

Public Prosecutor Vs. Muttiah and anr.

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Court : Andhra Pradesh

Decided On : Dec-15-1959

Reported in : 1961CriLJ219

Judge : Manohar Pershad and; Jaganmohan Reddy, JJ.

Appellant : Public Prosecutor

Respondent : Muttiah and anr.

Judgement :

Manohar Pershad, J.

1. This is an appeal on behalf of the State against the acquittal of the accused. In such appeals, this Court does not usually interfere with the order of acquittal unless there are compelling and substantial reasons; but the learned Public Prosecutor contended that the learned Sessions Judge has erred in holding that the failure on the part of the prosecution to produce all the eye-witnesses for examination before the committing Magistrate's court was fatal as such, it is urged, that his conclusion that the accused are entitled to an acquittal is not justified.

2. The facts leading to this appeal are:

On 22nd July 1958, when A-I returned to his house in the evening, he found the door closed from inside. He called out the deceased, who was his daughter-in-law.

She came out and went away saying that she would go to the pond to wash clothes. After entering the hut, he found P.W. 1 concealing himself in a big earthen pot. A-1 caught hold of his hair and pulled him out and tied him to a pillar with the help of P.W. 2. Sometime later, the deceased came back to the hut. She was also tied to a pole and beaten by A-I. Baliah, P.W. 4, the brother of P.W. 1 arrived at the house of the accused on hearing from P.W. 2 that his brother was tied to a pole.

He got his brother released on assuring the accused that he would be bound by whatever decision the panchayat gives. P.W. 1 was accordingly released. Thereafter, A-2 came and when he knew that his wife had been found in a compromising position, he gave her a few blows and released her. She then took her food in the night and at about midnight, she died. The matter was not reported to the police patel, but somehow the police patel got the information of the offence, came to the house of the accused and finding the dead-body, made a report.

An inquest was held over the dead-body, Ex, P-3 after which it was sent for post-mortem examination. Shortly thereafter both the accused were arrested and a cord was discovered in consequence of the information given by A-I and a stick, sari, bodice and a mat were discovered at the instance of A-2 under panchanamas Exs. 5, 6 and 7. The accused confessed their guilt before the Circle Inspector and later before the Magistrate. They were charge-sheeted under Section 304 I.P.C. In all, 12 witnesses were examined on behalf of the prosecution. The accused did not produce any defence evidence, On the evidence, the learned Sessions Judge acquitted the accused. Hence this appeal on behalf of the State.

3. Of the prosecution witnesses P.W. 7 is the doctor. According to him, he conducted the post-mortem examination on July 23, 1958. There were four antemortem injuries.

(1) Contused wound on the left buttock 5' x 1' and 1/2

(2) Contused wound on the right buttock 4' x 1' and 1/2

(3) Contused wound on the left shoulder blade and they were two 4' x 1'

(4) Contused wound at the level of lower ribs lower side 5' x 1'.

In the opinion of the doctor, the cause of the death was shock and internal haemorrhage due to the rupture of the liver in two places.

4. Thus it would appear that from the statement of the doctor, the deceased died an unnatural death. The prosecution has led evidence to show that the deceased died due to the injuries inflicted on her by both the accused. The question is whether the prosecution has succeeded in proving this fact.

5. Of the other witnesses, P.W. 1 is the person who was found hiding in the earthen pot. According to him, while he was returning from the house of his aunt, the deceased met him and asked him where he was going. He told her that he was going to get a leaf for bidi to which she said that she would give the leaf herself in her house. She accordingly invited him to her house. He accepted the request and when they entered the house, she closed the door from inside. Just then A-I arrived. He called out to her. In reply, she said that she was taking a bath. She told him (P.W. 1) that as the father-in-law had come, he should get into the big earthen pot and she would go out to wash the clothes.

According to this witness, after he got into the pot, the accused entered the house, caught him with the help of P.W. 2 and tied him to a pillar. Another Venkiah arrived there and asked the two persons not to tie him. Just then, he says the deceased returned. A-1 tied her to the pillar with a string. The second Venkiah went and brought his brother P.W. 4 who told the accused that he would give any fine that might be imposed by the caste panchayat, which might be held the following day. Thus he says, he was released. He says further that A-I beat the deceased with a stick on both the sides and the legs, and that he dealt 5 or 6 blows in his presence.

In cross-examination he says that after the deceased chained the door from inside the house, he asked her the reason, but she could not give any answer as A-I arrived by then. He says he got into the pot at the instance of the deceased and he does not know what happened after he got into the pot. He says further that as soon as A-I came into the house he put his hand in the pot and saw what was there. He admits he was not beaten or abused by the accused. He says further

that prior to his release the deceased had arrived there and she was tied to the pillar and he came to know the next morning that she had died.

6. P.W. 2 is Venkaiah, he says that the deceased died as a result of a beating given by the two accused with a stick. According to him, he was in his house and he went to the house of the accused on being called by A-1 and when he went to the house he saw A-1 and P.W. 1 there, both struggling with each other. A-1 asked him to tie down Nagiah and when he asked him the reason, the accused told him that he had come to his daughter-in-law to have sexual intercourse. He and A-1 tied down P.W. 1. Just then the deceased came there.

A-1 tied her also to the pole and beat her with a stick 5 or 6 times. Meanwhile the mother and brother of P.W. 1 arrived and got him released. When P.W. 1 left the house, A-2 came there and when he was informed about the matter he also started beating his wife. In cross-examination, he says that when A-1 began to beat the girl, she said that she had done nothing and the witness went to the house of Baliah, When she said so, he says, A-1 stopped beating her. He says further that when he went to the house of the accused again, he saw A-2 coming there and beating his wife and that at the time of the beating, the other Venkaiah intervened.

7. P.W. 4 supports the statements of P.Ws. 1 and 2 to this extent that when he went to the house of the accused, he found his brother P.W. 1 and the deceased both tied to the poles. He further supports their Statements by saying that he saw A-1 and A-2 beating the deceased.

8. That statements of P.Ws. 1, 2 and 4 read along with the statement of the doctor, P.W. 7 in our opinion, are sufficient to come to the conclusion that the accused beat the deceased, which, resulted in her death. The learned Sessions Judge has held, as stated earlier, that since the prosecution failed to examine all the eye-witnesses before the committing Magistrate's Court, that was sufficient to discard the evidence and in that view acquitted the accused. In this connection, the learned Sessions Judge has placed reliance on the case of *Narayana Rao v. State of Andhra Pradesh* : 1957 CriLJ1320 .

We are unable to accept the view of the learned Sessions Judge. In the case relied upon by the Sessions Judge, their Lordships of the Supreme Court were considering the question how far non-compliance with the provisions of Sections 173 and 207-A (3) of the Criminal Procedure Code had affected the legality of the proceedings and the subsequent trial resulting in the conviction of the appellant; and in that connection on a reading of Section 173 and Section 207A (3) and (4) of the Code of Criminal Procedure, their Lordships observed at page 106 of Andh LT : at p. 741 of AIR that:

in cases exclusively triable by a Court of Sessions it is the duty of the Magistrate while holding a preliminary enquiry to satisfy himself that the documents referred in Section 173 have been furnished to the accused and if he found that the Police Officer concerned had not carried out his duty in that behalf, the Magistrate should see to it that that is done. After the accused have been furnished with the necessary documents it is now required to record evidence of only such witnesses for the prosecution as had witnessed the actual commission of the offence charged against the accused and of such other witnesses as he may consider necessary in the interests of justice.

In this case what the Supreme Court was called upon to determine was whether the non-compliance with the provisions of Section 173 by the failure of the prosecution to furnish copies of the depositions of witnesses though they were furnished at the sessions trial before the witnesses were examined vitiated the trial.

The Supreme Court proceeded 'on the assumption that there was an entire omission to carry out the provisions of Sub-section (4) of Section 173 read with Sub-section (3) of Section 207A'. What was in fact held in that case was that the non-compliance with the provisions of Sections 173 and 207-A (3) Cr.P.C. does not necessarily vitiate the proceedings and the subsequent trial. It would follow therefore that their Lordships were only considering the effect of the non-compliance with the provisions of Sections 173 and 207-A (3).

The question whether under Section 207-A (4) all the eye-witnesses have to be examined at the committing Magistrate's Court was not before their Lordships for

consideration and so far as we know there is no finding to that effect in this decision. The learned Counsel for the other side very rightly conceded that there is no such finding in the above decision of the Supreme Court, as observed by the learned Sessions Judge. We may at this stage point out that there was a direct decision of this High Court on this point in *In Re: Chervirala Narayan* AIR 1958 Andh Pra 235 which has escaped the attention of the learned Sessions Judge.

9. Before we consider the several decisions on this point we may observe that Section 207-A was added by Act XXVI of 1955, Sub-section (4) whereof reads as under:

The Magistrate shall then proceed to take the evidence of such persons, if any, as may be produced by the prosecution as witnesses to the actual commission of the offence alleged; and if the Magistrate is of opinion that it is necessary in the interests of justice to take the evidence of any one or more of the other witnesses for the prosecution he may take such evidence also.

The contention of the learned Counsel for the respondent is that, under the provisions of Subsection (4) the Committing Magistrate is empowered to take the evidence of the other witnesses only In a case where he has already taken the evidence of all the eye-witnesses, and therefore, the order of committal made by him in the absence of eyewitnesses on the basis of other evidence is illegal. The object of Section 207-A is to expedite committal proceedings by providing a simplified procedure.

Under Section 173 Cr.P.C. the officer in charge of the Police Station after forwarding the report prescribed under the section to the Magistrate is enjoined before the commencement of the enquiry or trial to furnish to the accused a copy of the said report and of the first information report recorded under Section 154 and of all other documents Or relevant extracts thereof on which the prosecution proposes to rely, including the statements and confessions if any recorded under Section 154 and the statements recorded under Subsection (3) of Section 161 of all the persons whom the prosecution proposes to examine as its witnesses.

Sub-section (4) of Section 207-A enjoins on the Magistrate to examine witnesses to the actual commission of the offence alleged, produced by the prosecution. The word 'actual' qualifying the word 'commission' emphasises the fact that the said witnesses should be those who have seen the commission of the offence. If the word 'actual' is not in the section it may perhaps be contended that circumstantial evidence of the facts to establish the offence is comprehended by the said word. In other words, by the use of the words 'actual commission' clearly is meant to indicate evidence which goes directly to prove the fact in issue.

But, there may not be eye-witnesses in a case or, if there are, the prosecution may not have produced all of them before the court. In such a contingency, in the interests of justice, the Magistrate may examine some Or all the other eye-witnesses not produced before him but whose names are disclosed in the report. He may also for the same reasons examine witnesses other than eye-witnesses. The learned Counsel for the respondent, while conceding that the Magistrate has power to examine witnesses other than eye-witnesses, contends that the said power is conditioned by the previous examination of some of the eye-witnesses by the Magistrate.

If this argument is accepted, it will lead to an obvious anomaly. While the Magistrate can examine witnesses other than eye-witnesses when the said eye-witnesses were already examined by him, he would not be in a position to examine any witnesses at all if. there were no eye-witnesses or though there were eye-witnesses the prosecution did not choose to examine them. It would follow therefore that the Magistrate would be in a helpless position. He would either have to commit the accused to Sessions or discharge him only on the documents referred to in Section 173, Cr.P.C. It would enable the prosecution to dictate the conduct of the committal proceedings sometimes to the obvious detriment of the accused.

The phrase 'if any' in the first part of the section indicates that the Magistrate shall proceed to take the evidence of persons who speak to the actual commission of the offence if they exist and are produced before him. It is clear therefore that under the above provision it is not incumbent on the prosecution to produce all the

eye-witnesses before the committing Magistrate. What is incumbent is that if any eye-witnesses are produced by the prosecution, the Magistrate shall record their evidence and after recording their evidence, if he feels that there are other eye-witnesses who have been cited and who should be examined, he can summon them and examine them.

10. Identical question had arisen in the case AIR 1958 Andh Pra 235 before a Bench consisting of K. Subba Rao, C.J., (as he then was) and one of us. Subba Rao, C.J. at pages 238-239 observed:

In our view, the section therefore by using the words 'actual commission' clearly is meant to indicate evidence which goes directly to prove the fact in issue. But there may not be eye-witnesses in a case or, if there are, the prosecution may not have produced all of them before the Court, In such a contingency, in the interests of justice, the Magistrate may examine some or all of the other eye witnesses not produced before him but whose names are disclosed in the report. He may also for the same reasons examine witnesses other than eye-witnesses.

It has been further observed:

What it means is that the Magistrate after exhausting his power under the first part of the sub-section may also take such evidence i.e., evidence other than the evidence of witnesses to the actual commission of the offence.

11. In the case of Pedda Amma Muttigadu, In Re: : AIR 1959 AP469 Basi Reddy, J. considered this matter and has observed thus: the language of sub-section understood in its natural and ordinary sense, does not make it obligatory on the part of the prosecution to produce the eye-witnesses; all that the first part of the sub-section says is, that the Magistrate shall take the evidence of such of the eye-witnesses as may be produced by the prosecution. The production or non-production of such witnesses is thus left to the discretion of the prosecutor; and the sub-section does not empower the Magistrate to compel the production of such witnesses by the prosecution. That is the plain meaning of the words used in the sub-section....' '...it would, however, be a wholesome practice and one which would be fair to the accused if, in every case, where there are eye-witnesses the

prosecution produces all, or at any rate, some of them, to be examined at the preliminary enquiry. If the prosecution does not do so, a committing Magistrate would be exercising a sound judicial discretion if acting under the second part of the sub-section, he summons and examines some, if not all, the eyewitnesses.

A similar question came up for discussion before one of us in *Ponneri Desi Reddy v. State* Crl.Revn. No. 522 of 1958 disposed of on 18-12-1958 (A.P.), and it has been held:

Though, after the amendment to the Criminal Procedure Code by the addition of Section 207-A it is not obligatory on the part of the prosecution to produce all the eye-witnesses and makes it only necessary for the Magistrate to examine such of the eye-witnesses as may be produced by the prosecution, it does not prohibit the Magistrate from summoning and examining such of the eye-witnesses as he thinks necessary in the interests of justice.

While considering a similar question, our learned brother, Srinivasachari, J., sitting singly, has held in the case *In re Kotta Narayan* AIR 1958 Andh, Pra 651, that under Section 207-A, Cr.P.C. a discretion is vested in the Magistrate if he is satisfied that a prima facie case is made out to commit the accused to Sessions after the examination of the witnesses produced by the prosecution, not necessarily all the witnesses relied upon by the prosecution. While thus observing, our learned brother held that an order of committal to Sessions after examination of only two of the eye-witnesses cannot be quashed as being not in accordance with law.

12. In the Allahabad High Court, in the case of *State v. Yasin* : AIR1958 All861 , B.R. James and J.N. Tarku, IT., dissenting from *State v. Ramratan Budhan* (S) AIR 1957 Madh B 7, *Paval-appa v. State of Mysore* (S) AIR 1957 Mys 61, *State v. Govindan Thampi Bhaskaran Thampi* (S) AIR 1957 Trav-Co. 29, and *State v. Birda* (S) , held that under Section 207-A(4) the Magistrate is only bound to record the evidence of such witnesses to the actual commission of the offence alleged as may be produced by the prosecution that the committal order based upon examination of only some of such witnesses provided they are the only witnesses tendered by the prosecution for that purpose does not suffer from any infirmity or

illegality and that the prosecution also is not debarred from adducing in the Sessions Court witnesses other than those examined before the committing Court. Thakru, J., at p. 862 observed:

The initiative under the first part is entirely with the prosecution. In my opinion, the words 'if any and as may be produced by the prosecution', put that matter beyond the pale of controversy. It follows therefore, that if the prosecution do not examine any eye-witnesses or examine only some of them, the Magistrate cannot compel the examination of the remaining eye-witnesses under the first part of that sub-section.

But so that the accused may not be prejudiced in his defence, by the prosecution withholding material witnesses, whether direct or circumstantial, the Legislature has vested the Magistrate with the discretion to examine any one or more of them suo motu or at the instance of the accused if he considers their examination necessary in the interests of Justice.

Identical question had arisen in the Bombay High Court in the case of State v. Dhirajlal Maniklal 59 Bom LR 645. Vyas and Shelat, JJ., held that under Section 207-A(4) of the Cr.P.C. 1898, it is not obligatory upon the prosecution to produce before the Magistrate at the stage of the committal inquiry all or any of the persons who might have witnessed the actual commission of the offence. After examining the provisions of Sub-section. (4) of Section 207-A, Vyas, J., observed at p. 647:

The discretion conferred upon the prosecution in this respect is absolute and the words 'persons, if any, as may be produced' must, in our opinion, mean that the prosecution cannot be compelled to produce any 'eye-witnesses' of the offence at that stage if it does not wish to do so. If it wishes to produce all the 'eye-witnesses' before the Magistrate, it may do so. If it wishes to produce only some of them or none of them, that also would be within its competence to do. If the intention of the Legislature in enacting Sub-section (4) had been to cast an obligation upon the prosecution to produce at the committal enquiry all persons who might be witnesses to the actual commission of the offence they would have used the words: 'such persons as may be witnesses to the actual commission of the offence alleged', instead of the words 'such persons, if any, as may be produced by the

prosecution as witnesses to the actual commission of the offence alleged'. The words 'as-may be produced' would be wholly inconsistent with that intention, and the Legislature would not. have used them in that case.

It was further held that the words 'other witnesses for the prosecution' in the latter part of Section 207-A(4) of the Cr.P.C. 1898, mean 'other persons whose statements under Sections 164 and 161 of the Cr.P.C. were recorded by the Police during investigation and whom the prosecution proposes to examine as its witnesses minus the persons already produced by the prosecution before the Magistrate under the earlier part of the sub-section as witnesses to the actual commission of the offence.

13. In the case of *Manik Chand v. The State* : AIR1958 Cal324 , Chakravarthi, C.J., with whom K.C. Das Gupta, J., (as he then was) concurred, while considering the provisions of Section 207-A(4) Section 173 and Section 156(1), (2), Cr.P.C. observed at p. 338 as follows:

The first part undoubtedly lays an obligation but it is only an obligation on the Magistrate to examine such witnesses of the actual commission of the offence alleged as the prosecution may produce before him. Primarily and directly, the second part lays no obligation at all, but only confers a power and a discretion on the Magistrate to examine on his own account witnesses other than those examined by the prosecution, if he considers it to be in the interests of justice to do so. The Magistrate must undoubtedly apply his mind to the question as to whether some more of the prosecution witnesses than the prosecution have produced ought to be examined in the interests of justice and he must exercise the power and the discretion conferred on him to examine such witnesses judicially. His power may become a duty and his discretion an obligation if he takes such a view of the evidence of the witnesses whom the prosecution have examined that there are matters in it which remain to be clarified, and on which other witnesses if examined, may throw some light.... If again he fails to apply his mind at all to the question of examining more witnesses or fails to examine more witnesses on an erroneous view that it is not justly necessary in the circumstances of the case to do so, he may be corrected by a superior court. But he is under no absolute duty

to examine in every case all such witnesses of the actual commission of the alleged offence as the prosecution have not examined. Nor does the sub-section impose any absolute duty on the prosecution to produce before the Committing Magistrate all their witnesses of the actual commission of the offence alleged.

14. In considering the effect of the word 'may' in Sub-section (4) of Section 207-A as to whether it means 'shall' or 'must' it was observed further:

It is true that the legislative provision expressed in a permissive form is sometimes construed as really mandatory and the word 'may' is taken as if it read 'must' or 'shall'. But that is only when a power is conferred on a person by saying that he may do a certain thing, giving him liberty to do it so far as the form of expression goes, while on the other hand it appears either from the nature of the thing to be done or from other indications in the provision that the Legislature intended to make it the duty of the person concerned to exercise the power. In such a case it is said that the effect of the word 'may' is not to make it optional or discretionary with the donee of the power to exercise it or not, but the effect is to enable him to exercise it which is otherwise made his duty to do. That principle of construction cannot apply in a case where the word 'may' is not used with a verb which confers a power on a certain person and enables or permits him to exercise it, but is used with a verb in the passive voice which occurs in adjectival phrase, describing a fact and occurs in conjunction with other words, which completely exclude implications of an obligation.

The Mysore High Court in *State v. Laxman Bhimappa* AIR 1959 Mys 260, took a similar view. It has been held by Hombe Gowda and Malimath, JJ., at p. 264:

A plain reading of the first part of the subsection clearly indicates that the discretion of producing eye-witnesses rests entirely with the prosecution and if they do not choose to produce any such witness they cannot be compelled to do so.... Having carefully examined all the decisions of the several High Courts we have no hesitation to hold that it is not necessary to read the word 'may' in the first part of Section 207-A(4) of the Cr.P.C. as 'shall'; that there is no injustice likely to result by not construing it to mean 'shall' because in a particular case if the court feels that injustice may result on account of the improper exercise of discretion by

the prosecution, the Magistrate is entitled to act in exercise of his inherent power and the second part of Section 207-A(4) does refer to that power.... Whave no doubt in our mind that the view taken by the Madhya Bharat, Kerala and Orissa High Courts that it is obligatory upon the prosecution to produce all the witnesses for the actual commission of the offence and the committal order passed without examining all such witnesses is bad in law or vitiated is not sound.

I.N. Modi and D.M. Bhandari, JJ., in the Rajasthan High Court in the case, of Ghisa v. State , took a similar view that there was discretion for the prosecution to produce evidence to the occurrence. The former relied on the word 'may' while the latter laid emphasis on the words 'if any' occurring in Section 207-A, Cr.P.C.

15. All the above cited cases speak with one voice affirmatively in favour of the view that it is not obligatory on the part of the prosecution to produce all the eye-witnesses, nor does the examination of only a few of the eye-witnesses and failure to examine the others vitiate the committal proceedings nor for that matter the trial.

16. Koshi, C.J., and T.K. Joseph, J., in (S) AIR 1957 Trav-Co, 29, while considering the provisions of Section 207-A(4) took a different view. This view was however specifically considered by other High Courts which have dissented therefrom. Koshi, C.J., speaking for the Bench observed at p. 30: 'On a careful reading of the sub-section to our minds it would appear that what it enacts is that when the proceeding before the committal court has passed the stages mentioned in Sub-sections 1 to 3 and reached the stage envisaged in Sub-section 4, that court shall take the evidence of the witnesses to the actual commission of the offence alleged, while it is discretionary whether any other witnesses should be examined or not.

The words 'if any' in the sub-section really present difficulties. A close reading of the sub-section will, however, show that those words relate to the expression 'witnesses to the actual commission of the offence alleged'. The prosecution is bound to produce witnesses to the actual commission of the offence alleged and court has no discretion to refuse to examine them. Its discretion is tonfined to the examination of any other witnesses.

The word 'may' occurring in the expression 'as may be produced by the prosecution as witnesses to the actual commission of the offence alleged' does not entitle the prosecution to exercise any discretion.'

The same view had been taken by Velu Pillai, J. in *State v. Mathai Mathai Of Vemberil House, Koola-matoomkara, Arukulam* 1959 Mad LJ Cri. 270 (Kerala) where it has been held that the wording of Sub-section (4) of Section 207-A is mandatory and the Magistrate has no discretion to dispense with the examination of the eye-witnesses.

17. Our learned brother, Sanjeeva Row Nayudu, J. sitting singly, in the case of '*Chandu Satyanarayana v. State* : AIR 1959 AP651 has observed as follows: 'According to Section 207-A (4) of the Criminal Procedure Code, the witnesses whom the Magistrate could examine during the preliminary enquiry are of two categories. The first category consists of the witnesses to the actual commission of the offence alleged and the second category consists of one or more other witnesses for the prosecution (i.e., witnesses other than those to the actual commission of the offence. In the case of the former the section makes it imperative on the Magistrate to examine those witnesses and in the case of the latter i.e., where the witnesses were not witnesses to the actual commission of the offence, the Magistrate is bound to apply his mind and decide whether in the interests of justice those witnesses should be examined."

18. It was further observed by our learned brother:

The fact that the section gives a discretion to the magistrate in the matter of examining witnesses who are not witnesses to the actual commission of the offence, implies that the decision of the Magistrate does not depend upon the will of the prosecution to produce or not to produce witnesses. The expression 'produced' cannot in law be equated to bodily producing before the Magistrate, what the section intends is that-the witnesses must have been put for-ward by the prosecution as their witnesses in proof of certain facts. Once their names are included in the charge-sheet, it is the bounden duty of the Magistrate to secure the presence of those witnesses before him in order that he may exercise his power under Section 207-A (4).

It would follow from the above discussion that all the High Courts excepting the High Court of Travancore and Cochin learned brother Sanjeeva Rao Nayudu, J. sitting singly have taken the view that under Section 207-A(4) it is not incumbent on the prosecution to produce all the eye-witnesses before the committing Magistrate's Court and neither the committal proceedings nor the examination of those witnesses other than those produced before the Magistrate can be considered to be illegal.

With due respect to our learned brother Sanjeeva Rao Nayudu, J., we cannot agree with the view that under the above provision, no discretion is given to the Magistrate and it is incumbent on the prosecution to produce all the eye-witnesses before the committing Magistrate's court. It may be stated that our learned brother does not appear to have considered the Bench decision in AIR 1958 Andh Pra 235, which was binding on him or any other decision of this Court.

19. It may be pertinent to cite the observations in Subbarayudu v. State : AIR 1955 AP87 where a Full Bench of this Court observed:

In the interests of uniformity of law the practice should be this. A single Judge shall not differ from the judgment of another Judge of the same Court. If he does not agree he shall refer the matter to a Bench of two Judges. He is bound by the decision of a Divisional Bench exercising appellate jurisdiction. If there is a conflict of Bench decisions he should refer the case to a Bench of two Judges who may refer it to a Full Bench. A single Judge cannot differ from a Divisional Bench unless a Full Bench for the Supreme Court has overruled that decision specifically or laid down a different law on the same point. He cannot ignore a Bench decision on the ground that some observations of the Supreme Court made in a different context indicate a different line of reasoning. A Divisional Bench must ordinarily respect another Divisional Bench but if it differs the case should be referred to a Full Bench.

In that view, we have no hesitation in dissenting from the view expressed in 1959-2 Andh WR 232 : AIR 1959 Andh Pra 651, Nor for that matter are we impressed by the reasoning of the Bench of the Travancore-Cochin High Court that the word 'may' must be taken as if to read 'must' or 'shall'. Where a power is conferred on a

person by saying that he may do a certain thing, it vests a discretion in him and he has the liberty to do it. But where it appears from the nature: of things to be done or from other circumstances indicating otherwise that the Legislature intended to make it the duty of the person exercising the power, the effect of the word 'may' would not be to vest an option, but an obligation.

As Chakravatthi, C. J., in the Calcutta case pointed out, 'the principle of construction cannot apply in a case where the word 'may' is not used with a verb which confers a power on a certain person and enables or permits him to exercise it, but is used with a verb in the passive voice which occurs in adjectival phrase, describing a fact and occurs in conjunction with other words which completely exclude implications of obligation.' Even if the word 'may' occurring in the first part of Subsection (4) is to be read as 'shall' it would reduce the sub-section in the words of Basi Reddy, J. to a meaningless jumble of words'.

It is also difficult for us to envisage the natural meaning of the expression 'produced' used in Subsection (4) in relation to the production of the eye witnesses, as being equated with citation of witnesses and not their being kept present before the Magistrate for recording their evidence as held by Sanjeeva Row Nayudu, J. A reference to the dictionary would show that the word 'produce' means the bring ing forward for inspection or consideration, as will produce evidence, witnesses, reasons or produce tickets, etc., connoting thereby the physical production. In our view the object of the amendment is to expedite the sessions trials, and the manner to which it was sought to be achieved was to prescribe a procedure which cuts short committal proceedings.

If in the achievement of this object, Parliament lays down that the Magistrate shall examine the eye-witnesses to the actual occurrence 'as may be produced by the prosecution' it is not permissible for courts to ignore the clear intention manifested by the words used, and hold that these words mean something else which is far from its contemplation. We are in entire agreement with the view expressed by the Bench of this High Court in Cherivarla Narayana's case AIR 1958 Andh Pra 235, which is also in consonance with the overwhelming weight of authority of the other High Courts in India on this subject.

20. The trial court, as stated earlier, has acquitted the accused holding that as the prosecution had not examined all the witnesses before the committal court, the evidence produced in the Sessions Court was inadmissible; but in the view we have taken, this judgment of the trial court cannot be sustained and therefore the order of acquittal would have to be set aside.

21. The next question that has to be considered is under what section the accused have to be convicted. The accused were charged under Section 302, I.P.C. According to P.Ws. 1, 2 and 4, it would appear that A-1 and A-2 beat the deceased with a stick on the buttocks and thighs. The doctor, P.W. 7 has pointed out the injuries on the buttocks at the lower ribs and on the left shoulder blade. It would follow from this that the injuries were not on any fatal part of the body. The weapon used was a stick. The place of injuries is the buttock and thigh.

This would go to show that the idea of the accused in beating the deceased was only to chastise her and not with any intention to kill her. It is also clear from the evidence of the doctor that there was some undigested food, it is further evident from his statement that the death must have occurred 24 hours before the post mortem. It follows therefore that fast a few hours before her death she must have taken her meals and it is said that she died at about midnight. This conforms with the evidence of the doctor that 2 or 3 hours before her death she took some food.

Having regard to the injuries found on the person of the deceased and the circumstances justifying the chastisement, we are opinion that Section 302, I.P.C. or 304, I.P.C. would not be applicable, because there is neither the intention nor could there be any apprehension of death in the minds of the accused. The accused, in our opinion, would only be held liable under Section 323, I.P.C. for simple hurt. We accordingly convict both the accused under Section 323, I.P.C. and sentence them to a fine of Rs. 100/- each; in default to undergo one month's R.I. each. The fine should be paid within a month from the date of the receipt of the records in the lower court.