

(1986) 05 PAT CK 0030
In the Patna High Court
Case No : Criminal Appeal No. 391 of 1981

Bisundeo Mishra and 6 Ors		APPELLANT
	Vs	
The State of Bihar		RESPONDENT

Date of Decision : 30-05-1986

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 172, 230, 242(2), 242(2)
Penal Code, 1860 (IPC) — Section 147, 149, 302, 304, 323

Citation : (1989) PLJR 405

Hon'ble Judges : S.H.S. Abidi, J

Bench : Single Bench

Advocate : Y.V. Giri and B. Tiwary, for the Appellant; Jugeshwar Prasad Sinha for the State, for the Respondent

Final Decision : Dismissed

Judgement

S.H.S. Abidi, J.—Bishundeo Mishra & six others had been prosecuted under sections 147 and 302 /149 of the Indian Penal Code. Ram

Peyar Mishra was charged u/s 380 of the Indian Penal Code (shortly put as I.P.C.,). Madan Mishra and Kripa Sindhu Mishra were charged u/s

323 I.P.C. and they have been convicted by the Court below u/s 304 /149 I.P.C. and have been awarded six years rigorous imprisonment only

under the former section and no separate sentence under the latter section. Madan and Kripa Sindhu Mishra have further been convicted u/s 323

I.P.C. and sentenced to undergo rigorous imprisonment for one year each. Against their convictions and sentences this appeal has been filed by all

the accused. The prosecution case, in short, is that on 18.5.1974 accused Bishundeo Mishra, Madan Mishra and Satyadeo Mishra attempted to

construct house over the land of the informant. This led to the apprehension of breach of the peace. Dafadar Rajab Mian reported the matter at

Kuchaikot police station, On the same day at a bout 1 P.M., deceased Shiwadhar Mishra was sitting at his house. In front of the house a road runs

from north to south. The appellants Ram Peyar Mishra and Satyadeo Mishra were passing through that road, for going towards south. The

informant was sitting at his bungalow which is just in front. From there the informant saw appellant Ram Peyar Mishra registering his protest to the

deceased that his brother, being the Mukhiya, had stopped the construction of his house by sending the dafadar to police station. This led to

altercation and on hulla the remaining appellants came there armed with lathis and kudals. Appellant Bishundeo Mishra exhorted and gave order to

do away with the life of the deceased. Thereupon appellants Satyadeo Mishra and Girdhari Mishra assaulted the deceased by the back portion of

the Kudal and the remaining appellants inflicted injuries upon which the deceased fell down on the ground. The informant (P.W. 1) went to the

rescue of his brother and he too was assaulted by Madan Mishra and Kripa Sindhu Mishra by means of lathi. On alarm being raised by the

informant, Bhukhal Mishra, Jugati Mishra, Bachcha Mishra and several others arrived there and on their arrival the accused persons fled away.

2. The deceased was unconscious so his brother, the first informant, took him on a tyrecart to Ruchaikot State Dispensary where P.W. 5 Dr.

Abraham Ansari examined him. The police was informed by the doctor. Consequently, the Assistant Sub Inspector of Police came to State

Dispensary, Kuchaikot and recorded the fard-beyan of the informant on the same day at 3.30 P. M. The deceased was sent to Sadar Hospital

Gopalganj for better treatment where he succumbed to his injuries and thereafter the police made investigation into the case and submitted charge-

sheet against the accused persons.

3. The prosecution in support of its case examined eight witnesses. P.W. 1 is Mukund Mishra (injured informant). P.W. 2 is Bhukhal Mishra who

came on alarm and had seen the occurrence. P.W. 3 is Shyam Bahadur Mishra. He was named in the first information report. He had arrived at

the scene of occurrence and deposed as an eye-witness. Yugti Mishra (P. W. 4) has turned hostile. P.W. 5 is Dr. Ibrahim Ansari who had

medically examined the deceased as well as the informant at the Kuchaikot State Dispensary. P.W. 6 is Umamath Verma the Officer-Incharge,

who has investigated the case and submitted charge-sheet. P.W. 7 is Mahabir Thakur, compounder of Gopalganj Hospital, who has proved the

post mortem report (Ext. 3) which was prepared by Dr. R. P. Sinha (not examined) after examination on 19.5.1974 at about 9 A. M. P.W. 8 is

Ham Nath Pandey, who has proved the cue diary and has said that he has recognised the hand-writing of the investigating officer Majid Khan for

the reason that when Majid Khan was posted at police station in 1975, he had seen him writing in connection with a theft case. This witness has

proved paragraph nos. 1 to 49 of the case diary and he has further said that Majid Khan was then posted at Begusarai and that Dr. R. P. Sinha

was posted at Bokaro. This witness has further stated that he is son-in-law of Mukund Mishra (P. W. 1).

4. The accused in defence have denied the prosecution case And said that they have been falsely implicated in this case.

5. The trial court after considering the evidence has convicted the appellants, as mentioned above.

6. Learned counsel for the appellants argued that the prosecution has failed to prove the genesis and immediate cause of the occurrence. It was

further argued that the prosecution has withheld the material witnesses, namely, Chaukidar, Dafadar and two constables who had asked earlier not

to construct the house and also witnesses mentioned in the first information report except P. Ws. 1 and 2. Thirdly it was argued that the inquest

report and O. D. slip of both the hospitals have been withheld and so the prosecution has not come with clean hands. Next it was argued that by

the non-examination of the investigating officer and the Doctor prejudice has been caused to the defence as pertinent question could not be asked

from the investigating officer and also from the Doctor, specially, P.W. 5 who would have said about his report that there was no apparent injury

on the person of the deceased except oozing of blood. Further it was argued that P Ws. 1 to 3 were interested witnesses and independent

witnesses had been withheld. So evidence of the interested witnesses should not be relied upon. It was lastly argued that the trial court has not

considered the individual case of the appellants.

7. The factum of death of Shiwadhar Mishra is well proved by the evidence of the witness, namely, P.W. 2 (informant) injured and P. Ws. 2, 3, 5

and also P.W. 7, who has proved the post mortem report. Moreover, even the defence has not challenged the same, so the factual of death cannot be disputed and which has been established by the prosecution.

8. As to the contention about genesis, the evidence of P.W. 1 gives out the immediate cause of occurrence. He has said that at 3.30 P. M. on the date of occurrence he was at his bath an. Earlier than that at about 8 A.M. the foundation was being dug in plot no. 1082 whose area is 31/2

kathas and which is homestead in which his share was 1 katha 12 dhurs towards east, whereas the accused had half share towards west. The

digging of foundation led to an altercation between the accused and the complainant party. Razak Mian, the dafadar had come and had seen the

occurrence and had stopped the digging. Two constables had also come but they were not examined. It was at about 1 P. M. that Rampeyare

Mishra and Satyadeo came in the verandah and told to the informant that it was his brother (the deceased) who had got the police brought and got

stopped the digging of foundation. This resulted in altercation and then all the accused and Ram Peyare came and assaulted the victim. So P.W. 1

is the best person who has given out the genesis of the occurrence. Though the dafadar and police constables had not been examined, but they

were not material witnesses and their examination alone was not necessary to unfold the prosecution case about genesis, specially when P.W. 1

has given full account of the case and origina of mar-pit and further he was the best person to depose about the same. It is not necessary to

examine all the persons mentioned in the first information report unless their examination is necessary to unfold the prosecution story and that their

examination is duplication of evidence. Because of non-examination of the two persons, it cannot be said that the genesis of the occurrence had not

been proved. So the first and second contentions about the genesis are withholding of the witnesses fail.

9. The third contention was that inquest and O. D. slip of the hospital were withheld.

Undisputedly the injured was taken to the hospital where his fard-beyan was recorded by the Sub Inspector of Police, though that Sub Inspector

of Police had not been examined. But Dr. Ibrahim Majid who had examined the injured has said that the police was informed and the fard-beyan

was recorded. Nothing has come out to show that the fard-beyan had not been recorded at the dispensary. The deceased died in the hospital.

Firstly inquest was done and thereafter postmortem examination. Nothing has come out to show that any prejudice has been caused to the

defence. Simply because inquest report and O.D. slips had not been filed, prejudice cannot be presumed unless it is shown to have been caused.

In the circumstances, this contention also fails.

10. The learned counsel for appellants further urged that neither the investigating officer nor Dr. R. P. Sinha, who conducted the post mortem, have

been examined in this case and so the prosecution is liable to be thrown out on this ground also. It is true that neither of them have been examined

by the prosecution as witnesses. P.W. 8 Hans Nath Pandey has said that the investigating officer of this case is Majid Khan and that he has seen

him writing and so he recognised his writing and, therefore, he proved the contents of paragraphs 1 to 49 of the case diary. He has said that Majid

Khan was then posted at Begusarai. Similarly that Dr. R. P. Sinha, who had conducted the post mortem examination which report has been

proved by P.W. 7 Mahabir Thakur compounder of Gopalganj Sadar Hospital and he has said that Dr. R. P. Sinha was at that time at Bokaro. So

from the said statement of P.W. 8 it appears that the Doctor as well as the investigating officer were very much in the State of Bihar. From the

record it appears that several opportunities were given to the prosecution to produce its witnesses. The prosecution produced some witnesses on

different dates. The order sheet shows that on 27.2.1981 no P.W. was present and the learned A.P.P. filed a typed application upon which the

court gave dasti summons for the witnesses fixing 6.4.1981. On 6.4.1981 P.Ws. 5 and 6 were examined and the court directed A.P.P. to examine

rest of the witnesses on 6.5.1981. On this date A.P.P. again took dasti summons, as no prosecution witnesses appeared. So was the position on

the next date i.e. 28.5.1981. Also on 5.6.1981 P.Ws. 5, 7 and 8 were produced by the prosecution but not the doctor and the investigating

officer. The application of the A.P.P. for further opportunity to produce them was rejected, as earlier opportunity was given for the same.

11. As regards non-examination or non-production of a doctor, who has conducted the post mortem examination of the deceased or the Doctor

who has examined the injured, let us see what is the position. In *Roghoni Singh vs. Emperor* (ILR 9 Cal 455) a Division Bench observed that the

evidence of a medical man, who has been and made a post mortem examination of the corpse of the person touching the injury, is admissible,

firstly to prove the nature of the injuries which he observed and secondly, as evidence of the opinion of an expert as to the cause of death. It was

also observed that the Assistant Surgeon might have used this report to refresh his memory when giving evidence, but the report itself was not

admissible in evidence. Similarly, in *Queen Empress vs. Jadul Das* (ILR 27 Cal. 295), the medical officer, who performed the post mortem

examination, was not examined by the court of Sessions even though the evidence as given in the committing Magistrate's court was not explicit as

regards the actual cause of death. At the trial, the Civil Surgeon was examined as an expert but that officer was not examined on the points which

were disclosed in the evidence of the medical officer who had conducted the post mortem examination. The Sessions Judge took the statement of

the medical officer on matters entered in the post mortem report. In that context, it was observed "Now that report is not admissible as evidence

except to contradict the officer who made it. It may, however, be used by the officer when under examination for the purpose of refreshing his

memory". In *Rangappa Gondan vs Emperor* ILR 59 Madras 349 (1936 Madras 426), it was held that the report of a post mortem examination on

a dead body is not evidence, and can only be used by the witness who conducted the post mortem enquiry as an aid to memory.

In *Loku Basappa Pujari & another vs. State* (1960 Bombay 461) it was observed at page 462 :--

The notes on post mortem examination are but contemporaneous record made by the medical officer who performed the post-mortem examination

on a dead body for forming his opinion as to the cause of death. If instead of orally deposing before the Court about the individual observations

made by him, the medical officer states that the notes maintained correctly set out his observations and the notes are then tendered in evidence, no

fault can be found with the admission of those notes on the record. We may hasten to observe that the notes of the post mortem examination are of

course not intended to be mechanically admitted on the record of the case. In every case when the medical officer is examined before the court to

establish the cause of death disclosed by a post-mortem examination, he must be called upon to give evidence about the matter Which have a

bearing on the questions to be decided by the court and he must also be called upon to depose whether the record made by him in the notes of the

post mortem examination is true and if the medical officer deposes to the truth of the record made by him, the record itself may be treated as

evidence. Admission of the notes in evidence is but a convenient method of maintaining the record of the observations made and the opinion

formed by the medical officer, when he orally deposes in a comprehensive form to the correctness of all the statements recorded therein.

In another Division Bench case of Bhupat Kumar vs. State (1975 B.B.C.J. 317) after referring the decision in Loku Basappa Pujari (supra) it was

held that the notes of post mortem would be admissible when the doctor holding post mortem was examined. ""If the post mortem report is

removed from consideration then there will be some difficulty in determining the cause of death of the deceased. So far as the injuries to the

accused are concerned the medical evidence merely corroborates the statements of the prosecution witnesses to the occurrence. The medical

evidence of course would show the nature of the injury which sometimes may be apparent even to a lay man but so far as the case of death is

concerned, it is primarily the medical evidence which proves it. It is true that an inference may be drawn from the fact that the victim died soon

after the assault was made on him, that most probably he died as a result of the injuries sustained by him in the assault. This, however, could not be

enough to sustain a conviction u/s 302 of the Indian Penal Code. The doctor could have stated that one or more injuries were such which could

have resulted in the death of Sona Mahton in the ordinary course. The medical evidence could also have shown that the injuries inflicted on the

victim were such which the assailant must have known that they were likely to result in the death of the victim. IN the absence of any such evidence

it may be difficult to hold that the assailants intended to cause the death of the victim or that they knew that the death was most likely a result of the

assault committed by them"".

In the case of State vs. Gyan Singh (1981 Cri. L. J. 538 at 541) yet another Division Bench of the Delhi High Court observed that ""the opinion of

the medical officer contained in the post mortem report is only to aid the investigating officer in investigation. The report cannot be held to be a

record of medical officer of his official act for use of the public. It is well settled that the post mortem report and injury report is not substantive

evidence. It has to be proved by the maker of it. It can not, therefore, be termed as a public document as envisaged u/s 74 of the Evidence Act.

In the case of Bhandal Garh Vs. State of Assam, a Division Bench observed as follows :--

We are also of the opinion that the injury report Ext. 5 cannot be admitted in evidence and relied on by the prosecution because the Doctor who

examined the appellant was not put in the witness box. Unlike, in the case of Serologist, examination of a medical witness, except in a case

covered by section 291 Cr. P.C. is not dispensed with by law. As an expert his evidence is relevant u/s 45 of the Evidence Act. But by virtue of

section 4 he is required to state his opinion as a witness in the court. It is true that in his statement u/s 313 Cr. P. C the appellant gave a story that

he was assaulted by the deceased with Lathi, but in the absence of proof of the injury, it cannot be said that these could be connected to the

statement of the appellant.

Later on in Gofur Shiekh and Another Vs. The State, , a Division Bench of Calcutta High Court observed:

Normally the post mortem report is used by the doctor, who conducted the post mortem examination for the purpose of refreshing his memory as

permitted by law while giving substantive evidence in court. No evidence has been led in this case to show that the post mortem report was being

tendered in evidence under any of the relevant provisions of Chapter II of the Evidence Act. In our view, the learned Judge has erred in law in

treating the post mortem report as substantive evidence in this case without any foundation having been led for the applicability of any relevant

provisions of Chapter II of the Evidence Act.

12. Thus notes on post mortem examination constitute a very valuable material for checking the correctness of the medical and other evidence. It is

a record made by the medical officer while conducting the post mortem examination for forming his opinion as to the cause of death. If the medical

officer, who conducts the said examination, is examined in court, then the notes

which are tendered in evidence, can be looked into and then he will be able to establish the cause of death disclosed by the post mortem examination, and then he will be required to give in evidence the matters which have bearing on the question. Thus without examination of a doctor, post mortem report cannot be looked into specially for the purpose of ascertaining the cause of death as it is the opinion of the doctor which it is he alone, who can substantiate in his evidence. Similar is the position of the injury report, when a doctor gives his opinion about the nature of injury. If the doctor is examined then he will not only give reasons for his opinion, but also give an opportunity to the defence to cross-examine him as to the cause and reason for holding such opinion. It is a very valuable right which a defence cannot be refused by withholding of the doctor by the prosecution.

This non-examination of the doctor may be for reasons beyond the control of the prosecution or for any other reason. But if the prosecution fails to give any satisfactory evidence that the doctor is not available then in no case the opinion of the doctor about the cause of death in the post mortem report can be looked into. However, if the post mortem report is tendered under any relevant provisions of the Chapter II of the Evidence Act and that the reasons are found to be sufficient, then the nature of the injuries can be looked into which the victim, might have received. But in that event too the opinion about the cause of death cannot be relied on. In no event the post mortem report or the injury in the absence of doctor who examined the victim, can be treated as substantive evidence.

13. As regards the evidence of investigating officer (shortly put as I. O.") it is also very material for the prosecution case. Similarly his non-examination has got bearing on the case. He investigates the matter, prepares the case diary, receives the post mortem report, goes to the place of occurrence and collects the material and evidence for the prosecution so that on the basis whereof the prosecution may stand on its own leg. It is he who is to explain his each and every act and action at every stage of investigation. But it cannot be said that if the I.O. has not been examined, the case of the prosecution cannot proceed. Then the statement of the eye witnesses and other evidence produced by the prosecution is trustworthy, reliable, then this lacuna cannot have any fatal effect. Non-

examination of the investigating officer will not make the place of occurrence vague and doubtful if the evidence of the witnesses is such which fixes the place of occurrence. Similarly other matters which have been seen by the witnesses during the course of investigation and are being deposed by the eye-witnesses, the absence of the I.O. will not have any effect. Similarly if no contradiction is pointed out in the statement of the witnesses and the statement given by the witnesses leading to the investigation by the I.O., then also absence of I.O. will not have any effect. But if there is contradiction between the statement of the witnesses in court and one giving u/s 161 Cr. P.C. then it is essential to produce the I.O. so that questions may be put to him to test as to whether those particular portion of the statement which is said to have been given to him or not have been given to him, have been given or not given. If the I.O. is produced and he says that the witness has not given the statement whereas the witness in court says that he has given the statement, then the statement of the witness in court is to be looked down with suspicion and be not relied on, as he has not given out that matter at the earlier opportunity. But if that matter is very minor and is in continuation of detail already given, then it will not have any effect. But if that matter deposed in a court has not been stated earlier before the police and is being stated in the court then contradiction may be there or which may be a sort of improvement or embellishment for which the presence of the I.O. is essential. So in any case the non-examination of the I.O. will have to be considered looking to the circumstances of each case. The accused shall point out the prejudice which has been caused to him on account of non-examination.

14. In all serious offences the location of the place of occurrence is material for the purpose of knowing and understanding the evidence of the witnesses as to the details of the incident which is the subject of the charge. A map of the scene of occurrence and the places around, material and relevant, is prepared by the I.O. during the investigation. At the trial it is the I.O. alone who can best explain the details about the location and the map of the place of occurrence and the relevant and material places around. In case of his non-examination in court the case may not be put so properly which may cause prejudice not only to the accused but also to the

prosecution and also put the court in difficulty in arriving at true conclusions. The interest of the accused is of prime importance as he is presumed to be innocent and the prosecution is to rebut the presumption of his innocence by cogent reliable and praiseworthy evidence and if it is not done then the accused is prejudiced and in case of prejudice to him he is entitled to benefit of all reasonable doubt. Therefore, the prosecution is required to see by proving its case to the hilt that no such situation has prejudiced to the accused is caused. If the I.O. is not examined and prejudice is shown to have been caused to the accused on that score then the benefit of this lacunae and fault of the prosecution is bound to go to the accused.

15. In the case of Niru Bhagat vs. Emperor (A. I. R. 1922 Patna 582 at 585) a Division Bench of our court held-""the non-examination of such material witnesses as the Investigating Officer is a serious omission which cannot but throw suspicion on the whole prosecution case"". In the case of J. K. Devaiya vs. The State of Coorg (A. I. R. 1956 Mysore 51 at 55) it was said-""an accused is entitled to know from the Investigating Officer what witness have been examined in the course of investigation, whether the witnesses examined in court were examined by him or not. What story the witnesses told before him and whether the same is consistent with the evidence given before the court. The non-examination of the Investigating Officer in this case is also a serious omission on the prosecution"". Recently a Division Bench of our court in the case of Basant Singh vs. The State of Bihar (1985 Cr. LJ 1406 : 1985 PLJR (NOC) 89.) has observed -- Of course, it is true, the Investigating Officer is an important witness, but cannot be substituted for an inevitable witness. If on account of certain compelling circumstance his attendance could not be procured, the extent of impact upon the prosecution case on account of absence of the Investigating Officer shall depend upon the acts and circumstances of each case. Non-examination of the Investigating Officer will not make the place of occurrence vague and doubtful because the evidence of the witnesses are sufficient to fix the place of occurrence as unfolded by the prosecution. Moreover, in the facts and circumstances of the case, no exception of exoneration can be awarded to the appellant Bhagwan Singh for any justification for the use of the gun.

Absolutely no contradiction has been pointed out and thus no case of prejudice

has been made out in absence of the examination of the

Investigating Officer, and therefore, non-examination of the Investigating Officer cannot be said to have prejudiced the defence to the extent that the

allegations directed against the appellant Bhagwan Singh has to be rejected.

16. Thus the I.O. is a material and relevant witness and his examination is essential, but that will not be material if the evidence of the eye witness

about the occurrence and the place of occurrence is cogent and further if it is shown that no prejudice has been caused to the accused on account

of the non-examination of the I.O. If on account of certain compelling circumstances his attendance cannot be procured then the extent of its effect

will have to be judged in the circumstances and facts of every case. But in no case it can be said that because of the non-examination of the I.O.

The prosecution case would be thrown out.

17. Now let us see as to what is the position of law about the production of the witnesses by the prosecution in support of its case and also the

power and duties of the court in this behalf. In the old Code of 1898 only section 352(2) was there which provided that the witnesses in these

cases which were started otherwise than on police report, could be summoned by the court on request by the prosecution. But there was no

provision for the cases instituted on police report. So there was an amending Act XXVI of 1955 to the Code introducing section 251A for the

purpose of warrant cases. Its object was to ensure speedy and expeditious trial to which side it may go, whether acquittal or conviction. But in that

too there was no provision for the Magistrate to ascertain from the Prosecutor the names of persons who will appear in court in support of the

case of the prosecution. In spite of this provision the courts have been holding the view that there was nothing in section 251A to preclude the court

from issuing summons to the witnesses whom the prosecution wanted to produce in support of its case. In the case of Smt. Jyotermayee Bose vs.

Birender Nath Pradhan (A. I. R. 1960 Calcutta 263) a Division Bench observed that section 253A does not enjoin upon the Magistrate any duty

to compel the attendance of any witness unless it was applied for. In the case of State of Orissa vs. Sibcharan Singh (1962 Cr. LJ 200 : A. I. R.

Orissa 157) it was observed that-

the courts were not powerless when the parties fail to produce evidence. The

court has got very wide power and in fact, it was one of the duties of the court to enforce the attendance of the witness even by coercive process and merely because the prosecution could not produce the witnesses, it was not proper to acquit the accused without making effort to secure the presence of the material witnesses. The prosecution alone could not be saddled with the entire responsibility. It is also the duty of the court to enforce the attendance of the witnesses by process as provided under the Code of Criminal Procedure.

8. In the case of State of Bihar vs. Pali Mistry (A. I. R. 1964 Patna 351) it was observed that- "it was not the sole duty of the prosecution to produce the witnesses whom it wants to rely and when the prosecutor has taken recourse to the agency of the court for securing attendance of the witnesses on being unable to produce the witnesses through its own agency, then it becomes the obvious duty of the Magistrate to take all such coercive measures provided under the law to compel the attendance of the witnesses and the court could compel the attendance of the witnesses as provided u/s 90(b) of the Code. In the case of the Public Prosecutor vs. Mr. Sambargi Mudalier (A. I. R. 1965 Madras 31) it was observed that "all powers provided to the court are to be exercised inspite of laches of prosecution for a just decision of a case. Further where the prosecution failed to produce the evidence the court has to summon the material witnesses in exercise of its power u/s 540 of the Code.

19. In the case of State of Mysore vs. N. G. Narsihme Gowada (1965 Cr. L. J. 8) it was observed that necessary step could be taken for the attendance of the witnesses of non-service of the report, specially, when there is no material to show that there had been remissness on the part of the prosecution agency. In the case of State vs. Nand Kisbore (1967 Cr. L. J. 1369 : 1967 Rajasthan 228) it was observed "that there is nothing in section 251A (7) which precluded the court from issuing summons to the witness if so required by the prosecution. Further if the prosecution does not produce any witness it is the duty of the court to examine such witnesses as are necessary for ends of justice before proceeding to act u/s (11). It was also observed that the Magistrate should not feel himself helpless in such a situation and should exercise his inherent powers u/s 540 of the Code 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 upon the courts to examine such witnesses as it considers necessary in the ends of justice".

20. In the case of State vs. Kali Ram Nand Lal (1968 Cr. L. J. 369 : A. I. R. 1968 Punjab 87) the court considered the divergent views. It

referred to the view that no duty is cast upon the Magistrate to summon the prosecution witnesses [as held in the State of Guy rat vs. Bhadya :

1962 (2) Cr. L. J. 537 Gujrat State vs. Ramlal (1961) (2) Cr. L. J. 92 . The other view expressed was that the court was not powerless and could

issue coercive process for compelling the attendance of the prosecution witnesses if the prosecution prayed for the same to the court, as held in the

case of State of Bihar vs. Polo Mistri (supra) and the Public Prosecutor vs. Sambourgi Madalier (supra) were also referred and it was held that it

could not subscribe to the view that if the prosecution fails to produce the witness in a warrant trial on police, or report in a warrant trial, then the

court is neither competent to summon the witnesses nor is under a duty to compel their attendance" Also it did not subsscribe to the view that the

court has no power to acquit the accused in such case and is duty bound to summon the prosecution witness in exercise of the power u/s 540of the

Code.

21. Later on in the case of State of Mysore vs. Khalilullah Ahmad Sharaff & another (1971 Cr. L. J. 226) a Division Bench observed that when a

specific prayer has been made by the prosecution to summon the witnesses, then it was the duty of the court to insist on their attendance and if the

witnesses did not come to court inspite of summons, it was open to the court to issue warrant and see that the witnesses appear in the court.

In the case of State of Mysore vs. B. Ramu (1975 Cr. L. J. 1257) it was observed that if from the record it did not appear that any attempt was

made by the court to take coercive steps as were open to cause the presence of the witnesses concerned and that it was not the entire

responsibility of the prosecution and duty was also imposed upon the court to issue coercive process.

Similarly in the case of Mukti Pada Modal vs. Abdul Jabbar (1973 Cr. L. J. 46) it was observed that section 251Aand 252 (2) appear in the

Code and in the same Chapter XXI and so the rule of prudence enjoined to exercise of discretion by the court u/s 540 of Cr. P. C to compel the

attendance of the witnesses, though unlike section 252(2) section 251A does not impose any obligation on the Magistrate to summon witnesses.

Though there was no duty cast u/s 251A of the Code, but at the same time there was nothing to prevent the court from issuing summons at the

instance of the prosecution and the Magistrate, if in the facts and circumstances of the case, so require, may in the interest of justice go to the length

of exhausting process for securing the attendance of the witnesses.

22. Later on a Division Bench of QUIL court in State Vs. Mangilal Ram and Another, after considering divergent views considered by the various

courts going to the extremities observed that the correct legal position was that in a warrant case instituted on police report it was the primary duty

of the prosecution to produce the witness and since the State Public Prosecutor had no power or machinery to compel attendance of the witness, it

was fully justified in seeking the help of the court in this regard which could issue on prayer summons to the prosecution witnesses and if the

witnesses did not appear on summons then it could ask the court to issue warrant of arrest. In both the events of summons and warrants the prayer

must be by the prosecution for the same. Even if the prayer was not made, the power of the court was there if the same, including the general

powers of the Code u/s 540, it could be exercised suo motu or on being asked. The suo motu power could be exercised if the prosecution was

negligent or did not make a prayer to issue summons or warrants as the case may be. But it could not be said that it was the only of the court to

issue summons or warrants when the prosecution asked for. The court could refuse the said prayer when there was such reason for the same. But

whenever it is imperative for the court to allow the prayer for the summons or warrants, as the case may be, the court could refuse it only if it found

the prosecution guilty of remissness or laches. But it could not refuse merely because section 251A(7) does not provide for the same.

23. Later on in the case of Public Prosecutor vs. Gundu Rao (1976 Cr. LJ. 1835) it was observed that when the prosecution failed to produce the

evidence then it was the duty of the Magistrate to take coercive step to compel the attendance of the witnesses and merely because the

prosecution was lathargic and neglectful in producing the witnesses, it did not follow that the Magistrate had no power to compel the attendance of

the witnesses. If it is found that there was no laches on the part of the prosecution, then refusal of issuing warrants against the witnesses was

unjustified and if the prosecution had itself undertaken to produce the witnesses, then it was the entire responsibility of the prosecution to produce.

But if the prosecutor wanted the help of the court, then assistance should have been given.

24. Some States local amendments have been made and this lacunae which have been noticed by the courts had been tried to be removed. The

State of U. P. has amended Cr. P.C. Section 251A(6) by section 3 of the Criminal Laws (U. P. Amendment Act) 1961. Later on in the present

Code of 1973 section 242(2) has been added which empowers the court to issue summons to any of the prosecution witnesses with direction to

attend or to produce documents. It has gone to the extent of providing in the Code in section 350 that if any witness being summoned to appear

before the court is legally bound to appear at a certain place and time in obedience of summons and without just excuse neglects or refuses to

attend at that place he departs from the place where he is to attend before the time at which it is lawful for him to depart and the court before

which the witnesses is to appear is specified that it is expedient in the interest of justice that such a witness should be tried summarily, the court may

take cognizance of the offence and after giving the offender an opportunity of showing cause why he should not be punished under the section,

sentence him to fine not exceeding 100/-rupees. Thus Cr. P.C. has fully provided for the attendance of the witnesses if application is made to the

court for issuance of summons u/s 242(2) or 254 (2) . In case the prosecutor applies to the court that after service of summons the witness has not

turned up for no fault of the prosecution, then the summary proceeding can be started against the witness for ensuring attendance and he can be

sentenced to pay a fine not exceeding of 100/- rupees.

25. Recently in a full bench decision of the Madras High Court in State vs. Veerappan & others (A. I. R. 1980 Madras 260) it was observed after

approving the decisions of various courts that "it was the duty of the Magistrate to compel for the attendance of the witness if the prosecution did

not produce the witness and further it was the duty of the court to summon the witnesses in course of the trial and that the entire responsibility of production of the witnesses could not be saddled with the prosecution and a duty was imposed upon the court for enforcement of the attendance of the witnesses by the process provided in the Code and it is the duty of the court to issue coercive process if in spite of summons served on the witnesses, they do not appear before the court and the prosecution fails to produce the witnesses as directed. It was further observed that nevertheless the provision has 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 duty cast on the court on an application by the prosecution to issue summons to the witnesses and to secure the presence of the witnesses by exercising of the power conferred on it by the court for that purpose and the 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." It was further observed that "after carefully considering of 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 summonses to the witnesses either u/s 242 (2) or 254 (2) of the Criminal Procedure Code, it is the duty of the court to issue summonses to the prosecution witnesses and to secure the witnesses by exercising of 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 neglects 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, or u/s 255 (1) Cr. P.C. in summons cases".

26. The latest decision is *State of Sikkim vs. M.K.O. Nair and another* (1986 Cr. L.J. 415) where the learned single Judge after considering large number of cases including the above mentioned full bench case of Madras High Court has observed that "It was, therefore, the duty of the

prosecution to see that the summonses were served and to file the report accordingly and if for any justifiable cause the summons could not be served, to bring to the notice of the court why the summonses could not be served. After intimating to the court as to what had happened to the summonses it was the duty of the prosecution to take appropriate steps for the attendance of the witnesses. But the prosecution failed to say as to what had happened to the summons and made a prayer for adjournment and issue of fresh summons. On account of failure of the prosecution to show its diligence in complying with the undertaking given on the previous date, the court was not bound to grant the adjournment and order to issue of fresh summonses. Thus the court would not be acting beyond jurisdiction or contrary to law if the requests for adjournment were refused. It was equally open to the court to grant adjournment subject to payment of cost and when the prosecution expressed unwillingness to pay the cost, the court was perfectly justified in refusing the adjournment and closing the prosecution evidence"".

27. The prosecution is bound under law to produce the entire evidence in support of its case, be it the oral evidence eye, witnesses, witnesses on circumstance or other witness on questions of fact. It is also required to produce the medical witnesses as well as the witness on investigation, specially, the investigating officer. Various provisions contained under the law call upon the prosecution to produce its witness and for that end in view the prosecution can request the court on an application for issuing summons to any witness to come and depose before the court or produce any document or anything in that regard. This is so in the case of warrant, in the sessions case or even the summons case, under sections 230 , 242 (2) or 254 (2) or section 254 Cr. P.C. When the summonses are issued the witnesses are required to appear. But if the witness does not appear the court should give opportunities and reasonable opportunities to the prosecution to produce the witnesses, but it cannot go on giving repeated and unreasonable opportunities to the detriment of the accused and also at the cost of the accused who appears on every date face the ordeal of the prosecution, and finds that for the one or lame excuses of the prosecution, the case is adjourned.

28. The purpose of law is to give reasonable opportunities at every stage both to the prosecution and the defence to produce the evidence in

support of its case. One should not be denied opportunities on unreasonable grounds and there should be no hot haste by the court. But it is not the purpose of law that this process of adjournments on one or the other grounds whether taken by the prosecution or the accused should continue and the case should linger on to the great detriment, prejudice and torture of the party concerned. The court is to exercise its power and see that there should not be unnecessary delays. If even after repeated adjournments the prosecution fails to produce its evidence, the court is not to be a silent spectator to the laches and lapses of the prosecution. Justice should be done to both sides. The court is to see that the accused is not harrassed. Similarly, the court is also to see that for inevitable reasons if the prosecution fails to produce the witness, then for that reason the court should not acquit without exercising its powers and in suitable cases it can be to the extent of coercive measures as permitted under Cr. P.C. to compel the attendance of the witnesses. If an application is made to the court by the prosecutor or the court suo motu orders for the same to compel the attendance of the witnesses then it can resort even to the provisions contained u/s 350 Cr. P. C which provides for the summary trial of the defaulting witnesses and also a fine to the extent of Rs. 100/-. Thus a doctor, who conducts the post mortem or a doctor who examines injury of an injured and whose opinion is essential for the success of the case of the prosecution or whose opinion is also essential for the accused to get an acquittal, is not produced, similarly if an investigating officer, whose evidence is essential for the case of the prosecution to succeed or that the accused who confronts him with the investigation, an objective findings he has given and also the statements which have been recorded by him u/s 161 Cr. P.C. during the investigation and also for other collateral purposes during the investigation is not produced, then in any event the court is not powerless to summon for the appearance of the Doctor or the I.O. and in case of his failure and there being no laches on the part of the prosecution and sufficient opportunities have already been given by the court, the court can resort to coercive measures provided under the Code for his attendance in court and can even resort to the provisions contained in section 350 of the Code.

29. The observations in Basant Singh vs. State of Bihar (1985 Cr. L. J. 1406 at page 1409) are relevant to be quoted below :--

During the recent times, it has been noticed that the final court has to face tremendous difficulties in procuring the attendance of the investigating

officer for the reasons that they are transferred frequently and the sessions trial is taken up after some delay from the time when the investigation

had been completed in the case. The problem has also to be faced in case the investigating officer is dead or he retires from service and in the case

of later inspite of prolonged adjournments the evidence is not proceeded.

Similar is the position with a doctor who is also transferred or who retires or dies and so the disposal of the case is delayed to the great prejudice

of parties. At last the prosecutor gives up the examination of the investigating officer and the Doctor.

30. In the instant case as found above, the Doctor and the I.O. have not been examined by the Prosecutor. The postmortem report has been

proved by P.W. 7 Mahabir Pd. compounder of Gopalganj sadar hospital, though Doctor R.P. Sinha who conducted the postmortem examination

was then at Bokaro as deposed by P.W. 8. Similarly the I.O. Majid Khan was not produced and para 1 to 47 of the case diary were not proved

by the P.W. 8 who has said that he has seen Majid Khan writing when Majid Khan was posted at Begusarai. Further inspite of the learned A. P.

P. taking dasti summons taken two witnesses did not appear. The learned A. P. P. has not applied to the court for measures to be taken for

compelling the attendance of these two witnesses. In this situation the postmortem examination could not be looked into for the cause of death,

though only, for injuries to the deceased which fact is corroborated by the evidence of the witnesses. Similarly the case diary could not be looked

into except for the limited purpose as provided u/s 172 of the Code. Moreover, there is nothing to show that any prejudice has been caused to the

defence on account of the non-examination of the two witnesses. Rather it is the prosecution which is suffering on that score. The learned A. P. P.

should have applied to the court that inspite of dasti summons being issued the two witnesses who were very much in the State of Bihar, and

posted at Bokaro and Begusarai were not appearing in the court inspite of dasti summons being served and hence the court could have passed

orders Accordingly. So the contentions of the learned counsel for the appellants that on account of the non-examination of the I.O. and the Doctor

the case of the prosecution should be thrown on board has got no force.

31. However, it appears from the post mortem report that it can only be seen for limited purpose of seeing the injuries and also the evidence of the

eye witnesses which is corroborated by the said injuries of the post mortem report that the victim had received injuries which caused death. The

court below had convicted the appellant u/s 304 Part II of the Indian Penal Code, as it appears that there was no intention to cause death. This

appears to be a correct finding as, there is no opinion of the doctor as to whether the injuries were sufficient in ordinary course of nature to cause

death. Moreover, it appears that the parties has got their lands and as said by P.W. 1 that the share of the accused was also to the extent of half

towards west in the plot No. 1082 in which the share of the complainant party was to the extent of I katha 12 dhurs towards east out of total area

of 31/2 kathas and there was a dispute about digging of foundation on it. Since the parties are agnates so the possibility for mistake is there about

the location of the place over which the foundation was being dug. So from this it appears that there was no intention to cause injuries resulting into

death. In this way the conviction of the appellants u/s 304 Part II of the Indian Penal Code appears to be correct.

32. The appellants have been sentenced to six years R. I. for the occurrence which took place in the year 1974 and since then the parties are

facing the ordeal of the prosecution in respect of the land in which towards west the accused had share and towards east the deceased had the

share. It is also to be taken into account that the deceased was assaulted with the hack portion of the Kudal and by lathis The injured was taken to

Sadar Hospital Gopalgarij after being examined by P.W. 5. According to P.W. 5 there was no apparent injury on the person of the deceased

except oozing of blood from his month. The victim did not die instantaneously, though later on. In this view of the matter taking injuries into account

and also the period of pendency of the prosecution for over 12 years and that the appellants have been in jail for some time it is just and proper to

reduce the period of sentence of the appellants to the period already undergone by them which will sufficiently meet the ends of justice. In the result

the conviction of the appellants u/s 304 Part II of the Indian Penal Code is upheld but the sentence of the appellants is reduced to the period

already undergone by them. Since they are on bail they are discharged from the liabilities of their bail bonds. With this modification in the sentence, this appeal is dismissed.