

Role of a Magistrate in a Criminal Investigation

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INTRODUCTION

A young bank official named Joseph is arrested by two policemen one fine morning, without even being informed why. Joseph is outraged. Till his death, Joseph does not get to know what is he being tried for. Joseph is the protagonist of Franz Kafka's seminal work 'The Trial', which is the story of Joseph's case, his trial and tribulations with : the invisible Law, absent judge, opaque court processes, police excesses and the high-handedness of our criminal justice system. He dies a year later at the hands of the very policemen who had arrested him, in a striking finale of how the system consumes him. Like all fiction, the story is a lie, but one that says a lot of truth about our criminal justice administration, or at any rate, its prevailing stereotype, which has a definitive impress of truth.

Enter G, a 6-year old girl taken to a field, enticed with sweets, and then raped; her delicate face smashed beyond recognition, having been bludgeoned to death by bricks. Her little feet chopped-off from right above her ankles. You see, she was wearing silver anklets which wouldn't come-off otherwise. The case was based on circumstantial evidence. X was acquitted by courts - on all counts, primarily on account of : grave lapses by the investigative/prosecution agencies, non-examination of material witnesses and obliteration of vital evidence. The sheer agony of the court is palpable in the judgment².

Joseph was arbitrarily arrested, falsely prosecuted and ultimately loses his life, while the court remains oblivious. Conversely, in G's case, the accused who brutally cut short her life, went scot free on account of glaring omissions in the investigation. Irregularities which could have been nipped in the very bud by a more involved, responsive & pro-active magistracy. In both these cases, it is not Joseph or X who is at trial, it is 'us'.

This paper makes a case for a more pro-active & responsive magistracy. It is an endeavour to highlight the areas in which magistrates, as the protectors of rights of people, can make meaningful interventions during investigation, with a view to protect liberty and also to ensure an effective investigation. An attempt would be made to analyse the relevant statutory provisions and case law on the subject, and also to draw comparative insights from the conception and role of a Magistrate in the french criminal justice system.

Criminal Investigation and the Magistrate.

Every criminal case begins with investigation. An investigation, shorn of legal niceties, is a systematic enquiry into facts constituting an alleged offence, in order to unearth its true perpetrators. It is an attempt to recreate the unknown from the known, by collection and presentation of pieces of evidence, with a view to aid the court in arriving at a just conclusion. Every investigation is followed by at-least some form of judicial scrutiny (often termed 'inquiry') which acts as the safety valve, wherein cases which are groundless on the face of it are sifted and filtered out at the very threshold, and only those cases where there are sufficient grounds to presume the commission of the offence - graduate to the next stage i.e Trial. A trial, as the term connotes, is a test. Test of truth and falsehood which is examined in proceedings where the evidences collected during investigation and

¹ Delhi Judicial Services, presently Metropolitan Magistrate, Delhi

² State of Gujarat v. Kishanbhai (2014) 5 SCC 108

conclusions reached by the investigators are allowed to be proved or disproved and a finding as the guilt or innocence of the accused is arrived at. In an Adversarial model (as opposed to an Inquisitorial system), the job of investigation is in the domain of the executive, acting through the police.³ Inquiry and Trial are entrusted to the judges. This broad separation of powers is with a view to ensure that a judge does not get directly involved in the process of collection of evidence, which might prejudice or taint his conclusions. This is in view of a very real fear that he might make an opinion on the case prematurely and facilitate the collection of only those pieces of evidence which reinforce his initial opinion and neglect the rest⁴. Being the investigator himself, he would have difficulties disassociating himself from the result of his investigation, or rather its eventual success. The principle of investigation by the police also pays due homage to the traditional principle of separation of powers, wherein each organ acts in its respective area of functioning and assumption of powers of one organ by the other is frowned upon as undue interference & adventurism. The job of a judge, therefore, in a traditional adversarial model is supposed to be minimalist and he is not supposed to don the mantle of an investigator, much less a Sherlock Holmes. Formalistic adherence to Adversarial legalism and minimalism is not just the norm, but also the bane of our system, as this paper would attempt to demonstrate.

Case for a more responsive and pro-active magistracy.

“The fault, dear Brutus, is not in our stars, but in ourselves, that we are underlings.”⁵

The adversarial system envisages the judge as an impartial arbiter : who decides which way does the truth lie, after a clash of adversaries, who are assumed to be equal in strength and out of the dialectical contest between whom - the truth is supposed to emerge. These parties fight on the question of the probative worth of the evidence and the inference that ought to be drawn from the material collected by the investigating agencies and the office of the judge is to preside over this contest and to ensure parties play by the rules. The parties are expected to play by the rules fairly and reasonably and begin from equal starting points. However, the reality is less simple, and mostly never this straight. If men were such angels, external controls would be unnecessary. ⁶ It is now widely accepted that only seldom is the playing field - level. Deeply pervasive inequalities and power imbalances - on account of sex, caste, gender & class often result in a totally asymmetric judicial system, skewed against the Davids and in favour of the Goliaths. The executive is often prone to abuse of power for ulterior ends, and owing to lack of police reforms - the quality of investigation is mostly appalling, either due to incompetence (innocent) or plain extraneous considerations (blameworthy). Many of these investigating lapses often result in the real perpetrator escaping the clutches of law or the innocent being falsely implicated. or in some cases - both. Flaws in the investigation often deal the court with a practical *fait accompli* as the court becomes seized of the matter only after vital evidence is obliterated, lost or fabricated. The large number of acquittals relative to

³ Section 2(h) of CrPC reads : “investigation” includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (**other than a Magistrate**) who is authorised by a Magistrate in this behalf;

⁴ See ‘Confirmation Bias & Belief Perseverance’

⁵ Julius Caesar (I, ii, 140-141) Shakespeare

⁶ James Madison, Federalist no. 51.

total prosecutions⁷ is a cause of huge concern and demonstrates major systemic failures. Non-examination of vital witnesses, non-application of forensic methods, inept handling of forensic evidence at the crime scene, non-protection of witnesses have been the ruination of many prosecutions. Pained by such lapses leading to the eventual acquittal of a man accused of raping and murdering six-year-old, the Supreme Court⁸ directed that a post-acquittal analysis be made in every case of acquittal, as to the reasons for the acquittal and mandatory departmental proceedings be initiated against investigating officers and prosecutors found guilty of misconduct in relation to investigation and trial. The need for an effective & impartial investigation, therefore, can hardly be overemphasised : to check not only unmerited acquittals, but also unjust prosecutions.

In this, the magistrates have to drop minimalism as the ruling mantra, and pro-actively act as the protector of rights (especially the weaker sections) and correct wrongs. Magistrates being judiciary's first interface with the public at large, and the courts of first resort, ought to jealously guard personal liberty and constitutional rights and have a greater responsibility on their shoulders. Investigation is the stage where most excesses take place. Investigation also forms the basis for the superstructure of the trial and *faux pas* in investigations and unjust prosecutions are best checked by magisterial vigil, right from the point of registration of FIR, throughout the investigation, and later even after filing of police report. Magisterial checks and balance, therefore, is the pressing desideratum. The next section deals with the statutory provisions & judicial decisions that permit the exercise of such interventions, at various stages of the investigation and even during inquiry.

Magisterial Vigil during Investigation.

In chronological order, the role of magistrate in investigation can be understood in terms of these five stages :

Stage – I – Soon after the registration of FIR

Stage – II – In cases where the arrest is effected by the Investigating officer, on his production before the court and while deciding the question of the validity of arrest and need for further custody - Judicial or Police.

Stage – III- Magisterial interventions while deciding applications for recording of statement(s) u/s 164 of the Cr.P.C, test identification parades, applications seeking conduct of narco-analysis, taking of handwriting/signature specimen, etc.

Stage – IV – Monitoring of investigation.

Stage – V – Further investigation, post-filing of police report u/s 173 of the Cr.P.C

Stage – I – Soon after the Registration of FIR

Criminal justice Administration is set into motion with the receipt of information with respect to the commission of a cognizable offence⁹. Section 157 mandates the sending of a report

⁷ 45.1% conviction rate under IPC crimes as per NCRB : Crime in India, 2014. This has to be read with a caveat as this figure stands good only for those cases - where the matter goes to trial and the trial is finished; This does not include cases in which no cognisance was taken by the Magistrate at the very first instance, or accused was discharged for lack of evidence.

⁸ In State of Gujarat v. Kishanbhai (2014) 5 SCC 108

⁹ Section 154 of the Cr.P.C

to this effect to the area magistrate forthwith, to bring the matter to his scrutiny. This is a safeguard meant to prevent police excess, embellishments, false prosecutions and non-investigation at a crucial stage. A copy of the FIR (often termed ‘*occurrence report*’) is to be brought to the seisin of the magistrate as soon as possible, and any delay can adversely affect the prosecution case at trial, if not explained adequately. In heinous cases, a copy of the FIR alongwith an endorsement is dispatched via a special messenger to the area magistrate or duty magistrate. Delhi High Court Rules¹⁰ require the magistrate to make an endorsement on the copy of the FIR regarding date/time and place of receipt. The Delhi High Court recently in Rafiq¹¹ has directed magistrates to mention the aforesaid details & sign such copy of the FIR legibly, forthwith on its receipt, so that the time of registration of FIR can be ascertained with exactitude. The magistrate, on receiving a report in which the police officer indicates that he is not taking up investigation, may direct investigation nevertheless, or if he thinks fit, proceed at once to the spot, to hold a preliminary enquiry himself.¹² The latter course, however, is rarely adopted, more because of the burgeoning case load, I must add, than a sense of apathy. However, wherever warranted, the Magistrate should not hesitate to exercise this power to get to the bottom of the matter.¹³

Stage II – Production of the Accused before the court for the first time.

*“Eternal Vigilance, is the price of liberty....”*¹⁴

Law of Arrest

Arrest leads to deprivation of liberty and, therefore, has great ramifications for the person arrested. Any denial of personal liberty has to be through a due process¹⁵. A process that is non-arbitrary, just, fair and reasonable. On account of a catena of judicial decisions¹⁶ and statutory changes to that effect, no arrest shall be made, merely because it is lawful for the police officers to do so and each arrest has to be justified on ground of its imperative need and reasons are to be recorded in writing by the police officer effecting the arrest. According to the latest amendments to the CrPC, in cases covered u/s 41(1)(b) of the CrPC i.e where the case relates to offence punishable with imprisonment of 7 years or less, arrest can be made by the police only on satisfaction (recorded in writing) to the effect that, the arrest is imperative for :

- ✓ prevention of further offences;
- ✓ proper investigation of the offence;
- ✓ prevention of tampering or disappearance of evidence;
- ✓ prevention of any undue influence/threat to the complainant or witnesses;

¹⁰ Delhi High Court Rules – Vol III, Chapter 11, Part A, Rule 4.

¹¹ Rafiq v. State (Crl. A. No. 1505/2013 - Date of Decision 23.07.2015)

¹² Section 159 of the Cr.PC

¹³ The Judge, even at the time of inquiry and trial, can conduct a local inspection with a view to appreciate the evidence better. Such power is expressly provided-for in Section 310 of the CrPC

¹⁴ Attributed to Thomas Jefferson.

¹⁵ Article 21 of the Constitution. Maneka Gandhi v. Union of India, (1978) 1 SCC 248

¹⁶ D.K.Basu v. State of West Bengal (1997) 6 SCC 642, Joginder Kumar v. State of U.P (1994) 4 SCC 260. Also see Code of Criminal Procedure (Amendment) Act, 2008.

✓ ensuring his presence in the court;

The requirement of recording of reasons is expected to transcend the essentially subjective decision of arrest, to greater objectivity and to rule out arbitrary arrests, made with a view to wreak vendetta.¹⁷ The Magistrate is a bulwark against unnecessary detention and abuse of power and process.¹⁸

The recording of these reasons, therefore, is a condition precedent for arrest.

Magisterial check on police powers of arrest.

The sufficiency of reasons for arrest recorded by the police officer is to be examined by magistrates and not to be accepted at the mere *ipse dixit* of the police. After examining the validity of the arrest, the next point of inquiry is : whether there are grounds to keep the accused in detention or whether he can be released on bail, or otherwise discharged. The Supreme Court recently in **Arnesh Kumar v. State of Bihar**¹⁹ has ruled that decision to detain & remand is not a mechanical act and a remand order has to be a reasoned order and should reflect due application of mind. Mere mechanical reproduction of above elements in remand application is also to be deprecated. These conditions have to be justified in the factual matrix of each case. The fact that 76 % of the prisoners in Tihar Jail²⁰ are undertrials is evidence of a rather trigger-happy (or rather custody-happy) magistracy. Magistrates, to borrow the expression of Lord Atkin, ought to avoid being more executive-minded than the executive²¹ and consider the question of bail/release by special order on the first production *suo motu*. In a deeply entrenched, but no less despicable practice : Magistrates routinely grant remand for 15 days (that being the maximum permissible at a time) without independent reflection on whether the same is required or not. Each day's remand ought to be justified in order to be granted. The fact that magistracy is overburdened with work cannot be an alibi. Such mechanical extension of remand reflects apathy and culpable indifference to values of personal liberty and human rights.

The anxiety as to participation in investigation by the accused is allayed by Section 41A of the CrPC, which provides for service of a notice on the accused by the Investigating Officer (in short 'IO') seeking participation in investigation and the necessary information from him. If the accused does not comply with the notice, he can be arrested, after recording the factum of his non cooperation in writing.

¹⁷ According to Third National Police Commission - 60 % of the arrests made were unjustified and unnecessary arrests account for 43 % of the expenditure in jails (Joginder Kumar v. State of U.P - supra)

¹⁸ Fair Trial Manual : A Handbook for Judges and Magistrates by CHRI. (http://www.humanrightsinitiative.org/publications/police/fair_trial_manual.pdf)

¹⁹ 2014 8 SCC 273

²⁰ As on 31.12.2015, by a report of the Tihar Prison (available at : http://www.delhi.gov.in/wps/wcm/connect/lib_centraljail/Central+Jail/Home/Prisoner+Profile)

²¹ Lord Atkin's dissenting judgment in *Liversidge v. Anderson* [1941] UKHL 1

Arrest by Magistrates

Conversely, in cases where the offence happens within the presence of the magistrate and within his local jurisdiction, the magistrate may himself arrest a person, or order any other person to effect the arrest.²²

Safeguards relating to arrest

The magistrate is also under an obligation to peruse the Arrest Memo/Medical examination report of the accused (to rule out cases of police torture) as well as the victim (to preserve crucial medical evidence).²³ It is also incumbent on the Magistrate to ensure production of the accused before itself within 24 hours of arrest²⁴ and communication of information to relatives/friends about his arrest and compliance of the detailed guidelines laid down by the Supreme Court in D.K.Basu (supra). The Magistrate is also ensure that the copy of the FIR is uploaded on the internet, forthwith, except of course, in cases where the matter is sensitive in nature, or issues of privacy are involved.²⁵

Importance of Case Diary

Case diary is an effective instrument for the magistrate to keep a tab on the propriety of an investigation. The Supreme Court has repeatedly reiterated that the case diary should be maintained with scrupulous completeness and efficiency, since it is an extremely important document.²⁶ When a person arrested is produced before a magistrate for remand, the magistrate has to : peruse and scrutinise copies of FIR/Case Diary 'Zimnis', which ought to be in the form of a volume, duly paginated²⁷ and contain statements of the witnesses recorded u/s 161 of the CrPC²⁸, and also to ensure that the same are in chronology and reflect the progress of investigation. The Delhi High Court Rules²⁹ make it incumbent upon the Magistrate to record reasons for the grant of remand and to sign and date every page of the case diaries or copies thereof as a token of his having seen them. This rules out any fabrication, embellishment or interpolation of case diary at a later stage.

Audi Alteram Partem

Even god did not banish Adam and Eve from the heavens for their proverbial sin, before giving them an opportunity of making their case. The Magistrate can claim little immunity from this salutary principle of natural justice, wherein no man ought to be condemned without hearing him. The magistrate is duty bound to ensure Legal Representation for the

²² Section 44 of the CrPC

²³ Section 53/53A/164A of the CrPC

²⁴ Section 57 of the CrPC & Article 22 of the Constitution of India

²⁵ Court on it's own motion versus State (Writ Petition (Crl.) No. 468 of 2010)

²⁶ Bhagwant Singh v Commissioner of Police, Delhi, (1983) CriLJ 1081.

²⁷ Section 172 (1-B) of the CrPC

²⁸ Section 172(1-A) of the CrPC

²⁹ Delhi High Court Rules – Vol III, Chapter 11, Part B, Rule 3.

accused at the very first production and to give him an effective opportunity of being heard. If the accused does not have a private counsel, Legal Aid from the state is to be ensured.³⁰ In Delhi - Remand Advocates have been appointed by the District Legal Services Authorities, in each court, to ensure fair representation for each accused. The Magistrate ought to ensure that the Legal Aid Counsel appointed for the Accused is provided with a copy of the FIR and other documents, with a view to enable him to prepare his defence. However, the job of the Magistrate does not end at the appointment of the Legal Aid Counsel; he is also duty bound to ensure that the legal aid counsel appointed effectively represents the Accused. This involves a fair bit of recalibration of scales of justice to ensure a level playing field. If the legal aid counsel provided is not very competent, the magistrate can, nay ought to bring this to the attention of the District Legal Service Authority, who can appoint a new counsel and make a note of this information while deciding the question of empanelment of lawyers as Legal Aid Counsel.

Non-filing of police report within stipulated period - Default Bail

If the arrest is justified at the anvil of the considerations as discussed, and no case for release on bail is made out, the accused can be remanded to Police or Judicial Custody during the first 15 days, and thereafter, only judicial custody for a further period of 45 days (in case of offences punishable with imprisonment of 10 years or less) or 75 days (in cases of offences punishable with imprisonment greater than 10 years). If the investigation is not concluded within the said period, the accused, if still confined in custody, becomes entitled to statutory bail (also known as 'default bail' or 'compulsive bail') and an indefeasible right accrues in his favour. It deserves reiteration that Cr.P.C does not fix a time limit for investigation, but by entitling the accused to bail on the expiry of specific periods, it puts a pressure on the police to complete the investigation within time. It has been judicially held that this right accrues to the accused on the expiry of the 60th or the 90th day, as the case may be, from the date of the first remand, and once this beneficial right has accrued in favour of the accused and availed by him (the accused should apply for bail, albeit - not necessarily by a formal application), the same cannot be defeated by subsequent filing of charge sheet, however, if after grant of bail, the accused does not meet the conditions of bail, for example : non furnishing of bail bonds, and in the meanwhile police report is filed - in that eventuality, the right stands defeated.³¹ The Supreme Court³² has recently held that such bail applications ought to be decided on the very day of filing, in order to avoid the salutary purpose from being frustrated by subsequent filing of police reports. The Magistrate should also be on the guard for incomplete reports masquerading as police reports, filed hastily with the sole motive to defeat the right of the accused. The police report, has to conform to the essentials laid down in Section 173 of the CrPC.

Remand to Police Custody

Detention in police custody (permissible only within 15 days of the first remand), is usually disfavoured by law, which guards personal liberty zealously³³. Courts are cognisant of the police's predilection for disclosure statements & confessions (often extorted), instead of

³⁰ Md. Ajmal Amir Kasab v. State of Maharashtra (2012) 9 SCC 1. The Hon'ble Supreme Court has also held that any lapse on this count by the magistrate may entail departmental action.

³¹ Uday Mohanlal Acharya vs. State of Maharashtra (2001) 5 SCC 453

³² Union of India through CBI v. Nirala Yadav – (2014) 9 SCC 457.

³³ CBI v. Anupam J. Kulkarni – AIR 1992 SC 1768

scientific and objective methods of investigation. Therefore, at the time of giving police remand, the magistrate ought to ensure and record the imperative need for police custody, and as to why it is necessary for an effective investigation. The need for discovery of the weapon of the offence, fruits of crime, unearthing a larger conspiracy and facilitating the arrest of co-accused by disclosure are important considerations. However, mere verification of information given by the accused is not a ground for police custody. Similarly, the Magistrate should also ensure that remand is not taken merely to make a 'pointing out' memo. Such pointing-out memos, needless to state, have no statutory sanction or admissibility in a court of law. Only when there is a certain physicality to a discovered fact : that the same falls within the definition of Section 27 of the Evidence Act. Practise has shown that 'Pointing out Memos' are recorded with a view to circumvent the clear embargo on police confessions under Section 25 of the Evidence Act, and to permit a rather insidious inclusion of incriminating facts through a circuitous route.

One more thing that a Magistrate ought to be extremely cautious about is that in almost every criminal case - there is an (alleged) confession made to the police by the accused, however, practise shows that only seldom does the police file an application for the confession to be recorded in the presence of the Magistrate, after compliance of Section 164 of the CrPC. It defies reason as to when so many accused are penitent and inclined to confess, then why no confessions are being recorded through the Magistrates. This becomes crucial since the confession before the Police Officer is inadmissible in law and has to be totally excluded from consideration. However, such confessions are employed to IOs routinely to have atleast some semblance of a case against the accused and seek repeated Police Custody/Judicial Custody on that basis. Expediency should never be allowed to supersede the legal principle and Magistrates ought not to blink at such a practise, as the very fact of there being a police confession in every case and judicial confession in none, reflects a pernicious, and a rather appalling state of affairs. In every case where the accused has allegedly confessed to the police, the magistrate ought to put a question to the IO as to what prevented him from getting the confession recorded before the court. This will keep the coerced confessions in check and encourage police officers to explore other avenues of investigation, which are more legitimate.

It is also important for the Magistrates to remember that Police custody ought not to be given at the drop of a hat and at the mere asking of the police. While giving police custody, a copy of the order ought to be sent to the CJM/CMM of the area to bring the matter within his seisin.³⁴ It is also advisable for the magistrate to scrupulously ensure medical examination of the accused before and after the grant of police custody, so as to rule out torture at the hands of the police. In many a cases the injuries on the person of the accused are suppressed in the Medical Certificates. In such cases, the Magistrate may order a fresh medical examination of the Accused by a team of doctors at a reputed and independent medical institution and entrust the safety of the accused personally to a higher police functionary. It also needs to be remembered that the Accused has a right to interview with his legal advisor during this time.³⁵

³⁴ Section 167(4) CrPC

³⁵ Adjudication in trial courts : A Benchbook for Judicial Officers, by N.R.Madhava Menon, David Annoussamy & D K Sampath.

Release by special order in case of unjustified arrests

If the arrest seems unwarranted in the facts of the case, the magistrate can always disallow both judicial and police custody and release the person on bail (on surety or personal bonds), or even by way of a special order u/s 59 of the CrPC. A more active use of this provision is the need of the hour. In cases of totally unjustified arrests, the magistrates should not shirk from pointing this out in their orders and direct initiation of disciplinary proceedings against the erring police officers.

Immediate Succour to the (oft forgotten!) victims

The magistrate, when seized of the matter for the first time, ought to enquire about the status of the victim of the crime and whether the victim needs immediate first aid or any other interim compensation. A recommendation in this regard can be made by the Magistrate concerned to the District Legal Services Authority³⁶. DLSA shall go on to grant compensation in accordance with the Victim Compensation Scheme. In cases relating to motor accidents, the Magistrate may ensure that the SHO Concerned informs the Motor Accident Claims Tribunal of the accident within 48 hours and files the mandatory Accident Information Report (which is entertained as a Claim Petition), within the stipulated 30 days from the registration of the FIR³⁷, so as to ensure timely dispensation of compensation to the victims.

Special Provisions relating to juveniles.

While dealing with juveniles, the court ought to proceed strictly in line with the principles of *parens-patriae*³⁸ & *best interests of the child* and zealously guard their welfare. Any offender under the age of 18 ought to be tried by the Juvenile Justice Board and is not to be exposed to the rigours of ordinary criminal law process.

Whenever a plea of juvenility is taken by an accused, the age determination enquiry has to be conducted by the court only, in accordance with Section 7A of the JJ Act and Rule 12 of the Delhi JJ Rules, 2009. Where, in the opinion of the Magistrate, the accused is patently (from the physical appearance or otherwise) below 18, the court shall immediately transfer the child to observation home and order production of the juvenile before the JJB concerned. In other cases, the inquiry has to be conducted by the court, and if the accused turns out to be a juvenile, he shall be ordered to be transferred to observation home the same day and if person has turned an adult on the date of such order, in that case, to a place of safety. As per the Delhi JJA Rules, the documents forming basic input for age enquiry are:

- Date of birth certificate from school first attended (not the play school), and in absence whereof;

³⁶ Section 357A(6) of the CrPC

³⁷ Section 158(6) Motor Vehicles Act, as amended in 1994. Detailed guidelines passed in : Rajesh Tyagi v. Jaibir Singh, 1 (2010) ACC A SC

³⁸ Black's Law Dictionary, Sixth Edition, p. 1114 - **Parens patriae**. "Parens patriae," literally "parent of the country," refers traditionally to role of state as sovereign and guardian of persons under legal disability, such as juveniles or the insane, State of W.Va. v. Chas. Pfizer & Co., C.A.N.Y., 440 F.2d 1079, 1089, and in child custody determinations, when acting on behalf of the state to protect the interests of the child. It is the principle that the state must care for those who cannot take care of themselves, such as minors who lack proper care and custody from their parents

- Birth certificate by corporation/municipal authority or a panchayat;
- Matriculation or equivalent certificates, if available;
- And only in the absence of above – medical board, who shall, in case age cannot be ascertained with exactitude, give the benefit of one year to the accused on the lower side, and give an opinion; the court to declare juvenility on the basis of this. Order once made is conclusive on the point.

Contrary to popular misconceptions, an age inquiry, envisaged under the act, is a summary inquiry to be completed within 30 days³⁹ and not a full blown investigation or trial. Oral evidence need not be recorded to arrive at a finding. Lengthy examination/cross examinations are also out of the question, unless of course, a vexed question of fact arises. The input for such an inquiry may be prima face opinion on the basis of documents.⁴⁰

Experience has shown that in many cases, investigating officers would deliberately state the age of the accused to be above 18 years in order to defeat the benevolent provisions of the Juvenile Justice Act. To counter this, the Delhi High Court⁴¹ has directed that : in case of person arrested being within 18 to 21 years of age, the Investigating officer of the case of the case has to mandatorily prepare an age memo and collect proof regarding the age of the accused, and court also has to conduct an age inquiry in such cases, if juvenility is pleaded. The copies of such age memo have to be provided by the IO to accused, his/her family members and officials of DLSA (District Legal Services Authority), giving them an opportunity to contest the finding.

STAGE – III – Magisterial interventions while deciding applications for recording of statement u/s 164 of the Cr.P.C/Test Identification Parade, and the like.

While recording statements u/s 164 of the Cr.P.C

Recording of Statements of the witnesses is a vital part of the investigation. This not only allows an investigator to come to a finding, but also captures the testimony of the witness, when the same is still fresh and unsullied. However, the code reflects a palpable distrust of police officers in the matter of impartial recording of statements. Statements recorded by the Police Officers during investigation are inadmissible in evidence, except in limited cases where it can either be used as a Dying Declaration or only insofar as it leads to a recovery. ⁴² These statements, however, can be used for contradiction and cross examination of the prosecution witnesses, at the time of trial.

However, Section 164 of the CrPC does permit recording of the testimony of a witness before the Magistrate, during investigation. This statement, though not a substantive piece of evidence, can be used at trial to corroborate or contradict the substantive testimony of the witness at the time of trial.

³⁹ Rule 12 of the Delhi JJA Rules, 2009

⁴⁰ Ashwani Kumar Saxena v. State of M.P (2012) 9 SCC 750.

⁴¹ Court on it's own motion versus Dept of Women and Child Development &Ors – WP(c) 8889 of 2011, Date of Decision – 11.05.2012

⁴² Section 162 of the CrPC.

In India, the statement u/s 164 of the CrPC is recorded by the same Magistrate who goes on to conduct inquiry or trial, or his link Magistrate (In Delhi). In contrast to this, in the French system, the statements of the witnesses are recorded by an 'Examining Magistrate', a judge who carries out investigation and also arranges prosecutions. The conception of a Magistrate under the French System will be dealt in greater details in the following paras.

Coming back - Under the present code, Section 164 allows recording of statement of witnesses & confessions by the magistrate. The statement of witnesses under this section is recorded on oath. The underlying objective is to preserve evidence, get an account of the testimony of the witness at the first instance (while it is still fresh), and to prevent retraction of testimony at a later stage. Another upside of a statement recorded u/s 164 of the Cr.P.C is that the same can be used for corroboration of the witness's testimony at trial⁴³, thereby strengthening the veracity of prosecution case. Applications for recording of statement of witness u/s 164 Cr.P.C are usually filed by the prosecution/IO. In **Jogendra Nahak**⁴⁴ - the Supreme Court has held that - all and sundry cannot approach the magistrate for the recording of their statement u/s 164 and any witness, unsponsored by the IO/prosecution, cannot seek to get his examination recorded u/s 164 Cr.P.C.

However, this view which has held primacy for long, can be taken to have been statutorily diluted in cases concerning crime against women⁴⁵. The amended Section 165(5A) of the Cr.P.C casts a duty on the magistrate to record the statement of the persons against whom such offence is committed, as soon as the commission of the offence is brought to the notice of the police., and this obligation is not contingent on the IO moving an application to that effect. In this regard, it would be incumbent on the area magistrate to be cognisant of such situations and pass the necessary orders to ensure examination of the witness promptly in such cases. Although, there is no direct decision on this point yet, however, on a purposive reading, the new amendments can be read to have carved out an exception to the rule of sponsorship of witness as a pre-requisite, in cases of women complaining of sexual assault, whose statement can be recorded even without sponsorship by the IO. However, the magistrate ought to be extremely careful as regards the identity of the witness/complainant before proceeding to record the statement.⁴⁶ This ensures that in a case of apathy of the IO to the case, the magistrate is not to remain a mute spectator and ought to record the statement himself.

Another exception has been carved out by the Supreme Court in **Mahabir Singh**⁴⁷ to the effect that : an accused can approach the court with a request for recording of his confession, however in that situation also, the magistrate has to ensure his identity as the accused and also the fact that investigation into that offence is currently underway, otherwise such statement shall not amount to a statement 'in the course of investigation' and, therefore, not a valid statement within the meaning of Section 164 of the Cr.P.C.

⁴³ Section 157 of the Evidence Act

⁴⁴ Jogendra Nahak v. State of Orissa (2000) 1 SCC 272

⁴⁵ Sections 354, 354A to D, 376, 376A to E, 509 of the IPC

⁴⁶ Ajay Kumar Parmar v. State of Rajasthan (2012) 12 SCC 406

⁴⁷ Mahabir Singh v. State of Haryana, AIR 2001 SC 2503

The safeguards in place to ensure the voluntariness of a confession/statement made before the magistrate are too well established to be reiterated. However, there are certain cases that deserve extra care and caution : for instance, in cases of rustic/illiterate and other vulnerable witnesses, the magistrate is duty bound to cull out the truth from the witness by asking the relevant questions.⁴⁸ In cases of child victims, the statement ought to be recorded in the special child witness/vulnerable witness room, away from the grim dynamics of the court. The magistrate can also take the aid of visual guides/diagrams and anatomically correct dolls with a view to ensure that the young witness, who might not be articulate or possess an adult vocabulary, is able to communicate and explain as to what happened. POCSO⁴⁹ also envisages the presence of a parent/support person with the victim at the time of recording of statement. It also permits the services of a special educator/interpreter/translator to aid the judge to understand and record the statement better.⁵⁰ Wherever possible, the magistrate must direct the IO to make the necessary arrangements for video recording of the statement. The expectation, therefore, is of utmost sensitivity and responsiveness while recording the testimony of a vulnerable witness, being alive to the trauma & stigmatic impact that the witness has undergone. ⁵¹

Bond by witnesses

Usually, statements of the witnesses are recorded u/s 161 of the CrPC, which have no evidentiary value. The statements of the witnesses are to be recorded at trial to be considered in evidence. Usually, recording of evidence commences a long time after investigation. Very often, problems are faced securing their appearance before the court. Only seldom IOs get the witnesses to execute bonds of appearance before the court. Provisions of Section 171 of the CrPC, in this regard, are observed in their stark disregard. Intervention to this effect by the Magistrate would be extremely useful, and would go a long way in ensuring witnesses presence at the time of trial.

Test Identification Parade

While entertaining a request for the conduct of TIP, the Magistrate has to bear in mind that the accused is produced before him in a muffled face and his identity has not been disclosed to the witness directly or through the media. The consent of the accused is required to be obtained before the conduct of TIP and by consent, it goes without saying that it should be an '*informed consent*', after an opportunity to consult his lawyer. In case of no consent, an adverse inference may be drawn against the accused, however, that is a matter of trial before the concerned court and not for the magistrate to consider at that moment. The magistrate has to ensure that the accused or his photograph has not been shown to the witness before the conduct of TIP so as to influence its result. A frank question in this regard to the witness before the conduct of TIP shall go a long way in checking false TIPs, which may be stage managed by the police.

⁴⁸ R.Shaji v. State of Kerala (2013) 14 SCC 266

⁴⁹ Section 25 of the POCSO, Section 164(5A) in cases of women victims of sexual assault.

⁵⁰ In such cases the video recording of the statement is mandatory as per the mandate of Section 164(5A)(a) 2nd proviso

⁵¹ See Exhaustive guidelines for various stakeholders with respect to vulnerable witnesses, laid down by the High Court in Virender v. State of NCT of Delhi (Crl. A.No. 121/2008 - Date of Decision : 29.09.2009)

The Magistrate should also ensure legal representation and informed consent of the accused in cases where handwriting/signature specimens or conduct of narco-analysis is sought by the police, for the purposes of investigation.

Magistrate and Witness Protection.

Witnesses disappearing or turning hostile is a major stumbling block in successful criminal justice administration. The need for a specific witness protection legislation has been sorely felt for many years. Pursuant to the repeated directions of the High Court of Delhi with respect to a law to this effect, the Delhi State Government has notified the 'Delhi Witness Protection Scheme, 2015'. Under the scheme, witnesses are categorised under three categories, depending on the threat perception. The Delhi State Legal Services Authority has been appointed as the competent authority for the implementation of the scheme. As per the scheme, the witness facing a threat is required to file an application for protection before the Ld.Member Secretary/Officer on Special Duty, DSLSA, which has to be routed through the Prosecutor. However, the Magistrate too, has a vital role to play in this. The Magistrate establishes a direct dialogue with the witness at various stages of the investigation; therefore, in appropriate cases, where there is sufficient cause to believe that a threat to the witness exists, there is nothing that prevents the Magistrate from referring the case to the DSLSA for consideration under the scheme, even *sans* a formal application. The witnesses's oral request may be treated as an 'application'. Considering the fact that most witness are laypersons, without adequate legal advise and knowledge as to their rights, this latitude will go a long way to serve the spirit of the scheme.

STAGE – IV – MONITORING OF INVESTIGATION

Apart from the magisterial interface with the investigation, as discussed above : The question as to how a case has to be investigated has been traditionally considered to be the sole prerogative of the investigating officer, premised on (the now defunct!) ideals of formalistic separation of powers. The dangers of unfettered power and insulating investigation from court's vigil have already been demonstrated in the introductory paragraphs of this paper.

Such anachronistic notions of a passive magistrate have taken a thorough beating over the last couple of years and the definitive shift towards a more inquisitorial and participative system is clearly discernible. The argument that there is no provision in CrPC that allows the magistrate to monitor an investigation has been debunked by the Supreme Court conclusively in ***Sakiri Vasu***⁵² wherein such power has been read within Section 156(3) of the CrPC. It has been held that the power to direct investigation u/s 156(3) of the CrPC is wide enough to include all such powers in a Magistrate which are necessary for ensuring a proper investigation. Therefore, in appropriate cases, the victim, complainant or a witness can approach the court seeking necessary directions to the police and supervision of investigation.

⁵² *Sakiri Vasu v. State of U.P* (2008) 2 SCC 409. (Note on position post *Sakiri Vasu* -The correctness of *Sakiri Vasu* was subsequently questioned by the Supreme Court in *Nirmal Singh Kablon* (2009) 1 SCC 441 by saying "correctness whereof is open to question", however since the matter was not referred to a larger bench for reconsideration and no reasons given as to why *Sakiri Vasu* was not acceptable - *Sakiri Vasu* still holds field and has since been endorsed by a catena of judgments including *T.C.Thangaraj vs V.Engammal & Ors* (2011) 12 SCC 328.

This reflects a definitive shift in the perception of a magistrate and recognition of his social function. The fact that he ought not to remain a mute spectator to the distortions and inadequacies of investigations, but make meaningful interventions. At the same time, the magistrate ought to desist from investigating himself, as in the system we have adopted in India, the same magistrate often conducts the trial. However, the magistrate is empowered to monitor the investigation, with a view to ensure that it is free and fair.

The exact import of word '*monitoring of investigation*' is too circumstantial to be put in a straitjacket. Placing a narrow interpretation on the phrase will render it sterile. The phrase, therefore, ought to receive a social context or liberal interpretation. Illustrative cases, where the power to pass necessary directions may be used are : to protect witnesses, check disregard of vital evidence (which may get obliterated in course of time), non-examination of witnesses, deliberate shielding of some accused, or the investigating officer being interested in the case. In such cases, a magistrate ought to push the envelope and actively monitor the investigation, while avoiding investigating himself, or directing investigation by a specific agency, with respect to which there is a specific embargo on the powers of the magistrate.

Monitoring of investigation by the magistrate is, therefore, of vital importance to protect the integrity of prosecution. In this regard, the Magistrate has to walk a tightrope and balance, on one side - the separation of executive from judiciary and the investigative autonomy of the police and on the other, the imperatives of a fair, free and impartial investigation and to ensure that the search for truth is not muddied by police lapses, whether innocent or blameworthy.

The Malimath Committee had recommended that a provision on the following lines be added immediately below Section 311 of the CrPC :

Power to issue directions regarding investigation

“Any court shall, at any stage of inquiry or trial under this Code, shall **have such power to issue directions to the investigating officer to make further investigation or to direct the Supervisory Officer to take appropriate action for proper or adequate investigation so as to assist the Court in search for truth.**”⁵³

The above amendment remains elusive. Similarly, amendments to Section 482 of the CrPC so as to acknowledge ‘inherent powers in the trial court’ to pass any orders to do complete justice, have also remained on the paper. However, even *dehors* these amendments, there is nothing that prevents the court from reading this ‘pursuit of truth’ within the existing framework and more particularly, within Section 156(3) of the CrPC.

Comparison of the Indian Magistrate with the French System of Juge d’instructions’

Any analysis of the role of a Magistrate cannot be complete without a comparison with the extraordinary role of a Magistrate in the French System. France’s investigating magistrates, or *Juge d’instructions*, as they are called in french, have been a central pillar of the french criminal justice system for the last 200 years. Under the French System - Investigation in respect of serious and complex offences is done under the supervision of

⁵³ Malimath Committee on Reforms in Criminal Justice System, 2003. Available at : http://www.mha.nic.in/hindi/sites/upload_files/mhahindi/files/pdf/criminal_justice_system.pdf

an independent judicial officer, who for the purpose of discovering truth : collects evidence for and against the accused and then decides whether the accused ought to be tried or not. In case of there being adequate material, the matter is forwarded for an adversarial trial by jury.

The institution of a *juge d'instruction* was made in the mid 19th Century. *Juges* are appointed by none other than the President himself - for fixed three-year terms (which are renewable) upon the recommendations of the Ministry of Justice. The *juge d'instruction* commences investigation on either a referral by the prosecutor or on a private complaint. Once the *juge d'instruction's* is seized of the matter : even the accused gets right to all the documents and evidence collected during the investigation, and the right to be assisted by a counsel throughout the investigation. In contrast to this, in a strictly adversarial system - such as ours, the accused has little role to play in the investigation. The Investigating officers usually collect only incriminating material, totally disregarding exculpatory material. The accused does not get to participate in the investigation process, till the filing of the police report, and not even thereafter, strictly speaking, as even upto the stage of charge, he cannot adduce any evidence of his own to assist the court. He can only address submissions, punch holes, and expose intrinsic infirmities in the case of the prosecution. This results in the court having a totally one sided view of the case, atleast till the stage of charge. This also results in a warped investigation; as much of what the accused can possibly rely on, is lost. This is especially problematic having regard to the fact that : most accused persons have little investigative prowess compared to the state, and by dictates of logic - a negative (innocence) is always more difficult to be proved than a positive (guilt).

Coming back to the institution of *Juge d'Intruction*, To assist fact finding, *juge* has a wide range of powers available. He may issue search warrants and order seizure of property. He also may issue warrants requiring attendance of other witnesses; he may even require experts to testify. Infact, if there is a conflicting testimony, witnesses are confronted with each other and often with the accused. This exercise is not done, in an adversarial system, till the recording and appreciation of evidence, which is usually- years after the actual occurrence and when the recollection of the incident is allowed to be muddled.

The evidence collected and the testimony of witnesses recorded - make up what is known as a 'dossier of a case', which serves as a guide for the *juge* in the preliminary hearing in the court. It is also made available to the defence, so that the element of surprise, so prevalent in common-law trials, is eliminated from the main hearing. It is on the strength of this file that the *juge d'instruction* bases his decision as to whether to commit a case to trial. The trial is conducted by another judge or the jury, which allows a fresh set of eyes to evaluate the evidence collected.

The institution of *Juge d' instruction'* has been instrumental in unearthing many large scale political and financial scams by their incisive and fearless investigations, especially against the high and the mighty. On account of the legendary role played by them, these investigating magistrates have been immortalised in french literature and films. French Novelist Honore de Balzac once described a french examining magistrate as the 'most powerful man' in the country. The *juges* are known for being impartial and objective and their services are invoked in the most complicated of all cases. Expectedly, by their dauntless and rather unsparing investigations, the institution has ruffled a lot of feathers and there is a definitive attempt on the part of the powerful in France - to clip their wings. This has also succeeded in a fair measure as investigating magistrates today handle less than five per cent of all cases, however, most of these cases are sensitive. This constant dilution of their powers has been opposed by many in France as a major step backward for

individual liberties. It has also been argued that the move will leave nation's legal process tenuous, broken and vulnerable to political manipulation.

It will be naive to suggest that the institution of examining magistrates is devoid of imperfections. An inquisitorial system is not at all infallible. An apt illustration will be - Albert Camus' famous work - 'The Stranger', where an examining magistrate allows extremely prejudicial past character evidence (which ought to have been excluded) and societal retribution to creep into the trial against the defendant. Where : in a trial for Murder of an assailant, evidence was allowed to show that the defendant did not believe in god; Evidence was also allowed to the effect that the accused displayed a lack of emotion/grief at his mother's funeral some months back. Strangely, this fact was allowed to be led in evidence to prove his guilt in a totally unrelated murder case.

One more opposition to the french model is that : there is no constitutional right of *habeas corpus* in France. Investigating magistrates have a right to keep suspects in detention for extended periods of time without trial.

It is also argued that the 'examining magistrate' system is also less effective in ordinary crimes. It is slower and sometimes chokes the system; it is relatively more opaque and the concentration of power in one magistrate sometimes leads to arbitrariness in exercise thereof.

Having said this, the Inquisitorial system has certain undeniable advantages. It can be used to avoiding misunderstandings at an earlier stage in the case. In addition to this, in an inquisitorial system - 'truth seeking' is the fundamental value, and the very 'end' of the system. This is contrast to the Adversarial system, where by competing to prove one's case to the judge - parties are encouraged to win, not uncover the truth. This can lead to unnecessary complications during the trial and more technical objections. Truth seeking is lost somewhere in this dialectic clash, which is seldom played by the rules. Such a passive system, also ends up rewarding the better lawyer and not the more truthful case.

Relatively, Trial procedures in this non-adversary model are simpler, less technical, and less lawyer dominated than in the adversary model where a complex system of evidentiary and procedural rules governs the parties' judicial duel.⁵⁴

It is undeniable that the move towards a more pro-active and participative magistracy, on the lines of the examining magistrate is the need of the hour. Incidents of transgression of power will not be common-place, and in any event, a magistrate can be credited with greater objectivity than the average investigating officer. The argument of possibility of bias creeping in is not very convincing as bias can never be completely ruled out as long as investigation is done by any human agency. However, a judge's very training gives him atleast some amount of transcendence and objectivity; although - aberrations are always there.

Therefore, on a juxtaposition of the two systems. Both have certain advantages and concerns. But on a fair analysis - the trade of should not be difficult; The benefits of a more inquisitorial approach far outweigh the pitfalls. Across the world - there is a move towards more involved and less passive legal systems. Within the Indian Legal Framework - these benefits can be achieved with the expansion, or atleast better use of Section 164 of the

⁵⁴ Edward A. Tomlinson, Nonadversarial Justice: the French Experience, 42 Md. L. Rev. 131 (1983)

CrPC - wherein statements of more material witnesses are recorded before the Magistrate during investigation, more proactive use of S.156(3), inclusion of powers to pass specific directions to the Investigating Officers, with a view to aid the search of truth - as recommended by the Malimath Committee and saving of inherent powers with the trial court. This paper is an attempt to demonstrate that all this can be achieved, atleast in a fair measure, within the existing judicial framework.

Stage – V – Further investigation after filing of police report

Magisterial vigil does not terminate on the filing of the police report on the conclusion of the investigation and the court is not bound to accept the results of an investigation conducted by the police. In the case the police concludes that no case is made out against the accused, the Magistrate has to issue a notice to the informed/victim and hear him out.⁵⁵ After hearing the informant, the court can, notwithstanding the closure report, choose to proceed with the matter, as a case based on police report or even a prior complaint.

The third option available is ordering further investigation. Section 173(8) of the CrPC expressly lays down such a course of action. However, the section does not enlist considerations that will govern the exercise of such power. Illustrative cases where further investigation may be ordered are : where the police acts in a partisan manner to shield the real culprits and the investigation has not been done in a proper and objective manner but is tainted⁵⁶, non-examination of crucial witnesses, clearing of doubts and to substantiate the prosecution case. To conduct fair, proper and an unquestionable investigation is the obligation of the investigation agency and the court in its supervisory capacity is required to ensure the same.⁵⁷

Having said that, further investigation is to be distinguished from re-investigation or a de-novo investigation, which is not permissible. In cases where vital evidence has been disregarded by the police, the court can order further investigation into that aspect. The result of the further investigation is called a 'supplementary report' and can supplement the primary police report, already on record.⁵⁸ The earlier investigation is not wiped-off from the record and the subsequent investigation only supplements the earlier investigation.

The magistrate also cannot order a further investigation by a different agency (agency other than the original investigating agency) either, as that will amount to re-investigation. Only the higher courts have the power to order reinvestigation by a different agency, such as the CBI.⁵⁹ Having said that, in such cases, the Magistrate is not powerless, if the magistrate suspects foul play in investigation, he can always pass orders for senior officers to supervise the investigation personally and file periodic compliance reports, in a process akin to a continuing mandamus.

⁵⁵ Bhagwant Singh v. Commissioner of Police and Another, AIR (1985) SC 1285; Gangadhar Janardan Mhatre v. State of Maharashtra and Others (2004 7 SCC 768)

⁵⁶ Kashmeri Devi vs. Delhi Administration and others, AIR 1988 SC 1323.

⁵⁷ Vinay Tyagi v. Irshad Ali, (2013) 5 SCC 762.

⁵⁸ Vinay Tyagi (supra)

⁵⁹ Chandra Babu versus State, (2015) 8 SCC 774.

However, this has to be hedged with a caveat that : this power ought to be exercised sparingly, since the judge is also vested with inquisitorial powers as engrafted u/s 165 of the Evidence Act, and Sections 91 & 311 CrPC - that allow a judge to seek any information necessary to obtain proper proof of relevant facts and to seek production of vital evidence, examination of witnesses - not a part of prosecution or defence case, if the same is essential for a just decision of the case.

The power of further investigation, it must be remembered, can be exercised even suo motu⁶⁰, and even after taking of cognizance⁶¹ - to ensure that no crucial aspect of the case goes investigated and subsequent facts are brought to the fore.

Conclusion

“Trial judge as the kingpin in administration of Justice..”⁶²

It is apparent that ample powers are vested in the magistrate to check arbitrary arrests, police excesses & to facilitate a more incisive probe into the discovery of truth, at various stages of an investigation, and even after filing of the police report. Never should a judge find himself in a situation where he has to make a grudging confession of acquitting a known culprit due to lack of evidence or investigative lapses. A conscientious magistrate's Dharma also lies in the deft use of these provisions, in order to uphold constitutional values and the Rule of law, and in this he ought not to hesitate in recalibrating the scales of justice and even protectively discriminating to correct systemic asymmetries & disadvantages towards the weaker accused, witness or the complainant. Existing provisions can be interpreted creatively. Cues can be taken from the magisterial role, as envisaged in other jurisdictions. No doubt, there would be questions raised over the magistrate having descended into the arena. But the magistrate ought to not to be unnecessarily wary of such aspersions; or be a worshipper of dead habit, convention, or the complacency of the status quo, for no ideals, howsoever hallowed, can be allowed to impede the voyage of discovery, an affirmative duty for the search of truth.

⁶⁰ Vinay Tyagi (supra)

⁶¹ Kishan Lal v. Dharmendra Bafna, (2009) 7 SCC 685 at page 693

⁶² All India Judges Association v. Union of India (1992) 1 SCC 119