State Vs Veerappan and Others

Court: Madras High Court

Date of Decision: March 24, 1980

Acts Referred: Criminal Procedure Code, 1973 (CrPC) â€" Section 255(1)
Madras Prohibition Act, 1937 â€" Section 4(1)(b)

Citation: (1980) LW(Cri) 187

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

Bench: Full Bench

Advocate: P. Rajamanickam, P.P, for the Appellant; K. Doraiswami for Respts, Mr. M.S. Menon for Bar Association and Mr. K.V. Sankaran for Advocates Association, 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 under S. 4(1)(b) of the Tamil

Nadu Prohibition Act are before us, in as much 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 under S. 255(1), Crl. 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 under S. 245(1), Crl. 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 under S. 255(I), Crl. 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. S. 81, Crl. P.C. 1861, (sic) the Magistrate to issue a warrant. We shall first examine the provisions of the Crl. P.C. of 1973, which have

relevance to this matter. S. 255(1), Crl. 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 S. 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.

S. 254, Crl. P.C. states as follows-

(1) If the Magistrate does not convict the accused under S. 255 or S. 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.

It will be noticed that under Sub-s. (1) of S. 254, the Magistrate is enjoined to hear the prosecution and take all such evidence as may be

produced in support of prosecution and also to hear the accused and take all such evidence as he produces in hit 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-S. (2) of S. 254 makes provision for the prosecution of 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 a 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 S. 254 on the duty of the prosecution or the accused to produce all evidence in

support of its case or his defence:

5. S. 255(1) makes provision for the Magistrate upon taking the evidence referred to in S. 254 to take such further evidence, if any, as he may of

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

the evidence learned to in S. 254 and such further evidence, if any, as he may, of his own motion, cause to be produced. S. 244, Crl. P. C. of

1898 (corresponding to S. 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. S. 258, Crl, P. C, 1973, which is analogous to S. 249 of the Crl. 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 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 under S.

255(1), Crl. 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 under S. 255(1), Crl. P. C. when he has not taken the evidence referred to in S. 254, Crl. P. C.

6. 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. Under S. 240 if upon consideration of the Police report and the documents sent with it under

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 19

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. Under S. 242, Crl. 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 under 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. S. 243 states that the

accused shall then be called upon to enter up.-m 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 S. 254, Crl.

P.C. relating to the trial of-summons cases, the Magistrate even in warrant cases instituted on a police reports enjoined under Sub-s. (3) of S. 242

to take all such evidence as may be produced in support of the prosecution and a provision has been made in Sub-s. (2) of S. 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 under S. 254(2) the Magistrate '' may if he thinks if issue such summons, under S. 242, the Magistrate ''may'' issue, such summons

Apparently, the words ''if he thinks fit'' have been included in S. 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-s. (2) of S. 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 S. 254(1) as well as in S. 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

maybe produced''.

7. In State of Orissa Vs. Sib Charan Singh, it has been observed as follows: (Head note):-

The word "produced" in Sub-s. (7) of S. 251(a) Crl. P. C. 1898 and analogous, to S. 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 Crl. P.C. The courts are not therefore, absolutely powerless when the parties fail to produce evidence relevant In a

case.

In State v. Mandkishore, A.I.R 1967 Raj. 228 it has been observed is follows (Head note)-; J.

The word "produce" in Sub-s. (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 under 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.

8. S. 510, Crl. P.C. 1898, state as follows-

Any Court may at any stage of enquiry, trial o 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 reexamine 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 Crl. P.C. is S. 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 the 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.

9. We shall now proceed to indicate the powers which the Magistrate could exercise and the steps he could take under the Crl. P.C. in the matter

of securing the presence of witnesses, S. 62, Crl. 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.

S. 64 states ""Where the persons 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,"" S. 65, Crl. P.C. states:-

If service cannot by the exercise of due diligence be effected as provided in S62, S. 63 or S. 64, the serving officer shall affix one of the duplicates

of the summons to some conspicuous part of the house or 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.

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

(l) 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 Crl. P.C. of 1973, and was not in the old Crl. P. C. 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 witnesses by a police officer under 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 be coercive processes for securing the pretence of the witness before the Court.

ID suitable cases, or in cases of chronic or persistent failure to appear in response to the summons, a complaint can be laid under S. 174, I.P.C.

Then again, the Explanation (2) in S. 309, Crl. 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 including 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 under S. 62, Crl. P.C. Therefore, (sic) 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.

10. The next question that would arise is whether if, 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 under S. 255(1), Crl. P. C. in summons cases or

under S. 248(1), Crl. P.C. in warrant cases?

11. In State of Madhya Pradesh v. Kalthawaix 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 the

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. Under 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 challenged there is no privilege given to the

police to remain absent.

In that case the accused was prosecuted under S. 34 of the Police Act. The case was to be tried according to the procedure prescribed in the Crl.

P.C., 1898, for the trial of summons cases, that is, under S. 244, Crl. P.C., of 1898. The cases 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 tarn up and the learned Magistrate forthwith 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.

12. 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 v. Kaliram Nandlal AIR. 1968 P and H.; The State of Mysore v. B. Ramu 1973 M.L.J. Cri. 16; State of

Mysore v. Kalilulla Ahmed Sheriff; AIR 1971 My. 80 Kindwi Misra v. Sahadev Kunda; I962 2 C.L.J. 295 State of Orissa v. Sibcharan Singh;

1962 (2) Cri LJ. 220 State of Mysore v. Somala; 1972 M.L J. Crl. 476 State of Mysore v. Shanta alias Savitri 1972 M L.J. Crl 589 ; State v.

Nitiarp 1964 ML J. Crl. 330; Public Prosecutor v. Sambangi Mudilor AIR 1965 Mys. 167; State of Kerala v. Kunhiaaman A.1R. 1968 Guj. 15;

State of Mysore v. Nirasimha Gowda 1965 A.L.J. 1126, State of Gujarat v. Thakor Bhai Sukhabai AIR 1952. Tr. and Cochin 268, State of U.P.

v. Ramjani 1959 M.L.J. Crl 633, Lakshmiamma Kochukuttiamma v. Rama Pillai, Kumara Pillai and Others, State v. Madhavan Naim, Emperor v.

Varadarajulu Naidu AIR 1932 Mad. 25 ; State of Kerala v. Wesan Mary 1960 M.L.J. Crl. 378, Kesar Singh v. State of Jammu and Kashmir

1963 1 Cri. L.J. 765, R.K.V. Motors and Timbers Ltd. v. Regional Transport Authority, Trivandwm AIR I960 Ker 35, K.K. Sublier v. K.M.S.

Lakshmana Iyer 1942 M.W.N. Crl. 64 : 55 L.W. 232, State of Tripura v. Niranjan Dev Barma 1973 Cri. L.J.; 03 Apr an Joseph alias Kjrant

Kunju Kunju v. State of Kerala 1972 M.L.J. Crl. 10.

13. 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. State v. John Abraham 1959 M.L J. Crl. 814; State v. Lakshmana 1966 All. L.J. 342; Smt. Jyati

Moyee Bose v. Birendranath Prodlan A.l.R. 1960 Cal. 263; State v. Ramlal 1961 Crl.L.J. 33. In the first mentioned case, State v. John Abraham

1972 M.L.J. Crl. 10 the case was one of theft and when the case came up for the prosecution to adduce evidence, the prosecution riled 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 under S.

251(A)(7) of the Crl. 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.

14. In State v. Lakshmanan 1966 All. L.J. 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.

15. In Sri Jyothi Mayee Bose v. Birendranath Prodkan, AIR 1960 Cal 265 a Division Bench of the Calcutta High Court observed that Sub-s. (6)

of S. 251(A), Crl. 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 under S. 251(A), Crl. 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 Ss. 256 and 257 of the Code.

16. In Slate v. Ramlal 1961 2 Crl L.J. 331 a single Judge of the Allahabad High Court observed as follows;-

S. 252, Crl. 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, under S. 251(A) Crl. 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 found 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 an d it should not be permitted to take

shelter behind the absence of witnesses on account of want of summons by the is Court.

17. It may be noted that in the old Criminal Procedure Code before the amendment of) 973, of S. 251(A) 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 S. 242(e) in

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

four decisions would no longer be good law.

18. 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

witnesses 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 is the duty of the Court to issue coercive

processes if in spite of summons served on the witnesses, the witnesses do not appear before the Court and the prosecution fails to produce the

witnesses as directed. We are in respectful agreement with that view in so far as it emphasizes the duty of the Magistrate of 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. Kalibuliah Ahmed Sheriff A.I. R. 1971 Mys. 60 and The

State of Gujarat Vs. Thakorbhai Sukhabhai and Others, State of Rajasthan v. Mukthiar Singh 1965 2 Cri.L.J. 885 State of Mysore v. Somala

1972 M L J Crl. 476; K.K. Subbiyar v. Lakshmana Iyer, 1942 M.W.N.Crl.64 : 55 L.W. 232; State v. Nagappu 1971 Crl.L.J. 348. 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 by the Police report 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 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 cast 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 is 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 Samangi

Mudaliar 1565 1 L.R. Mad.416 : 77 L.W. 478 to which we had already made a reference. Ramakrishnan, J, held that in warrant cases where the

Court had already framed a charge under S. 251-A Crl. 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 laces 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 just decision of the case. Likewise, in Paban Chandra Majumdar v. Dulal Ghosh AIR IWCF 187 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 witnesses 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 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 is no evidence against them.

19. It was further observed-

It is 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 atone. 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.

20. On the question as to whether Magistrate can acquit an accused at all under S. 251-A(ll),Crl. 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 2 CrI. L.J. 537 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 Ss. 69, 70 and 71, Crl. P.C.

1896 there is no evidence before the Magistrate, the Magistrate can acquit the accused under S. 25A(11).

21. In State of Karnataka v, Subramania Setty 1980 M.L.J. Crl.131, a Division Bench of the Karnataka High Court referring to the decisions in

State of Mysore v. Narasimla Gowda 1964 2 Mys. L.J. 241 and the State of Mysore v. Atdul Uameed Khan, 1869 1 L.J Mys 4 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 1980 M LJ. (Crl) 138 applied to

the facts of the case with which the Division Bench was concerned. We may note here that in Atdul Uameed Khan''s case 1869 1 Mys L.J 4, 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 Kirnataka v. Subramani Setty 1980 M.L.J.

(Crl) 138 the Division Bench was dealing with a summons case instituted on a police report.

22. 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 under S. 242(2) or 254(2) of the Crl. P.C. 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 Crl. P.C. 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, under S. 248, Crl. P. C. in the case of

warrant cases instituted on a police report and under S. 255(1), Crl. P.C. in summons cases, and we answer the two questions referred to us in

the above terms.

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

S. 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-co-operative in their attitude. In view of these 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.