render a just decision after discovering all relevant facts and obtaining proper proof of such facts, to arrive at a just decision of the case. Power must be exercised judiciously and not capriciously or arbitrarily, as any improper or capricious exercise of such power may lead to undesirable results. An application under Section 311 CrPC must not be allowed only to fill up a lacuna in the case of the prosecution, or of the defence, or to the disadvantage of the accused, or to cause serious prejudice to the defence of the accused, or to give an unfair advantage to the opposite party. Further, the additional evidence must not be received as a disguise for retrial, or to change the nature of the case against either of the parties. Such a power must be exercised, provided that the evidence that is likely to be

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A *tendered by a witness, is germane to the issue involved. An opportunity of rebuttal however, must be given to the other party. The power conferred under Section 311 CrPC 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 great caution and circumspection. The*
B *very use of words such as “any Court”, “at any stage”, or “or any enquiry, trial or other proceedings”, “any person” and “any such person” clearly spells out that the provisions of this section have been expressed in the widest possible terms, and do not limit the discretion of the Court in any way.*
C *There is thus no escape if the fresh evidence to be obtained is essential to the just decision of the case. The determinative factor should therefore be, whether the summoning/recalling of the said witness is in fact, essential to the just decision of the case.”*

D 10. The indisputable fact situation of the case remains that the daughter of the appellant died an unnatural death on 14.01.2010 in Nigeria, where she was living with her husband (the respondent No. 2), who is standing the trial for offences under Sections 302, 304-B and 498-A IPC. The first post-mortem of the dead-body of the daughter of appellant was carried out on 16.01.2010 in Aminu Kanu Teaching Hospital, Nigeria
E by the said Dr. I. Yusuf. A copy of the post-mortem report prepared by the said doctor in Nigeria has, of course, been placed on record wherein, the cause of death is stated as “*asphyxia secondary to strangulation*”. Though the dead-body of the daughter of appellant was brought to India on 29.01.2010 and Medical Board was constituted for conducting the
F post-mortem but then, the Board found that no definite opinion could be given regarding the time and cause of death. The investigating agency, for the reasons best known to it, did not cite the said doctor, who conducted the first post-mortem in Nigeria as a witness. It is also not the case on behalf of the accused that the copy of the post-mortem report dated
G 16.01.2010 prepared in Nigeria was not disputed and/or he would not be seeking to cross-examine the said doctor, if he is examined as a witness in this matter. In the given set of facts and circumstances, evident it is that the testimony of the said doctor who conducted the first post-mortem in Nigeria is germane to the questions involved in this matter; and for a

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just decision of the case with adequate opportunity to both the parties to put forward their case, the application under Section 311 CrPC ought to have been allowed. A

11. The peculiar facts and circumstances of the case have either been ignored or have been cursorily dealt by the Trial Court with the observations that the effect of non-availability of the original post-mortem report would be considered at the time of the final disposal of the matter. In fact, the principal reason weighing with the Trial Court in declining the prayer for examination of the said witness had been that the case was pending since the year 2010. The High Court, on the other hand, chose not to exercise its powers under Section 482 CrPC, with the only observation that the discretion so exercised by the Trial Court was not to be interfered with. B C

12. Though it is expected that the trial of a sessions case should proceed with reasonable expedition and pendency of such a matter for about 8-9 years is not desirable but then, the length/duration of a case cannot displace the basic requirement of ensuring the just decision after taking all the necessary and material evidence on record. In other words, the age of a case, by itself, cannot be decisive of the matter when a prayer is made for examination of a material witness. D

13. In the given set of facts and circumstances, where the witness Dr. I. Yusuf is residing in Nigeria, for the purpose of recording of his statement, the Trial Court could have unquestionably taken recourse to the provisions of Sections 284 and 285 CrPC so as to avoid the delay in the matter and inconvenience to the parties and the witness. Sections 284 and 285 CrPC read as under:- E

Section 284. When attendance of witness may be dispensed with and commission issued. - F

(1) Whenever, in the course of any inquiry, trial or other proceeding under this Code, it appears to a Court of Magistrate that the examination of a witness is necessary for the ends of justice, and that the attendance of such witness cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable, the G

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A *Court or Magistrate may dispense with such attendance and may issue a commission for the examination of the witness in accordance with the provisions of this Chapter;*

B *Provided that where the examination of the President or the Vice-President of India or the Governor of a State or the Administrator of a Union territory as a witness is necessary for the ends of justice, a commission shall be issued for the examination of such a witness.*

C (2) *The Court may, when issuing a commission for the examination of a witness for the prosecution direct that such amount as the Court considers reasonable to meet the expenses of the accused, including the pleader's fees, be paid by the prosecution.*

Section 285. Commission to whom to be issued.-

D (1) *If the witness is within the territories to which this Code extends, the commission shall be directed to the Chief Metropolitan Magistrate or Chief Judicial Magistrate, as the case may be, within whose local jurisdiction the witness is to be found.*

E (2) *If the witness is in India, but in a State or an area to which this Code does not extend, the commission shall be directed to such Court or officer as the Central Government may, by notification specify in this behalf.*

F (3) *If the witness is in a country or place outside India and arrangements have been made by the Central Government with the Government of such country or place for taking the evidence of witnesses in relation to criminal matters, the commission shall be issued in such form, directed to such Court or officer, and sent to such authority for transmission as the Central Government may, by notification prescribe in this behalf*

G 13.1. On the question of inconvenience likely to be caused in the event of summoning of the said witness from Nigeria, noticeable it is that the appellant made a prayer that the doctor concerned being not

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available in the country, the order may be passed for taking his evidence by issuing commission under Sections 284 and 285 CrPC. The appellant stated in the application, inter alia, as under:-

“That however witness is residing in foreign and post-mortem was conducted also there, hence witness should be summoned through High Commission of Nigeria or order may be passed of taking evidence record on commission after issuing commission U/s 284, 285 in CrPC through video conferencing in case of not coming from foreign.”

13.2 The aforesaid relevant submissions of the appellant have also been ignored by the Trial Court as also by the High Court. For the purpose of dealing with such a prayer of the appellant the Trial Court could have, rather ought to have, taken guidance from the decisions of this Court including that in ***State of Maharashtra v. Dr. Praful B. Desai : (2003) 4 SCC 601*** where this Court approved of the process of recording the evidence of a witness in the criminal trial through video-conferencing when the witness was found residing/situate in the United States of America but whose evidence was essential for the case set up by the prosecution. This Court observed, *inter alia*, as under:-

“20. Recording the evidence by video-conferencing also satisfies the object of providing, in Section 273, that evidence be recorded in the presence of the Accused. The Accused and his pleader can see the witness as clearly as if the witness was actually sitting before them. In fact the Accused may be able to see the witness better than he may have been able to if he was sitting in the dock in a crowded Court room. They can observe his or her demeanour. In fact the facility to play back would enable better observation of demeanour. They can hear and rehear the deposition of the witness. The Accused would be able to instruct his pleader immediately and thus cross-examination of the witness is as effective if not better. The facility of play back would give an added advantage whilst cross-examining the witness. The witness can be confronted with documents or other material or statement in the same manner as if he/she was in Court. All these objects would be fully met when evidence is recorded by video-conferencing. Thus no prejudice, of whatsoever nature, is caused to the

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A *Accused. Of course, as set out hereinafter, evidence by video-conferencing has to be on some conditions.”*

Thereafter, with reference to Sections 284 and 285 CrPC, this Court further observed that,-

B *“22. Thus in cases where the witness is necessary for the ends of justice and the attendance of such witness cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case would be unreasonable, the Court may dispense with such attendance and issue a commission for examination of the*
C *witness. Normally a commission would involve recording evidence at the place where the witness is. However advancement in science and technology has now made it possible to record such evidence by way of video-conferencing in the town/city where the Court is. Thus in case where the*
D *attendance of a witness cannot be procured without an amount of delay, expense or inconvenience the Court could consider issuing a commission to record the evidence by way of video-conferencing.”*

E 13.3. In the present case too, where the witness Dr. I.Yusuf is residing in Nigeria, in order to avoid inconvenience to the witness as also to the parties, issuing of commission and recording his evidence through video-conferencing appears to be a viable alternative; and the Trial Court need to take all the requisite steps so as to ensure that his evidence comes on record with least inconvenience and/or burden to the parties and the witness.

F 14. In the given set of facts and circumstances, we are clearly of the view that the Trial Court disposed of the application under Section 311 CrPC on entirely irrelevant considerations and the High Court also failed to exercise its jurisdiction under Section 482 CrPC while overlooking and ignoring the material and relevant aspects of the case. In our view,
G the said application under Section 311 CrPC deserves to be allowed.

15. It goes without saying that we have not made any comments on the merits of the case; and the Trial Court would be expected to deal with the matter in accordance with law after assessment of the evidence brought on record.

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MANJU DEVI v. STATE OF RAJASTHAN & ANR.
[DINESH MAHESHWARI, J.]

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16. Accordingly, this appeal is allowed in the manner and to the extent that the impugned orders dated 31.05.2018 and 02.08.2018 are set aside and the application moved in this matter under Section 311 CrPC is allowed. The Trial Court shall now take all the necessary measures for ensuring the examination of the witness concerned by issuing commission and/or recording his statement through video-conferencing and shall also ensure expeditious proceedings so as to conclude the matter at the earliest.

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Nidhi Jain

Appeal allowed.