

ROLE OF MAGISTRATE UNDER THE CRIMINAL JUSTICE SYSTEM IN INDIA

-Bhavana Rao¹

1. INTRODUCTION

The Magistrate is an important functionary under the Criminal Justice System. In India the Code of Criminal Procedure gives each functionary a specific set of powers to execute in order to complete the process down through a cognizance of a crime to the process of punishing the guilty. Investigating into the crime is the function allotted to police. However the magistrate acts as both a guard to protect the unscrupulous functionaries from torturing the accused or the victims, as well as plays an important role in the investigation process.

This paper aims at understanding the role assigned to the magistrate under the Indian Criminal Justice System. The work will begin by an understanding of what investigation is, and the meaning assigned to terms like magistrate, investigation and inquiry. Then there will be a detailed analysis of the provisions under the Code of Criminal Procedure to decipher the role the magistrate plays in the process of investigation, and the synergy which is maintained between the State on the one hand and the Judicial wing on the other, in order to avoid any miscarriage of justice by having a thorough system of checks and balances in place.

All power is, in Madison's phrase, corrupting and absolute power corrupts absolutely. This statement aptly fits our objective of understanding the limitations and powers of the functionaries under the Criminal Justice System. The focus of this paper will be primarily the role a magistrate plays under the Indian Criminal Procedure.

2. INVESTIGATION: MEANING AND SCOPE

"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 authorized by a Magistrate in this behalf."²

The purpose of any criminal justice system is to get justice to the victim as well as a person who may have been wrongly accused. Investigating into the crime plays an important role in meeting this objective. And this is thus one of the crucial processes of any criminal procedure. Investigation involves designated functionaries under the criminal justice system to investigate into the crime at various levels.

Cr.P.C. lays down the powers and procedures by which the police is to conduct investigation. The main functionary is the police that works at the ground level to find out the truth of an offence and is involved with the survey of the crime scene and the examination of accused and the witnesses among other things. Ultimately the investigation, detection and apprehension of the criminal, effectually serves to curtail recidivism thereby reducing overall crime.³

Investigation involves the following procedures like "Recording of FIR and sending FIR to Court, Examination of the crime scene Inquest proceedings, Examination of witnesses and summoning of documents, Recording of confessions/statements before Magistrate, Forensic examination/post mortem/expert's evidence, Medical examination of accused persons/ prosecutrix, Search and seizure, Arrest, Recovery."

In some cases⁴ there can be preliminary investigation *ahead of a registration of First Information Report*⁵

¹ Assistant Professor- Selection Grade, University of Petroleum and Energy Studies, Dehradun.

²S.2(h) of the Code of Criminal Procedure, 1973

³ Charles M. Alifano, "Fundamentals of criminal investigation", worldwide law enforcement consulting group, available at www.worldwidelawenforcement.com (Visited on 19/02/2014)

⁴*Lalita Kumari v. Govt. of U.P* [W.P.(CrI) No; 68/2008]

⁵A Constitution Bench of the Supreme Court in *Lalita Kumari v. Govt. of U.P* [W.P.(CrI) No; 68/2008] held that registration of First Information Report is mandatory under Section 154 of the Code of Criminal Procedure, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation. If the information received does not disclose a cognizable offence but indicates the necessity for an inquiry, a preliminary inquiry may be conducted only to ascertain whether cognizable offence is disclosed or not.

At the conclusion of the investigation, the investigating agency is to submit a closure report or a police report/charge sheet. The investigation of a case punishable with death, imprisonment for life or a term of not less than ten years, is to be completed within a period of 90 days from the date of the arrest of the accused person, or in case of any other offence, within 60 days from the date of arrest. If the charge sheet has not been filed within this period, the person may be released on bail.

3. WHO IS A MAGISTRATE

According to the dictionary meaning a magistrate is a civil officer who administers the law, especially one who conducts a court that deals with minor offences and holds preliminary hearings for more serious ones. However a magistrate can be a judicial magistrate or an executive magistrate in India.

A **Magistrate**⁶ is an officer of the State. In contemporary practice, the expression more often than not refers to a judge. In ancient Rome, a *magistrate* was one of the chief government officers and possessed judicial and executive powers. In common law systems, a magistrate has limited law enforcement and administration authority. In civil law systems, a magistrate might be a judge in a superior court; the magistrates' court might have jurisdiction over civil and criminal cases.⁷

4. THE MAGISTRATE IN INDIA

The importance of lower judiciary is rightly explained by Chief Justice of India, Sathasivam in a speech delivered in Tamil Nadu State Judicial Academy for the Newly Recruited Civil Judges and he says

Criminal Justice reflects the responses of the society to crimes and criminals. The key components engaged in this role are the courts, police, prosecution, and defence. Administering criminal justice satisfactorily in a democratic society governed by rule of law and guaranteed fundamental rights is a challenging task. It is in this context that the subordinate judiciary assumes great importance.⁸

The Constitution of India talks about right given to the accused to be produced before the magistrate within 24 hours of his arrest. Justice Bhagwati in a case sums up the importance of Art 22 clause 2 as follows:

This healthy provision enables the magistrates to keep check over the police investigation and it is necessary that the magistrates should try enforcing this requirement and where it is found disobeyed, come down heavily upon the police... There is however, no obligation on the part of the magistrate to grant remand as a matter of course. The police have to make out a case for that. It can't be a mechanical order.⁹

5. CATEGORIES OF MAGISTRATES

There are four categories of magistrates in Judiciary of India. This categorization is specified in the Criminal Procedure Code, 1973 (Cr PC). It does lay down that in each Sessions district, there shall be:

- A Chief Judicial Magistrate
- Judicial Magistrates First Class,
- Judicial Magistrates Second Class, and
- Executive Magistrates

Chief Judicial Magistrate includes Additional Chief Judicial magistrates also. There is a Sub Divisional Judicial Magistrate (SDJM) in every Sub Division, although he is technically only a Judicial Magistrate First Class (JMFC). Judicial Magistrates can try criminal cases. A Judicial Magistrate First Class can sentence a person to jail for up to three years and impose a fine of up to ₹5000. A Judicial Magistrate Second Class can sentence a person to jail for up to one year and impose a fine of up to ₹1000. Further, the code of Criminal Procedure delineates the powers of the judicial officers and magistrates at different stages. It can be understood by examining the process of investigation in the next section.

6. THE PROCESS OF INVESTIGATION

According to Black's law dictionary¹⁰ the term Investigate means: "to inquire into the matter systematically; to make (a suspect) the subject of a criminal inquiry, to make an official inquiry"

According to Oxford shorter English Dictionary¹¹, the term Investigation means, the action of investigating; search inquiry; systematic examination; minute and careful research.

7. DIFFERENCE BETWEEN INQUIRY AND INVESTIGATION

The purpose and object of inquiry and investigation appear to be similar; however there are certain fundamental differences in between the two.¹²

⁶The meaning in general understanding referred to across jurisdictions in a casual way.

⁷ <http://en.wikipedia.org/wiki/Magistrate> visited on 19/02/2014

⁸ Speech delivered by Chief Justice of India P. Sathasivam at Tamil Nadu State Judicial Academy for the Newly Recruited Civil Judges

⁹ *Khatri II v State of Bihar* (1981) 1 SCC 627

¹⁰ Bryan A. Garner, (ed.), VII, *Black's Law Dictionary*.

¹¹ William little, H.W Flower, (vol.1), *The Oxford Shortest English Dictionary on Historical Principles*

1. An inquiry is made by a magistrate or a court but an investigation is done by a police officer or any other person not being a magistrate or a court.¹³
2. An inquiry may be judicial or non-judicial but an investigation is never judicial.¹⁴
3. An inquiry begins with interrogation rather than by inspection, but an investigation represents an attempt to know the hidden facts.¹⁵
4. The purpose of inquiry is to determine the truth or otherwise of certain facts in order to initiate judicial proceedings, i.e., trial against the accused but the object of an investigation is to collect evidence.¹⁶

The process of investigation by Magistrate is initiated based on the kind of offence. So it is important to understand the offences in Cr PC. They are:

a. **COGNIZABLE AND NON-COGNIZABLE**

Section 2(c) of the Code of Criminal Procedure defines cognizable offence:-it means an offence for which, and cognizable case means a case in which, a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant.¹⁷

Section 2(l) of the Code of Criminal Procedure defines non-cognizable offence: - it means an offence for which, and non-cognizable case means a case in which, a police officer has no authority to arrest without warrant.¹⁸

b. **BAILABLE AND NON-BAILABLE**

Section 2(a) of the Code of Criminal Procedure defines bailable offence: it means an offence which is made bailable by any other law for the time being in force; Section 2(a) also talks of Non-bailable offence; it reads as, any other offence.

Thus the basic distinction between Bailable and Non-Bailable offence lies in the fact of right of the accused to claim bail, in bailable offence accused has a statutory right to claim bail, and even police authority is under an obligation to inform the accused that he can be released on bail, and on the contrary in Non-bailable offence, accused does not have a statutory right to claim bail, it is the discretion of the court to grant bail. However under section 167(2) there is a provision for claim of default bail in Non-cognizable case.

The role of magistrate varies depending on the type of offence.

Also a magistrate has a role to play in two stages:

1. A **pretrial** phase of investigation
2. An investigation **during trial**

The pre trial phase can be looked at from the point of view of Registration of FIR, the grant of Bail, the production of an accused before the magistrate within 24 hours of the arrest, medical inspection of victims and accused, the recording of statements and dying declaration, detention and police custody. There is also an investigation which may be called a further investigation or a reinvestigation ordered by the magistrate as the case may be during the process of trial.

5. TRIAL COURT AS THE MOST APPROPRIATE FORUM

In many cases the courts have maintained that the Trial court is the most appropriate forum to go to in case of grievances related to investigation. Though there are provisions in the Cr PC where an accused can go to the High Court or the Supreme Court as the case may be, it is the trial court and the magistrate at the lowest level who has a good knowledge of a case in hand which is being investigated. Sections related to Investigation under Chapter XII of the Code of 1973 given in Table 1¹⁹.

Table 1

Section	Content

¹² Dr. N V Paranjape, *Code of Criminal Procedure*, 8-9 (Central Law Agency, Allahabad, 4th ed., 2011)

¹³*Ibid*

¹⁴*Ibid*

¹⁵*Ibid*

¹⁶*Ibid*

¹⁷S.2(c) The Code of Criminal Procedure, 1973

¹⁸S.2(1) The Code of Criminal Procedure, 1973

¹⁹ <https://old.amu.ac.in/emp/studym/99998646.pdf>

Section 154	Information in cognizable cases (First Information Report).
Section 155	Information as to non-cognizable cases and investigation of such cases.
Section 156	Police officer's power to investigate cognizable cases.
Section 157	Procedure for investigation.
Section 158	Submission of report.
Section 159	Power to hold investigation or preliminary inquiry.
Section 160	Police officer's power to require attendance of witnesses.
Section 161	Examination of witnesses by police.
Section 162	Statement of police not to be signed
Section 163	No inducement to be offered
Section 164	Recording of confession and statements.
Section 165	Search by police officer.
Section 166	When officer in charge of police station may require another to issue search- warrant
Section 166A	Letter of request to competent authority for investigation in a country or place outside India.
Section 166B	Letter of request from a country or place outside India to a court or an authority for investigation in India.
Section 167	Procedure when investigation cannot be completed in twenty-four hours.
Section 168	Report of investigation by subordinate police officer.
Section 169	Release of accused when evidence deficient.
Section 170	Cases to be sent to magistrate when evidence is sufficient.
Section 171	Complainant and witnesses not to be required to accompany police officer and not to be subject to restraint.
Section 172	Diary of proceedings in investigation.
Section 173	Report of police officer on completion of investigation.
Section 174	Police to inquire and report on suicide.
Section 175	Power to summon persons.
Section 176	Inquiry by magistrate into cause of death.

6. INVESTIGATION BY THE FUNCTIONARIES UNDER THE CODE²⁰ AND ROLE OF MAGISTRATE

According to the statutory definition of the term 'investigation' mentioned under section 2(h) of the Code of Criminal Procedure, it includes all the proceedings under the code for the purpose of collection of evidence conducted by police officer or by any person (other than a magistrate) who is authorized by magistrate²¹.

The distinction between cognizable and non cognizable offences demarcates the power of the police in respect of criminal investigation. With respect to cognizable offence police officer can investigate even without the order of the magistrate but has a limitation upon the power of the police in accordance with the provisions of section 157, that the police has to send a prior report, however in case of non-cognizable offence police has no power to investigate into the matter without the prior sanction from the magistrate.

²⁰ Dr.K.N Chandrasekharan Pillai, *R.V.Kelkar's Criminal Procedure* (Eastern book company, Lucknow, 5th Edition 2008.,)

²¹S.2(h) The Code of Criminal Procedure, 1973

Investigation into cognizable case: Cognizable offence is one which is generally considered to be serious in nature and that's the reason police authority has been given power to investigate into cognizable offence without the order of the magistrate.

Provisions relating to investigation into cognizable offence have been mentioned under section 156 of the code of criminal procedure; however the triggering point of investigation is section 154 of the code, which provides for registration or lodgment of FIR (First Information Report). But the most important aspect is that police officer has power to investigate into the matter even without registration of FIR, and such power comes from the very wordings of section 157 of the code. And also the Hon'ble Supreme court has laid down that where police has reason to believe regarding the commission of cognizable offence he can investigate into the matter and then register the FIR. But there still remains confusion as far as investigation is concerned and power of police to conduct preliminary inquiry with respect to registration of FIR.²²

156. Police officer's power to investigate cognizable case.

1. Any officer in charge of a police station may, **without the order of a Magistrate**, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XII.

2. No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.

3. **Any Magistrate empowered under section 190** may order such an investigation as above-mentioned.

Sub section (1) of section 156 confers wide powers on the police to investigate a cognizable offence without the order of the magistrate. This statutory right of the police to investigate cannot be interfered with or controlled by the judiciary²³. However if the FIR or other relevant materials do not prima facie disclose any cognizable offence, the police in that case have no authority to investigate.

The latter part of sub section (1) of section 156 determines the local jurisdiction of the police officer in charge of a police station to investigate cognizable offence. Such officer has power to investigate all such offences as would be triable under chapter XIII of the code by a court having jurisdiction over the local area within the limits of such police station. These rules contained in sections 177 to 189 would enable a police officer to investigate certain offences committed even beyond the local limits of his police station. According to sub section (2) of section 156, no one shall be allowed to raise an objection that the investigation done by a police officer was not empowered to investigate.²⁴

Investigation carried out by a Head constable who was the officer in charge of the police station would not be discarded.²⁵ Where investigation officer has filed the charge-sheet before the order transferring the investigation of the case was communicated to him, the charge sheet filed by him and the cognizance would not be illegal²⁶.

Where ASI not competent²⁷ to investigate a murder case conducts investigation of the case, in the absence of miscarriage of justice, trial would not be vitiated²⁸ According to sub section (3) of section 156 any magistrate empowered under section 190 can order a police officer in charge of a police station to investigate any cognizable offence. Section 190 provides that, subject to certain restrictions on taking cognizance in respect of certain offences, any magistrate of the first class, or any magistrate of the second class specially empowered in this behalf by the chief judicial magistrate, may take cognizance of any offence. A magistrate can order investigation under section 156(3) only at the pre-cognizance stage.²⁹ Usually it is for the police to register the case. However on perusal of a report the magistrate can order the registration of the case under section 156(3). However it is to be noted that magistrate has no authority to order investigation by an agency other than an officer in charge of a police station.³⁰

If magistrate is issuing process on the basis of the complaint, when the police report on the earlier complaint to them was received, was not proper. He ought to consider the police report as well.³¹ When a complaint is filed before the magistrate, instead of taking cognizance of the offence he may order investigation by police under section 156(3). When the magistrate initiates action under section 202, it is after taking cognizance that he issues process. It has been opined that if a magistrate has acted upon a complaint under

²²*Lalita Kumari v Govt of U.P.* Criminal Appeal No. 1410 Of 2011

²³*King Emperor v. Khawaja Nazi Ahmed*, AIR 1945 PC 18.

²⁴*State of Karnataka v. Chikkibala Naika*, AIR 2002, Kant HCR 2901.

²⁵*Id* at p.17

²⁶*Naushad Ali Siddqui v. State of U.P.*, 2006 Cri LJ 425 (NOC).

²⁷*Sic.*

²⁸*Murlidhar Singh v. State of Bihar*, 2008(1) Crimes 88 (pat).

²⁹*Tula ram v. Kishor Singh*, 1977 SCC (cri) 621

³⁰*State of Kerala v. K.M Haji* 1994 Cri LJ 1288 (ker).

³¹*Jagdish Ram v. State of Rajasthan*, 1989 Cri LJ 745

section 202, it may not be possible for him to send up the complaint to the police under section 156(3) for investigation.

In the case of *Randhir Singh Rana v Delhi admin*,³² the Supreme Court has held that a judicial magistrate, after taking cognizance of an offence on the basis of police report and appearance of the accused cannot order further investigation. Here the accused did not appear. Nor was he summoned. Hence the magistrate's sending the complaint again to the police was held proper. Before a magistrate directs investigation under section 156(3) he has to notionally decide that investigation by police is needed and inquiry by himself might not be sufficient. It has been suggested that the magistrate should be required to record reasons for his decision.³³

The power conferred upon the magistrate under section 156(3) can be exercised by the magistrate even after submission of a report by the investigating officer which would mean that it would be open to the magistrate not to accept the conclusion of the investigating officer and direct further investigation.³⁴

Section 155 of the code of criminal procedure, 1973: Information as to non-cognizable cases and investigation of such cases. When information is given to an officer in charge of a police station of the commission within the limits of such station of a non-cognizable offence, he shall enter or cause to be entered the substance of the information in a book to be kept by such officer in such form as the State Government may prescribe in this behalf, and refer the informant to the Magistrate. No police officer shall investigate a non-cognizable case without the order of a Magistrate having power to try such case or commit the case for trial. Any police officer receiving such order may exercise the same powers in respect of the investigation (except the power to arrest without warrant) as an officer in charge of a police station may exercise in a cognizable case.

Where a case relates to two or more offences of which at least one is cognizable, the case shall be deemed to be a cognizable case, notwithstanding that the other offences are non-cognizable. According to sub section 1 of Section 155 of the code, the police officer receiving information of a non-cognizable offence must enter the substance of it in a book kept in such form as the state government may prescribe and then refer the informant to the magistrate. The word "offence" includes an intended offence or offence imminently likely to take place.³⁵ According to sub section (2) of section 155 – a police officer must not investigate a non-cognizable offence without an order of the magistrate.

There is no section empowering a police officer to make a report in such a case without the orders of a magistrate.³⁶ The provisions of this sub section cannot be rendered nugatory by rendering police report as a valid report under section 190(1) (b) of the code. The provisions of section 155 of the code which require permission of the magistrate for investigation of a non-cognizable offence cannot be made applicable to prosecution of an accused for offence under section 138 of the Negotiable Instrument Act.³⁷

A magistrate cannot order investigation without jurisdiction. She cannot order investigation in a non-cognizable case wherever he wants. She should have both territorial jurisdiction as well as the power to try case.³⁸ If a police officer violates the provision of 155(2) by investigating into the crime without the permission of the magistrate, it may vitiate the proceedings and this situation leads to a consideration of violation of Article 21 of the Constitution.³⁹ However the invalidity of the investigation procedure cannot question the competence of the court unless there is miscarriage of justice.⁴⁰

Suppose an offence is cognizable on the date of investigation and non-cognizable otherwise that is, it was to be investigated into only with the permission of the magistrate, and then such offences can be considered cognizable and can be investigated into by the police.⁴¹ Legal fiction: if there are two offences, one cognizable and another non-cognizable, the offence in totality will be treated as cognizable due to a legal fiction imputed to the provision 155(4) and the police can assume that even the non-cognizable offence be treated as cognizable to investigate into.⁴²

However it will not be legal if the police had started investigating into a non-cognizable offence illegally and then a new offence is added up which is cognizable. Such second offence cannot be investigated

³² (1997) 1 SCC 361.

³³ *Suresh Kumar Gupta v. State of Gujarat*, 1997 Cri LJ 3948.

³⁴ *Ram Avatar v. State of Bihar*, 1986 Cri LJ 51 (pat).

³⁵ *Gulabsingh*, (1961) 64 Bom LR 274

³⁶ *King Emperor v. Sada*, (1901) 3 Bom LR 586

³⁷ *Abdul Halim*, AIR 1961 CAL 257

³⁸ *B K Gupta v State of W.B.* AIR 1976 SC 985

³⁹ *R M Rishbud v State of Delhi* AIR 1955 SC 196

⁴⁰ *Ibid*

⁴¹ *Bishwanath Saraf v State* 1978 Cri LJ 318

⁴² *Sukhevale Swapna Bai v State of A.P.* 2008 Cri LJ (NOC) 435 (AP)

into without the magistrate's permission and any investigation claiming that the offences can be grouped will be illegal and would not validate such investigation.⁴³

Order of the Magistrate for the purpose of investigation into the non-cognizable offence is mandatory in nature.⁴⁴ The investigation of a non-cognizable offence by the police without the permission of the competent magistrate is illegal, subsequent permission granted cannot cure the illegality.⁴⁵ In *Avinash v. State of Maharashtra*⁴⁶, the Bombay High court has held that investigation made in respect of a non-cognizable offence without the order of the magistrate is illegal and not curable under section 460 and 465 of the code of criminal procedure, 1973. Charge sheet filed without the permission of the court would be quashed. Where report has already been registered as non-cognizable one, subsequently any report or matter furnished by the informant discloses cognizable offence, the officer in charge is himself empowered to investigate the same, the order/permission of the magistrate would not be required.⁴⁷ Where a case is registered as a cognizable case, but after investigation is found as non-cognizable case, the bar of section 155(2) will not apply.⁴⁸

In *State of M.P. v Mubarak Ali*⁴⁹ the Supreme Court has categorically held that statutory safeguards must be strictly complied with, for they were conceived in public interest and were provided as a guarantee against frivolous and vexatious prosecution. According to sub section (3) of section 155 of the code, in non-cognizable offence, the police officer before arresting the **accused must obtain warrant under section 155 of the code, from the magistrate**, in the absence of which the remand of the accused would be illegal and set aside.⁵⁰

Once the order of the magistrate has been received, the officer in charge of the police station has same power as that in case of a cognizable offence to investigate into the matter.

Where the police force investigates into a non-cognizable offence without obtaining any order of the magistrate as required under this section and submits a report thereafter, the report submitted by the police officer shall be treated as complaint and the police officer shall be treated as complainant. Explanation of section 2(d) of the code. The Magistrate has power to direct investigation by the police in a non –cognizable case on the request of the private party or *suo motu* and not necessary at the instance of the police but it should not be taken to mean that in each and every such case, he may resort to this.

This power has to exercise sparingly and rarely in very special case. Sub section (4), is a new provision in the present code, it did not occur in section 155 of old code of 1898. It has been incorporated with a view to emphasize that if a case relates to two or more offences at least one of which is cognizable, it shall be deemed to be a cognizable case. Where during the investigation into a cognizable offence, a non-cognizable offence is also disclosed, the police may investigate into the latter offence also without the orders of a magistrate. Under the code of criminal procedure 1973, **magistrate has power to order for the investigation even by persons other than police officer.**

This alternative procedure is useful, particularly when the police officer, for one reason or the other are indifferent or likely to be indifferent towards the investigations, or are colluding with or shielding the offender. In such a situation the magistrate taking cognizance has power to direct an investigation to be made by person other than a police officer and such person shall have for that investigation all the powers conferred by this code on an officer in charge of a police station except the power to arrest without warrant. Provisions relating to investigation into the offence has been broadly mentioned under chapter XII of the code, comprising of section 154 to 176, the purpose is to secure speedy investigation because entire functioning of criminal justice system is based upon the investigation, and if delay is caused it does not only affect the prosecution but also create a ground for the accused to get clean out of it. Therefore each and every details pertaining to investigation is mentioned under chapter XIII is necessary required to comply with otherwise the very object of the investigation shall be defeated.

7. SYNERGY BETWEEN THE POLICE AND JUDICIARY

The functions of the judiciary and the police are complementary, not overlapping, and the combination of individual liberty with due observance of law and order is only to be obtained by leaving each to exercise its own function. This view has also been taken into consideration by the Supreme Court.⁵¹ However there exists a close relationship between judiciary and police during the course of investigation, and same is obvious through

⁴³*RupamDoel Bajaj v K P S Gill* 1996 Cri LJ 381 (SC)

⁴⁴*Manmatha Giri v. state of Orissa* 2002(1) Orissa 464 (466)

⁴⁵*M.L Das Tareja v. inspector of police, Borivali, Mumbai*, 2006 Cri LJ 462 (NOC).

⁴⁶ 1983 Cr.LJ 1833

⁴⁷*Brij Lal Bhar v. state of U.P* 2006 Cri LJ 3334 (All).

⁴⁸*Mailsami v. state*, 1994 Cri LJ 2238 (Mad).

⁴⁹ AIR 1959 SC 707

⁵⁰*J. Vanaraj v. State*, 2003(2) Crimes 326(mad).

⁵¹*State of West Bengal v. S.N Basak*, AIR 1963 SC 447

the various provisions of the code such as section 155(2), 156(3), 157, 158, 159, 164, 167.173, etc., but the important point is that judiciary cannot interfere with the investigation nor does it control it, however reasonable monitoring is allowed and the same has been confirmed by the supreme court in many occasions. From the above discussion one can briefly conclude that the process of investigation may start:-

1. By way of registration of FIR under section 154 of the code, or
2. Where the police officer has otherwise reason to suspect the commission of a cognizable offence, section 157(1) and 156(1), or
3. **Where the competent magistrate orders the police investigation.-**
 - i. **A non cognizable case{section 155(2)}**
 - ii. **By sending a complaint to the police under section 156(2)**
 - iii. **After taking cognizance of the offence on a complaint for the purpose of deciding as to the issue of process against the accused section 202(1) and section 203.**

It carries immense importance as far as administration of criminal justice system is concerned; it is on the basis of investigation either with or without permission of the magistrate the trial takes place, resulting into the acquittal and guilt of the suspected persons. Therefore every effort is required to be taken into consideration in accordance with the statutory provision so that the evidence collected during the course of investigation have in essence the truth. Unfortunately it has been observed in so many cases that police officer does not adhere to the timely investigation resulting into the delay in the proceedings. The same has been minutely observed by the law commission of India through its report and also come up with valuable suggestions in order to facilitate the better administration of justice.

8. DOES THE MAGISTRATE HAVE ONLY A SUPERVISORY ROLE TO PLAY?

The Magistrate under the code has been traditionally having a supervisory role and the courts hitherto have been emphatic in stating that the power is limited to supervision and not control.⁵² A writ jurisdiction can also not be invoked as a matter of due course to initiate the process of investigation.⁵³ Watching over an investigation in order to meet the ends of a fair trial is the purpose of this. However of late and more particularly from the 1990s there has been a shift in this arena and the courts have been talked about as those possessing more than the supervisory role envisaged in the code. The Magistrate or a court can validly interfere and give directions to the police or the investigating officers⁵⁴ under following three conditions:

1. When the police officer does not perform his/her statutory duty and does not proceed with an investigation in a particular period. In such cases the Magistrate can ask the officer in charge to produce an affidavit in court to the effect that the investigation is to proceed in a certain way. If he fails to do so he can be proceeded against under the Contempt of Courts Act.⁵⁵
2. If a person arrested is not produced before the magistrate within 24 hours of such arrest. In such cases the complaint can be addressed to the magistrate and he/she will issue orders addressing the complaint.
3. The investigation as to registration of FIR.

9. 41ST REPORT OF THE LAW COMMISSION OF INDIA

The law commission in its 41st report⁵⁶ has highlighted another important aspect of investigation that a magistrate should be kept in the picture at all stages of the police investigation, but he is not authorized to interfere with the actual investigation or to direct the police how that investigation is to be conducted. **This demarcation of functions between the police and the magistrate at the investigation stage has been clearly laid down by the Privy Council in Khawaja Nazir Ahmed case.**

Law commission in its 41st report has also highlighted the important aspect of section 159 of the code, which provides **power of magistrate to hold investigation or preliminary inquiry.** According to the report power under section 159 should be resorted by a magistrate only when he found that the police had desisted from investigation on insufficient grounds and felt that further investigation was likely to produce results.

Further law commission in its 154th report vol.1, submitted in the year 1996 has highlighted the loopholes in the investigation system and therefore expressed the view that the investigating agency should be distinct from the police staff assigned to the enforcement of law and order, however there is no requirement of absolute separation between the two branches. Law commission has further pointed out that even officers of the police department have taken the view that if an officer is entrusted with investigating duties, his services should not be required for other work while he is engaged in investigation. The separation of the investigating

⁵²Abhinandan Jha v Dinesh Mehra AIR 1968 SC 117 23

⁵³Kunga Nima Lepcha v State of Sikkim AIR 2010 SC 1671

⁵⁴T. C. Thangaraj v V. Engammal AIR 2011 SC 3010

⁵⁵Poovan v Sub Inspector of Police (1993) Cr. LJ 2183

⁵⁶Law Commission of India, 41st Report on Code Of Criminal Procedure, 1898 (September, 1969)

machinery may involve some additional cost, law commission further stated that the exclusive attention of the investigating officer is essential to the conduct of an efficient investigation and the additional cost involved in the implementation the purpose is necessary. The adoption of such a separation will ensure undivided attention to the detection of crime. It will also provide additional strength to the police establishment.

10. THE NATIONAL POLICE COMMISSION 4TH REPORT 1980⁵⁷

The National Police Commission in its fourth report bemoaned the lack of exclusive and single minded devotion of police official in the investigation of crimes for reasons beyond their control. The Commission on the basis of a sample survey conducted in six states in different parts of the country came to know the fact that on an average investigating officer is able to devote only 37% of his time to investigational work while the most of his time is taken up by other duties. In view of this observation the police commissioner has opined that there is urgent need to increase the cadre of investigating officers and for restructuring the police hierarchy to secure, inter alia a large number of officer to handle investigation work.

The Law Commission in pursuance of the report of National commission of police has stated that it is the high time where the investigation department should be separated from the department of police who is assigned with the task of maintenance of law and order. It further pointed out that the investigation into serious crime should be done by the senior police officer not below the rank of inspector of police. Law commission has also come up with reasons that why investigation department of police should be made independent.

1. Police department investigation wing should be kept under the **surveillance of judiciary**; it will reduce the political or other influential interference during the course of investigation.

2. **Under the supervision of magistrate and public prosecutor, the investigation department will be able to perform in conformity with law, expeditiously and with truthful results, the similar arrangement is done in France.**

3. Efficient investigation of cases will reduce unjustified and unwarranted prosecution and consequently a large number of acquittals.

4. It will facilitate the speedier disposal of the cases and therefore it helps the judicial system to work efficiently.

5. It will facilitate the expertise in the matter of investigation.

6. It will help in building rapport with the common men, and in a turn facilitate the investigation.

Therefore law commission by its 154th report has strongly recommended for the establishment of an independent investigating agency of the police who is indifferent from the police assigned with the task of maintenance of law and order. Law commission of India in its 154th report, volume II, page number 11-13, year 1996, has discussed at length the chapter XII of the code of criminal procedure and also suggested measures with respect to that.

The issues which are taken by the law commission in the aforesaid report are as follows:-

1. Delay in disposal of cases because of non- registration of first information report u/s 154.
2. Role of investigating agencies–investigation of cognizable offences amendment of section 156.
3. Procedure for investigation – Amendment of section 157.
4. Police officer power to require attendance of witnesses; Amendment of section 160.
5. Deletion of section 162 of Cr.PC and change in the mode of recording under section 161.
6. Procedure when investigation cannot be completed in 24 hours and consequent police custody.
7. Insertion of new section 3A in section 173.
8. **Inquiry by magistrate into cause of death:- amendment of section 176.**
9. **Insertion of new section 176A:- inquiry by magistrate into custodial injury.**

11. COLLABORATION BETWEEN THE POLICE AND JUDICIARY IN SOME COUNTRIES(AUSTRALIA, CANADA, USA, FRANCE AND BRITAIN)

i) AUSTRALIA

It is known that in common law systems like New South Wales (NSW) the judiciary is independent of any criminal investigation. Criminal investigations resulting in prosecutions can be tested at the judicial level.⁵⁸

⁵⁷Fourth Report of the National Police Commission, 1980

⁵⁸ http://www.aic.gov.au/media_library/conferences/prosecuting/harvey.pdf visited on 25/02/2014

The separation of function was discussed by the High Court of Australia in *R v Rogerson* (1992) 66 ALJR 500⁵⁹ as per Mason CJ:

...police investigations do not themselves form part of the course of justice.... In no relevant sense do the police administer justice, notwithstanding that they investigate crime, institute prosecutions (where appropriate) and assist in bringing prosecutions.

Lord Blackburn said in *Coomber v Justices of Berks* (1883) 9 App Cas 61⁶⁰

The administration of justice, both civil and criminal, and the preservation of order and prevention of crime by means of what is now called police are separate functions and not one single function. The only exception to this separation of function is the operation of the Coroner, who has an inquisitorial function and can direct police investigative activity in the course of an investigation.

Occurrence of judicial contact during a criminal investigation in relation to the issuing of process authorizing the use of investigative procedures i.e., search warrants, electronic surveillance warrants, etc, as provided by legislation. Beyond that regulatory function the judiciary is not involved in it. Just as investigation and the judicial function are separate functions, the situation between investigation and prosecution is similar.⁶¹ Although separate functions, of necessity, synergy must exist for both functions to operate effectively

ii) CANADA

Most police services either have their own identification specialists⁶² or have access to those of a neighboring service. These people are specially trained in the various methods of evidence gathering, for example, fingerprints and photography. Generally, these specialists are called upon by an investigator when there are no good witnesses to the crime available and the investigator has been unable to find sufficient evidence to identify a subject. In all cases of serious crime, their assistance will be used. Search warrants are required before police may search private residences, buildings or lands. As a general rule, a judge⁶³ will issue a search warrant if reasonable grounds exist to believe that the described articles will be found in a described building or place involving a particular crime. Search warrants empower police to enter private dwellings or other private places, using force if necessary, for the purpose of searching for the articles named in the warrants.

iii) USA

Since each State in the USA has a separate procedure here is an example of the procedure in New Jersey.⁶⁴ Once a complaint is issued, defendants are either arrested or issued a summons or notice to appear in municipal or Superior Court on a first appearance. If they fail to appear, warrant may be issued for the arrest of accused by a judge if there is proof of service, or evidence that the accused received the summons or notice and failed to appear. At the first court appearance, defendants are advised of their rights. Their bail is reviewed. Bail is required to be set within twelve hours of the issuance of a complaint. All defendants have a right to bail under our state constitution. If bail is posted, defendants are released until the charges listed in the complaint are resolved. Defendants can be required to post funds or property to assure that they will appear in court in the future. They may be required to deposit funds or property in exchange for a promise to appear. If defendants have significant ties to the community, or no criminal history, they may be considered for a Release on Own Recognizance or R.O.R., which is an affidavit certifying that they are aware of the charges levied against them, and will appear in court to face them. Defendants may also be required to give a personal bond, which is a promise to appear or face a judgment, whereby a specified amount of money is forfeited. Some defendants pay a bail bondsman to post funds on their behalf. These defendants may be ordered to post a higher bail, or have no bail set. They will remain in jail until the charges are disposed. If they are released and appear in court as required, bail money may be refunded in full upon case resolution or disposition. Once defendants are released, bail is discharged to the surety. Bail investigations may be ordered by a Superior Court judge of the Criminal Division.

Criminal Division bail investigators or case supervisors collect information on the defendant's ties or standing in the community. Identifying information is collected, including the names, addresses dates of birth, employment, criminal record, mental health and drug abuse history. These investigations are conducted by professionals working for the court. They investigate and report on a defendant's amenability to bail. Bail investigation reports consider the seriousness of the offense and the severity of punishment upon conviction, as

⁵⁹*R v Rogerson* (1992) 66 ALJR 500

⁶⁰*Coomber v Justices of Berks* (1883) 9 App Cas 61

⁶¹*Ibid*

⁶² <http://www.thecanadianencyclopedia.com/en/article/criminal-investigation> visited on 25/02/2014

⁶³*Ibid*

⁶⁴ <http://www.judiciary.state.nj.us/> visited on 25/02/2014

well as the defendant's family ties and financial status. All of these factors are considered in light of the probability that the defendant will appear for trial or other court events. Case supervisors or bail investigators report to the judge, who hears evidence from the defense and prosecution and decides the amount and form of bail to be set, if any.

iv) **FRANCE**

France's 600-odd investigating judges, a central feature of its inquisitorial system, can put suspects under formal investigation, order wiretaps, raid and search premises, confiscate documents, and summon and interrogate witnesses. On top of this, often after years of investigation, they also weigh the evidence, and decide whether to send a suspect for trial.

v) **BRITAIN**

In Britain, the Metropolitan Police sends the report of the initial investigation of the crime to the Crime Assessment Unit which decides if there is a need for further investigation. So in contrast to sending a crime finding to the Magistrate, the police in Britain play a significant role in investigation. In India the Magistrate could decide whether an investigation is called for in cases of offences which are of a particular nature like those relating to non cognizable crime. But what may look similar is that in cases of serious offences the police in Britain cannot proceed with the investigation without the permission of the Crown Prosecutors just as the police needs permission to investigate in certain offences in India.

12. CONCLUSION

Investigating is not only a procedure followed by the *police* before filing a report before the *magistrate* but also what court does after the making of the police report and the charges are framed against the accused. There is no clear mention in the code as to where investigation stops. Therefore there is investigation both before a trial and after a trial. Many a times the magistrate *plays not only a supervisory role but also a controlling or directing role in investigating the crime*. Investigation is in fact done by officers who are a part of the State but the role of the Magistrate and the role played by him, owing to the increase in Human rights Jurisprudence and increasing pressure on the Criminal Justice System to incorporate just and fair procedures whether there are rules to the effect or not, has increased manifold.

The procedure and idea of investigation, and the *relationship between the process of investigation and the role of the magistrate* has been approached from three angles of late. Firstly, what is the purpose of fair investigation and the consequences of importing this word *fair* to talk about investigations from the standpoint of both the victim as well as the accused and the importance of this word for the entire justice delivery system? Secondly, to understand the role of courts in the process of investigation, i.e., whether the court has only a Supervisory role to play or whether it has a further power of controlling how investigation should be performed.

The code clearly mentions the importance of the role of courts or Magistrate to be precise at the micro level as of supervisory in kind; but can this be a universal rule of law of limiting the role only to a supervisory nature in all cases? The plethora of judgements after the 1990 through 2012, e.g., judgement of Kailash Gaur⁶⁵, point to the fact that an investigation, if not fair can be a ground for vitiating the trial. However can this be done in all cases where investigation has been defective? Can the accused claim in a court of law that an investigation is unfair and therefore his basic right of presumption of innocence is being violated? If the nature of the defect in investigation of can be questioned by the magistrate or the trial court, then can all defective investigations be inquired into by the magistrate or does the magistrate have to do a balancing act of vitiating a trial only in certain cases and in others not. Thirdly, one should consider the power of police to investigate a crime before lodging an FIR. The role of the magistrate is not only limited to being of a supervisory nature. It is most crucial to the fair dispensation of justice.

Power of court when investigation has had been done with a serious lapse on the part of the police has been discussed in many cases and the courts have been of the view that the court should do a balancing act in such cases where an accused comes up with a plea of unfair investigation. The court should look into the question of whether the lapse was substantial or not. The right of the accused to fair investigation with the principle of presumption of innocence cannot be a blanket right when the defect in investigation was not of a serious nature or a lapse which affects the person accused or the victim in a particular case.

In Kailash Gaur⁶⁶ case the court held that the benefit of shoddy investigation should not necessarily go to the accused. In Gajoo⁶⁷ case the court pointed out:

⁶⁵Kailash Gaur v State of Assam (2012) 1 SCC Cr. 717

⁶⁶Ibid

⁶⁷Gajoo v State of Uttarakhand (2002) 9 SCC 532

A defective investigation on the part of the Investigation Officer cannot always go or prove to be of advantage to the accused. The court has to be circumspect in evaluating the evidence but it would not be right in acquitting the person solely on the account of defect. To do so would tantamount to playing into the hands of the investigating officer.

A Magistrate or a Court can decide on bail only after understanding the circumstances of a crime and it is based in a well investigated initial report of the police.

We can conclude that the role played by the magistrate in investigation runs through from the beginning of detection of crime to arrest and continues till the end of a trial reaches a certain phase where a reinvestigation may be ordered by the magistrate if it be justified by the case in hand. The magistrate is not a mere supervisor in cases of investigation now as was thought before and plays an active role in the process of investigation. Having laws and procedures is one thing but sitting through and watching the ineffectiveness of the functionaries who investigate an offence is another.

How far can the control be exercised is still a matter being debated upon by the legal fraternity and there is definitely a progress in terms of the ways a magistrate balances justice with rights. The focus should not be to strengthen the watch over the investigating functionaries but to improve the quality of functionaries so that each role assigned to a functionary under the code is played effectively without any scope for any miscarriage of justice. In *Karan Singh v State*⁶⁸ the court explained the need for a Magistrate to be active to proceed against investigations which are purposely carried out in a certain way to benefit some party.

The court should ensure that defective investigation purposely carried out by the Investigating officer, does not affect the credibility of the version of events given by the prosecution. Prompt action should necessarily be taken against the concerned officers involved.

Further there cannot be a separate kind of investigation for influential persons. The 239th Report of the Law Commission of India on Expeditious Investigation and Trial of Criminal Cases against Influential Public Personalities⁶⁹ explains as under:

While investigation of offences under the provisions of Cr. P.C. is the exclusive domain of the police, Magistrate should have limited role to play to counter the moves of persons in influential positions to subvert the effective process of investigation. Accordingly, the I.O. shall bring to the notice of Magistrate the bottlenecks, if any, that are coming in the way of speedy investigation including the attempts being made by the accused to hinder the investigation. *The Magistrate shall, apart from taking such steps as are permissible under law, for example, issuing summons for the production of documents in the custody of suspect/accused/or a third party, may also send up a report to the District Judge for appropriate action on the administrative side to eliminate delays.*

Fair investigation always existed in the Indian Criminal Procedure Code. However it has been relegated to the status of a Constitutional Right in spite of being there as a procedural right. Since 2005 there has been a trend on building up on these remedies under the Cr. PC and the focus now definitely has shifted from a Magistrate playing a passive role to an active functionary to supervise and direct investigations in order that the investigation is fair. The courts are now more ready to make investigation justice oriented.

13. BIBLIOGRAPHY

Statutes

1. The Constitution of India
2. The Code of Criminal Procedure, 1861
3. The Indian Penal Code, 1860
4. The Police Act, 1861
5. The Contempt of Courts Act, 1981

Reports

1. Law Commission of India, 239th Report on Expeditious Investigation and Trial of Criminal Cases Against Influential Public Personalities, 2012
2. Law Commission of India, 41st Report on the Code Of Criminal Procedure, 1898 (September, 1969)
3. Fourth Report of the National Police Commission, 1980

Books

1. Alifano, Charles M., "Fundamentals of Criminal Investigation", Worldwide Law Enforcement Consulting Group, available at www.worldwidelawenforcement.com (Visited on 19/02/2014)
2. Garner, Bryan A., (ed.), VII, *Black's Law Dictionary*.
3. Little, William., H.W Flower, (vol.1), *The Oxford Shortest English Dictionary on Historical Principles*

⁶⁸*Karan Singh v State of Haryana* 2013 7 SCALE 435

⁶⁹ 239th Report of the Law Commission of India on Expeditious Investigation and Trial of Criminal Cases against Influential Public Personalities, 2012

4. Dr. Paranjape, N V., *Code of Criminal Procedure*, 8-9 (Central Law Agency, Allahabad, 4th ed., 2011)
5. Dr. Pillai Chandrasekharan, *R.V.Kelkar's Criminal Procedure* (Eastern book company, Lucknow, 5th Edition, 2008)

Speeches

1. Speech delivered by Chief Justice of India P. Sathasivam at Tamil Nadu State Judicial Academy for the Newly Recruited Civil Judges

Websites

- a) <http://www.thecanadianencyclopedia.com/en/article/criminal-investigation> visited on 25/02/2014
- b) <http://www.judiciary.state.nj.us/> visited on 25/02/2014
- c) http://www.aic.gov.au/media_library/conferences/prosecuting/harvey.pdf visited on 25/02/2014
- d) <http://en.wikipedia.org/wiki/Magistrate> visited on 19/02/2014

Cases

1. *Khatri II v State of Bihar* (1981) 1 SCC 627
2. *Lalita Kumari v Govt of U.P.* Criminal Appeal No. 1410 Of 2011
3. *Lalita Kumari v. Govt. of U.P* [W.P.(CrI) No; 68/2008]
4. *King Emperor v. Khawaja Nazi Ahmed*, AIR 1945 PC 18.
5. *State of Karnataka v. Chikkibala Naika*, AIR 2002, kant HCR 2901.
6. *Naushad Ali Siddqui v. State of U.P.*, 2006 Cri LJ 425 (NOC).
7. *Murlidhar Singh v. State of Bihar*, 2008(1) Crimes 88 (pat).
8. *Tula ram v. Kishor Singh*, 1977 SCC (cri) 621
9. *State of Kerala v. K.M Haji* 1994 Cri LJ 1288 (ker).
10. *Jagdish Ram v. State of Rajasthan*, 1989 Cri LJ 745
11. (1997) 1 SCC 361.
12. *Suresh Kumar Gupta v. State of Gujarat*, 1997 Cri LJ 3948.
13. *Ram Avatar v. State of Bihar*, 1986 Cri LJ 51 (pat).
14. *Gulabsingh*, (1961) 64Bom LR 274
15. *King Emperor v. Sada*, (1901)3 Bom LR 586
16. *Abdul Halim*, AIR 1961 CAL 257
17. *B K Gupta v State of W.B.* AIR 1976 SC 985
18. *R M Rishbud v State of Delhi* AIR 1955 SC 196
19. *Bishwanath Saraf v State* 1978 Cri LJ 318
20. *Sukhevale Swapna Bai v State of A.P.* 2008 Cri LJ (NOC) 435 (AP)
21. *RupamDoel Bajaj v K P S Gill* 1996 Cri LJ 381 (SC)
22. *Manmatha Giri v. state of Orissa* 2002(1) Orissa 464 (466)
23. *M.L Das Tareja v. inspector of police, Borivali, Mumbai*, 2006 Cri LJ 462 (NOC).
24. *Brij Lal Bhar v. state of U.P* 2006 Cri LJ 3334 (All).
25. *Mailsami v. state*, 1994 Cri LJ 2238 (Mad).
26. *J. Vanaraj v. State*, 2003(2) Crimes 326(mad).
27. *State of West Bengal v. S.N Basak*, AIR 1963 SC 447
28. *R v Rogerson* (1992) 66 ALJR 500
29. *Coomber v Justices of Berks* (1883) 9 App Cas 61
30. *Kailash Gaur v State of Assam* (2012) 1 SCC Cr. 717
31. *Gajoo v State of Uttarakhand* (2002) 9 SCC 532
32. *Abhinandan Jha v Dinesh Mehra* AIR 1968 SC 117 23
33. *Kunga Nima Lepcha v State of Sikkim* AIR 2010 SC 1671
34. *T. C. Thangaraj v V. Engammal* AIR 2011 SC 3010
35. *Poovan v Sub Inspector of Police* (1993) Cr. LJ 2183
36. *Karan Singh v State of Haryana* 2013 7 SCALE 435