(1980) 03 MAD CK 0036

Madras High Court

Case No: Criminal Appeal No''s. 193 to 205 of 1977

The State (Tamil Nadu)		APPELLANT
	Vs	
Veerappan and Others		RESPONDENT

Date of Decision: March 24, 1980

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 242, 242(2), 248, 253(1), 254(2)

Citation: AIR 1980 Mad 260 : (1980) ILR (Mad) 245

Hon'ble Judges: Ratnavel Pandian, J; Paul, J; Natarajan, J

Bench: Full Bench

Advocate: M.S. Menon, for Bar Association and K.V. Sankaran, for Advocates Association, P. Rajamanickam, P.P, for the Appellant; K. Doraiswami, for the Respondent

Judgement

Paul, J

1. These appeals, which have been preferred by the State represented by the learned. Public Prosecutor against the orders of the learned Judicial

Second Class Magistrate of Namakkal acquitting the respondent-accused in each case of an offence punishable u/s 4(1)(b) of the Tamil Nadu

Prohibition Act are before us, inasmuch as on a reference by one of us, before whom the appeals originally came up for hearing, the matter has

been placed before this Full Bench since the matter involved a question of law of public importance, in regard to which question of law there have

been divergent views of various High Courts.

2. Of the two questions which have been referred to this Full Bench, the first one, namely, whether u/s 255(1) Cr. P. C., a Magistrate can acquit

the accused if the prosecution fails to apply for the issue of summons to any witness and does not produce the witness for several hearings and

does not serve summons on the witnesses despite having been granted sufficient opportunity to serve the summons or to produce the witnesses, is

the one that directly arises for determination in these appeals. The second question which arises for determination by us incidentally is whether a

Magistrate can acquit the accused u/s 248(1) Cr. P. C., if the prosecution does not apply for the issue of summons to any of the witnesses and

does not produce the witness for several hearings and does not serve the summons on the witnesses despite having been granted sufficient

opportunities to serve the summons on the witnesses or to produce the witnesses.

3. In all these appeals, the learned Magistrate acquitted the accused u/s 255(1) Cr. P. C., on the ground that even though the cases had been

posted for hearing on various dates and summons had been issued to the witnesses for all the hearings, the witnesses were not produced on any of

the hearing dates and in spite of a notice issued that the case would be disposed of without examining the witnesses if they are not produced the

prosecution did not choose to let in any evidence and as such the Magistrate found that the prosecution had no evidence to let in.

4. Section 81 Cr. P. C. 1861, the Magistrate to issue a warrant.

5. We shall first examine the provisions of the Criminal Procedure Code of 1973, which have relevance to this matter.

6. Section 255(1), Cr. P. C., under which the accused have been acquitted in these cases states as follows:

If the Magistrate, upon taking the evidence referred to in Section 254 and such further evidence, if any, as he may, of his own motion, cause to be

produced, finds the accused not guilty, he shall record an order of acquittal"".

Section 254, Cr. P. C., states as follows:

(1) If the Magistrate does not convict the accused u/s 252 or Section 253, the Magistrate shall proceed to hear the prosecution and take all such

evidence as may be produced in support of the prosecution, and also to hear the accused and take all such evidence as he produces in his defence.

(2) The Magistrate may if, he thinks fit, on the application of the prosecution or the accused, issue a summons to any witness directing him to

attend or to produce any document or other thing.

(3) The Magistrate may, before summoning any witness on such application, require that the reasonable expenses of the witness incurred in

attending for the purposes of the trial be deposited in court.

7. It will be noticed that under subsection (1) of Section 254, the Magistrate is enjoined to hear the prosecution and take all such evidence as may

be produced in support of the prosecution and also to hear the accused and take all such evidence as he produces in his defence. It was to be

noted that under that sub-section a duty is cast on the prosecution to produce its evidence and likewise on the accused to produce evidence in his

defence, sub-section (2) of Section 254 makes provision for the production or the accused to seek the assistance of the court in producing its or

his evidence by applying for issue of summons to any witness directing him to attend or to produce any document or other thing. It may also be

noted that this sub-section gives discretion to the Magistrate to so issue summons on the application of the prosecution or the accused by using the

words ''the Magistrate may if he thinks fit''. Thus an emphasis is placed by Section 254 on the duty of the prosecution or the accused to produce

all evidence in support of its case or his defence.

8. Section 255(1) makes provision for the Magistrate upon taking the evidence referred to in Section 254 to take such further evidence, if any, as

he may of his own motion cause to be produced. u/s 255(1) a Magistrate can record an order of acquittal if he finds the accused not guilty upon

taking the evidence referred to in Section 254 and such further evidence, if any, as he may of his own motion cause to be produced. Section 244

Cr. P. C. of 1898, (corresponding to Section 254 of the Code of 1973), as it was in force before the Criminal Procedure Code of 1973 came into

effect, also contained similar provisions.

9. Section 258 Cr. P. C., 1973, which is analogous to Section 249 of the Cr. P. C. of 1898, reads as follows:-

In any summons case instituted otherwise than upon complaint, a Magistrate of the first class or, with the previous sanction of the Chief Judicial

Magistrate, any other Judicial Magistrate, may for reasons to be recorded by him, stop the proceedings at any stage without pronouncing any

judgment and where such stoppage of proceedings is made after the evidence of the principal witnesses has been recorded, pronounce a judgment

of acquittal, and in any other case release the accused, and such release shall have the effect of discharge"".

In all the cases now before us, the Magistrate could have very well resorted to this section. But, instead, he has acquitted the accused u/s 255(1)

Cr. P. C. and it is this acquittal which has been challenged by the State in these appeals on the ground that the Magistrate cannot acquit the

accused u/s 255(f) Cr. P. C., when he has not taken the evidence referred to in Section 254 Cr. P. C.

10. We shall also now examine the provisions relating to the trial of warrant cases instituted on a police report. We might note here that the cases

now before us are summons cases, but in order to answer the question No. 2, referred to us in the reference, it is necessary to examine the

position regarding the trial of warrant cases instituted on a police report, for those provisions also help to throw light on the first question which has

been referred to us and which relates to summons cases. u/s 240, if upon consideration of the Police report and the documents sent with it u/s 173,

and examination of the accused, if any, as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being

heard, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence tribal under Chapter XIX which

such Magistrate is competent to try and which in his opinion could be adequately punished by him, he shall frame in writing a charge against the

accused. u/s 242 Cr. P. C., if the accused refuses to plead or does not plead, or claims to be tried or the Magistrate does not convict the accused

u/s 241, on his plea of guilt the Magistrate should fix a date for examination of the witnesses and the Magistrate may on the application of the

prosecution issue summons to any of its witnesses directing him to attend or to produce any document or other thing and on the date so fixed the

Magistrate shall proceed to take all such evidence as may be produced in support of the prosecution. Section 243 states that the accused shall

then be called upon to enter upon his defence and produce his evidence, and if the accused puts in any written statement, the Magistrate shall file it

with the record, and if the accused after he has entered upon his defence, applies to the Magistrate to issue any process for compelling the

attendance of any witness for the purpose of examination or cross-examination or the production of the document or other things, the Magistrate

shall issue such process unless he considers that such application should be refused on the ground that it is made for the purpose of vexation or

delay or for defeating the ends of justice and such grounds shall be recorded by him in writing.

It might be noted that as in Sec. 254 Cr. P. C., relating to the trial of summons cases, the Magistrate even in warrant cases instituted on a police

report is enjoined by sub-section (3) of Sec. 242 to take all such evidence as may be produced in support of the prosecution and a provision has

been made in subsection (2) of Section 242, for the issue of summons to any witness directing him to attend or produce any document or other

thing on the application of the prosecution. It may, however, be noted that while u/s 254(2) the Magistrate ''may if he thinks fit'' issue such

summons u/s 242, the Magistrate ''may issue'' such summons. Apparently, the words ''if he thinks fit'' have been included in Section 254(2) in

summons cases in order to give the Magistrate the power to refuse to issue such summons if he thinks it proper to do so. The words ''if he thinks fit

in sub-section (2) of Section 254, further indicate that the Magistrate has to apply his mind when an application is made by the prosecution or the

accused to issue such summons. Therefore, even in regard to warrant cases instituted on police report a duty is cast on the Magistrate to take all

evidence that may be produced by the prosecution as well as a duty to facilitate the production of evidence by the prosecution, by issuing

summons to witnesses on the application of the prosecution and likewise a duty has also been cast on the prosecution to produce all evidence in

support of its case. Since both in Section 254(1) as well as in Section 242(3), the words as may be produced in support of the prosecution'' have

been used it is necessary for us to examine the connotation of the words ''as may be produced''.

11. In State of Orissa v. Sibcharan Singh, AIR1962Orissa157, it has been observed as follows: (Head-note):

The word ''produced'' in sub-section (7) of Section 251 (a) Cr. P. C., 1898 and analogous to Section 242(3) cannot be given any restricted

meaning as to saddle the prosecution with the entire responsibility of producing the evidence. A duty also is cast upon the courts for enforcing

attendance of witnesses by the process provided in the Criminal Procedure Code. The courts are not therefore absolutely powerless when the

parties fail to produce evidence relevant in a case"".

In State Vs. Nandkishore and Another, , it has been observed as follows (Head-note):

The word ''produced'' in sub-sec. (7) includes the bringing forward of the witnesses by the prosecution at its own instance or through the process

of the court whom it desires to examine at trial. Besides in the administration of criminal justice a duty is cast upon the court to arrive at the truth by

all lawful means though the primary responsibility of prosecuting cognizable offence is on the executive authorities"".

We are in respectful agreement with the aforesaid observations of the Orissa and the Rajasthan High Courts. The Rajasthan High Court went on to

point out that the Magistrate should not feel himself helpless in such situations and should exercise his inherent powers u/s 540 to summon such

witnesses as he thinks necessary for the ends of justice. If the prosecution by its negligence or otherwise fails to discharge its responsibility in

producing witnesses, it is incumbent on the court to examine such witnesses as it considers necessary in the ends of justice.

12. Section 510 Cr. P. C. 1898, states as follow:

Any Court may at any stage of enquiry, 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 examine any such person if his evidence appears to it essential to the just decision of the case"".

The analogous and corresponding provision in the present Code of Criminal procedure is Section 311. Thus the court cannot absolve itself of its

responsibility to summon and examine all witnesses whose evidence appears to it to be essential to a just decision of the case, merely because the

prosecution does not produce such witnesses owing to its negligence or otherwise. It being clear that it is the duty of the Magistrate to issue

summons and secure the presence of witnesses and examine them, when the prosecution seeks the court''s assistance by means of an application,

the Court is further obliged in discharge of its duty to arrive at the truth by all lawful means in furtherance of the administration of criminal justice to

suo motu take all steps to secure the presence of witnesses where evidence appears to it to be essential to a just decision of the case.

13. We shall now proceed to indicate the powers which the Magistrate could exercise and the steps he could take under the Criminal Procedure

Code in the matter of securing the presence of witnesses. Section 62 Cr. P. C., reads as follows:

(1) Every summons shall be served by a police officer or subject to such rules as the State Government may make in this behalf, by an officer of

the court issuing it or other public servant"".

Section 64 states ""where the person summoned cannot by the exercise of due diligence be found, the summons may be served by leaving one of

the duplicates for him with some adult male member of his family residing with him and the person with whom the summons is so left shall if so

required by the serving officer sign a receipt therefore on the back of the other duplicate"".

Section 65 Cr. P. C., states -

If service cannot by the exercise of due diligence be effected as provided in Section 62, Section 63 or Section 64, the serving officer shall affix

one of the duplicates of the summons to some conspicuous part of the house of homestead in which the person summoned ordinarily resides and

thereupon the court after making such enquiries as it thinks fit may either declare that the summons has been duly served or order fresh service in

such manner as it considers proper"".

Section 69, which makes provision for service of summons on witnesses by post reads as follows: -

(1) Notwithstanding anything contained in the preceding sections of this Chapter, a court issuing a summons to a witness may in addition to and

simultaneously with the issue of fresh summons direct a copy of the summons to be served by registered post addressed to the witness at the place

where he ordinarily resides or carries on business or personally works for gain.

(2) Where an acknowledgment purporting to be signed by the witness or an endorsement purporting to be made by a postal employee that the

witness refused to take delivery of the summons has been received the court issuing the summons may declare that the summons has been duly

served"".

This provision is a new one incorporated in the Criminal Procedure Code of 1973 and was not in the old Criminal Procedure Code. This

provision, in our experience, has not been resorted to by any Magistrate as far as we know. Of course, it is not practicable to adopt this procedure

in every case, for it would result in heavy expenditure to the State. Nevertheless, where summons issued has not been served on the witness by a

police officer u/s 62, repeatedly, the Magistrate may resort to this provision of issuing the summons and sending it by registered post to the witness.

Of course, if after due service, the witness does not appear before the Court, the Court should issue coercive processes for securing the presence

of the witness before the court. In suitable cases, or in cases of chronic or persistent failure to appear in response to the summons, a complaint can

be laid u/s 174 I. P. C. Then again, the explanation (2) in Section 309 Cr. P. C., also can be made use of in suitable cases by the Magistrate, for

that explanation states ''the terms on which an adjournment or postponement may be granted include in appropriate cases the payment of costs by

the prosecution or accused''. We might also note here that no rules have been framed by the State Government u/s 62 Cr. P. C. Therefore, as it is,

there appears to us to be no bar to the serving of summons by an officer of the court or other public servant.

14. The next question that would arise is whether even after having recourse to the above provisions, the Magistrate is not able to secure the

presence of the witnesses and the prosecution on its part, even after having been given several opportunities, fails to serve the summons on the

witnesses or to produce them, the Magistrate would be justified in acquitting the accused either u/s 255(1) Cr. P. C., in summons cases or u/s

248(1), Cr. P. C. in warrant cases.

15. In State of Madhya Pradesh Vs. Kalu Thawar and Another, , a Division Bench of the Madhya Pradesh High Court observed as follows:

It was the duty of the prosecution to make necessary arrangements for the production of its witnesses.... The Police must always remember that it

has got a duty to the court and they cannot just send a challan and think that the rest will be done by the court. When nobody appeared in t he

court to inform what the reason was for non-appearance of the witnesses, the court could legitimately come to the conclusion that the police was

not very serious in prosecuting the offence which was a minor one. u/s 245, the Magistrate can record an order of acquittal if there is no evidence

to hold the accused guilty. If the prosecution did not take proper steps to produce the witnesses, or ask the court to give them time to do the same,

or to issue fresh summons, the court was not bound to fix another date. The police has a duty towards the citizen. When the accused is brought

before the court and the prosecuting department does not take any steps it will be an abuse of the process of the court to continue the trial.

Bringing a person before the court accusing him of some offence is a serious matter and however petty the offence may be, the prosecuting

department, must do its duty towards the accused as well as the court. When once the accused is challaned there is no privilege given to the police

to remain absent"".

In that case the accused was prosecuted u/s 34 of the Police Act. The case was to be tried according to the procedure prescribed in the Criminal

Procedure Code, 1898, for the trial of summons cases, that is, u/s 244 Cr. P. C. of 1898. The case was posted to a particular date for recording

evidence and earlier at the instance of the prosecution summons had been issued to the prosecution witnesses, but on the date of hearing the

witnesses did not turn up and the learned Magistrate forth with passed an order of acquittal, aggrieved by which an appeal against acquittal was

preferred by the State which appeal was eventually dismissed by the Division Bench of the Madhya Pradesh High Court with the above

observations. That was an extreme case.

16. There are quite a number of decisions in which it had been held that an acquittal of the accused on the failure of the prosecution to produce the

witnesses is not legal. (Vide State Vs. Kali Ram Nand Lal, , State of Mysore Vs. Ramu B., ; State of Mysore v. Kalilulla Ahmed Sheriff.

AIR1971 Mys 60; Kanduri Misra v. Sabadev Kunda, (1962) 2 Cri LJ 295; State of Orissa Vs. Sib Charan Singh, ; State of Mysore v. Somala,

1972 Mad LJ (Cri) 476: 1972Cri LJ1478Mys; State of Mysore v. Shanta, 1972 Mad LJ (Cri) 589 (Mys); State v. Nagappa, 1973 Cri LJ 548

(Mad); Public Prosecutor Vs. M. Sambaing Mudaliar and Others, ; State of Kerala v. Kunhiaraman, 1964 Mad LJ (Cri) 330 (Ker); State of

Mysore v. Narasimha Gowda, AIR 1965 Mys 167; The State of Gujarat Vs. Thakorbhai Sukhabhai and Others, , State of U.P. v. Ramjani, All

LJ 1126; Lakshmiamma Kochukuttiamma v. Raman Pillai, AIR 1952 Trav-Co 268; State v. Madhavan Nair, 1959 Mad LJ (Cri) 633 (Ker);

Emperor v. Varadarajulu Naidu, AIR 1932 Mad 25 (2); State of Kerala v. Desan Mary, 1960 Mad LJ (Cri) 378 (Ker); Kesar Singh v. State of

Jammu and Kashmir, 1963 1 Cri LJ 765: (AIR 1963 J &; K 23); R.K.V. Motors and Timbers Ltd. Vs. Regional Transport Authority,

Trivandrum, ; K. K. Subbier v. K. M. S. Lakshmana Iyer, 1942 Mad WN (Cri) 64: AIR 1942 Mad 452 (1); State of Tripura v. Niranjan Deb

Barma, 1973 Cri LJ 108 (Tripura); Apren Joseph v. State of Kerala, 1972Mad LJ(Cri)10: 1972 Cri LJ 1162(Ker). As against these decisions,

there are the following decisions in which it has been held that acquittal on the ground of non-production of witnesses by the prosecution was

proper.

17. State v. John Abraham, 1959 Mad LJ (Cri) 814: 1961 (2) Cri LJ92 (1) (Ker) State v. Lakshmanan, 1966 All LJ 342; Jyotirmoyee Bose Vs.

Birendra Nath Prodhan and Others, ; State v. Ramlal 1961(2)Cri LJ 331 (All).

18. In the first mentioned case, State v. John Abraham, 1959 Mad LJ (Cri) 814. 1961(2) CA LJ92(1)(Ker), the case was one of theft and when

the case came up for the prosecution to adduce evidence, the prosecution filed a report stating that the witnesses had refused to execute kychits

and seeking orders, but there was no prayer to issue process for compelling the attendance of witnesses. The learned single Judge of the Kerala

High Court repelled the argument advanced on behalf of the State that u/s 251A (7) of the Cr. P. C. 1898, the Magistrate was bound to examine

all the witnesses mentioned in the police report and issue process for their appearance in case the prosecution fails to produce them and the

learned Judge held that the duty of the court is only to take evidence which is ready when the case is taken up for hearing and the Magistrate is not

bound to go on adjourning the case until all the witnesses mentioned in the police report are examined.

19. In State v. Lakshmanan, 1966 All LJ 342, it was held that when the witnesses were not present and did not appear when called and there was

nobody on behalf of the prosecution although the Magistrate contacted the A. P. P. and also the Public Prosecutor and no request was made to

the court for any assistance to procure the attendance of the witnesses, it was held that the Magistrate could not be said to have acted illegally if he

closed the case and acquitted the accused.

20. In Jyotirmoyee Bose Vs. Birendra Nath Prodhan and Others, , a Division Bench of the Calcutta High Court observed that sub-see. (6) of

Section 251A, Cr. P. C., 1898, does not enjoin upon the Magistrate any duty to compel the attendance of any witness unless it was applied for

and in a case tried u/s 251A, Cr. P. C. the Magistrate is not compelled as he is if the case is tried as a warrant case instituted other than on a

police report, to proceed in terms of Sections 256 and 257 of the Code.

21. In State v. Ramlal, (1961)2 CA LJ331, a single Judge of the Allahabad High Court observed as follows-

S. 252, Cr. P. C. imposes a duty upon the Magistrate to ascertain the names of the witnesses who can give evidence on the relevant points and to

summon those witnesses in evidence. But, by providing an entirely new procedure, u/s 251-A, Cr. P. C., 1898 in cases instituted by the police, the

Legislature has deliberately departed from that procedure and in the new procedure has made no provision for summoning of the prosecution

witnesses. There is therefore no authority in law for the proposition that the Public Prosecutor can make an application for summoning of

prosecution witnesses and in such a case the Magistrate is bound to summon those witnesses..... The whole object of the section appears to

have been that the police should be prepared to produce its witnesses when the case is called upon for hearing and it should not be permitted to

take shelter behind the absence of witnesses on account of want of summons by the court"".

It may be noted that in the old Criminal Procedure Code, before the amendment of 1973, and Section 251A which dealt with the trial of warrant

cases instituted on police report there was no provision whereby the Magistrate on the application of the prosecution could issue summons to any

of its witnesses directing him to attend or produce any documents or other thing. In the present Code, there is such a provision in Section 242(2) in

regard to the trial of warrant cases instituted on a police report and in Section 254(2) in regard to the trial of summons cases. Therefore the

aforesaid four decisions would no longer be good law.

22. In almost all the decisions in which it has been held that an acquittal of the accused on the ground that the prosecution did not produce the

witness was improper, the courts have pointed out that the duty to summon the witnesses in the course of the trial is that of the Magistrate or the

Court concerned, and that the entire responsibility of production of witnesses cannot be saddled on the prosecution and a duty is also imposed

upon the Court for enforcing the attendance of witnesses by the processes provided in the Code and it in the duty of the court to issue coercive

processes if in spite of summons served an the witnesses they do not appear before the court and the prosecution f , ails to produce the witnesses

as directed, We are in respectful agreement with that view in so far as it emphasises the duty of the Magistrate or the court. In some of those

decisions it has been held that finding the accused not guilty implies that the court has applied its mind to the merits of the case after recording

evidence and then only has found him not guilty. (Vide State of Mysore v. Kalilullah Ahmed Sheriff, AIR1971Mys60 and The State of Gujarat Vs.

Thakorbhai Sukhabhai and Others, ; State of Rajasthan v. Mukhtiar Singh, (1965) 2 Cri LJ 835 (Raj); State of Mysore v. Somala, 1972 Mad LJ

(Cri) 476: 1972 Cri LJ 1478 (Mys); K. K. Subbier v. Lakshmana Iyer, 1942 Mad WN (Cri) 64: In Re: Oomayan, and State v. Nagappa, 1973

Cri LJ 548 (Mad) We are not however able to subscribe to that view. No doubt, there is no specific provision in either the relevant sections of

Chapter XIX which deal with the trial of warrant cases instituted on the police reports by Magistrates or Chapter XX relating to the trial of

summons cases instituted on police report, for acquitting the accused on the ground that the prosecution had not produced its evidence.

Nevertheless provisions have been made in the present Code, for summons to be issued to the witnesses on the application of the prosecution and

a duty is also cast on the prosecution to produce all its evidence. Thus there is a duty cast on the court on an application by the prosecution to

issue summons to the witnesses and secure the presence of witnesses by exercising all the powers conferred on it by the Code for that purpose

and duty is also cost on the prosecution to produce all its evidence and to seek the assistance of the court for so doing by applying to the court for

the issue of summons to the witnesses. Therefore, in our view, an acquittal of the accused merely on the ground that the prosecution had not

produced the witnesses would not be proper if the court had not on an application by the prosecution discharged its duty of summoning and

enforcing the attendance of witnesses. We also notice that almost all the decisions, which have held such an acquittal as improper dealt with cases

in which the Magistrate had not discharged the aforesaid duty. We would also like to refer to a few other decisions, which have a bearing on this

matter. The first one is the decision in Public Prosecutor Vs. M. Sambaing Mudaliar and Others, , to which we have already made a reference,

Ramakrishnan, J. held that in warrant cases where the court had already framed a charge u/s 251A, Cr. P. C, against the accused, an important

duty was laid on it to see that all the powers available to the court for the examination of witnesses were exercised for a just decision of the case

irrespective of the laches of the complainant. Therefore, this court had already emphasized the important duty laid on the court to see that all the

powers available to the court for the examination of witnesses were exercised for a just decision of the case. Likewise, in Paban Chandra

Majumdar Vs. Dulal Ghosh and Another, it was held that the order of acquittal was unwarranted by law when in a case instituted on a police

report, the Magistrate ordered summons to be issued to the prosecution witnesses, but after certain adjournments without taking any step for

procuring the attendance of witness to whom summonses were issued he proceeded further and after examining the accused who pleaded not

guilty, passed an order of acquittal. In The State of Bihar Vs. Polo Mistry and Others, , it was observed by a single Judge of the Patna High Court

as follows:

Where the prosecutor in a criminal trial has himself undertaken to produce the prosecution witnesses the entire responsibility for the production of

the evidence in support of the prosecution case is that of the prosecutor. But when the prosecutor has taken recourse to the agency of the Court

for securing the attendance of the prosecution witnesses it is undoubtedly the duty of the Magistrate to take steps for securing the attendance of the

prosecution witnesses in his court. Where, therefore, in the latter case, none of the prosecution witnesses turn up in spite of the service of the

summons issued by the court on them and there are no materials to indicate that there was any reasonable cause for their failure to appear, the

proper course for the Magistrate is to take necessary steps to compel the attendance of the witnesses and it is wrong on his part to proceed to

acquit the accused on the footing that there in no evidence against them.

It was further observed - ""It to undoubtedly the duty of the Magistrate to take steps for securing the attendance of the prosecution witnesses in his

court and it cannot be held that the entire responsibility for securing the attendance of prosecution witnesses lies upon the prosecutor alone. It is

only where the prosecutor finds himself unable to produce the prosecution witnesses through his own agency that he relies upon the agency of the

Court for securing the attendance of the prosecution witnesses; in such an event, it is the duty of the Magistrate concerned to take all such

measures as may be found necessary under the law to compel the attendance of the prosecution witnesses.

23. On the question as to whether the Magistrate can acquit an accused at all u/s 251A (11), Cr. P. C., if the prosecution failed to produce their

witnesses, a Division Bench of the Gujarat High Court observed in State of Gujarat v. Bava Bhadya (1962)2Cri LJ537(2), as follows:

Where a charge Is framed In a warrant case on police report, if owing to the failure of the prosecution to produce their witnesses and owing also

to the failure of the prosecution to make full endeavour to serve the summonses according to the provisions contained in Sections 69, 70 and 71,

Cr. P. C., 1890, there is no evidence before the Magistrate, the Magistrate can acquit the accused u/s 251A (11).

In State of Karnataka v. Subramania Setti 1980Mad LJ 138: 1980CA LJ NOC129, a Division Bench of the Karnataka High Court referring to

the decisions in State of Mysore v. Narasimha Gowda (1964) 2 Mys LJ 241: AIR1965 Mys167 and the State of Mysore v. Abdul Hameed Khan

(1969)1 Mys LJ4: 1970 Cri LJ 112 (Mys), observed that the real distinction between the two decisions is as to whether there was remissness and

want of diligence on the part of the prosecuting agency in producing the witnesses before the Court and therefore the principle laid down in Abdul

Hameed Khan''s case applied to the facts of the case with which the Division Bench was concerned. We may riots here that in Abdul Hameed

Khan''s case, it was found on the facts that the prosecution was not at all diligent as the non-bailable warrants issued to the witnesses had neither

been served nor returned to the court by the concerned police and it was therefore held that where the prosecution was not diligent in producing its

witnesses and had failed to serve the bailable warrants on the witnesses and return the same the Magistrate would be justified in refusing to grant

an adjournment and to proceed to acquit the accused on the material on record. We may note here that in State of Karnataka v. Subramania Setti

1980 MLJ 138 the Division Bench was dealing with a summons case instituted on a police report.

24. After carefully considering all the aforesaid decisions and the views expressed therein, we are of the view that if the prosecution had made an

application for the issue of summons to its witnesses either u/s 242(2) or 254(2) of the Criminal Procedural Code it is the duty of the court to issue

summons to the prosecution witnesses and to secure the witnesses by exercising all the powers given to it under the Criminal Procedure Code, as

already indicated by us and if still the presence of the witnesses could not be secured and the prosecution also either on account of pronounced

negligence or recalcitrance does not produce the witnesses after the Court had given it sufficient time and opportunities to do so, then the Court,

being left with no other alternative would be justified in acquitting the accused for want of evidence to prove the prosecution case, u/s 248, Cr. P.

C., in the case of warrant cases instituted on a police report and u/s 255(1), Cr. P. C. in summons cases, and we answer the two questions

referred to us in the above terms.

25. Coming now to these appeals, we might note here that the offences with which the respondents-accused have been charged are offences under

Sec. 4 (1) (b) of the Tamil Nadu Prohibition Act, and those prosecutions were launched nearly four years ago. Furthermore the prosecution had

not, in spite of notices, attempted to produce the witnesses and in fact were quite non-cooperative in their attitude. In view of those circumstances,

while pointing out that the acquittal of the respondents accused in the circumstances of these cases is not proper, inasmuch as the court had not

discharged its duty as indicated by us as above, we do not want to interfere with that acquittal at this length of time and hence we dismiss these

appeals.

26. Order accordingly.