CHAPTER 8
CRIMINAL JUSTICE SYSTEM IN INDIA
ERRORS AND CORRECTIONS

The work so far would re-emphasise that the criminal justice system in India is nothing more than an accusatory one with underlying ideology more particularly vested in the due process model. It always gives primary importance to the individual liberty and privacy than the social need of repression of crime, even when failure of the latter would lead to develop a general disregard for legal controls among law abiding citizens.

The concept of informal fact finding is quite alien to our system. It rather prefers formal or adjudicative fact finding for determining guilt or innocence of the accused. The system in India never accepts the evidence collected by the police barring a very few exceptions. It does not compromise with illegal arrest, unreasonable searches, coercive interrogation and the like.

We prefer the presumption of innocence whereas, we confront the presumption of guilt with all vigour. It is no doubt true that wrongful acquittals are undesirable and shake the confidence of the people in the judicial system, much worse, however is the wrongful conviction of the innocent person. The consequences of the conviction of an innocent person are far more serious and its reverberations cannot but be felt in a civilized society. Burden is always on the state to prove the charge against the accused. The interest of the accused to observe silence against incriminating questions has legal and constitutional recognition and protection.

1 The Code of Criminal Procedure, 1973, s. 162; the Indian Evidence Act, 1872, ss. 25, 26, 27
Its values cherish the concept of legal guilt over the concept of factual guilt as a corollary to its temperament towards the presumption of innocence. It has a typical adversarial form of trial procedure. Similarly the norm of equality is really a touchstone not only in the administration of criminal justice but also in the legal system as a whole in India. The system affords free legal aid to the accused at its cost. It provides counsel to those accused who are unable to bear the expenditure therefor, acting upon the ultimate drive of the doctrine of equality.

Furthermore our system holds a much liberal approach in the matter of pre-trial detention. Only in cases involving serious crimes it stipulates a maximum of ninety days as pre-trial detention. Nevertheless it confers wide discretion on the courts to release such pre-trial detainees on bail considering the facts and circumstances of each case.

Needless to elaborate, the criminal justice system of India has more features of the due process model. And, it has the same underlying philosophy and values as well. In certain respect it becomes more soft than even the pure due process model. The pure due process model approves electronic surveillance as a mode of collecting evidence in cases of espionage, treason or such other crimes directly affecting national security. The Indian system is yet to resort to the electronic surveillance as an evidence-collecting mode since it is much reluctant to sacrifice individual liberty and privacy. Now for the first time the Prevention of Terrorism Act, 2002 has introduced it to counter terrorism.

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8.1 Electronic Surveillance

Sophisticated electronic devices have now been developed which are capable of eavesdropping on anyone in most of any given situation. These Orwellian prospects pose increasingly difficult problems for the criminal process as pressure from law enforcement for license to enlist these devices in the investigation of crime meets counter pressure from people who see the doom of individual freedom in a wholesale intrusion by government into the private lives of its citizens. All agree that the use of these devices for private snooping should be prevented. Beyond that, agreement ends. There is bitter and protracted controversy over whether law enforcement should be allowed to use these devices at all and, if at all, in what kinds of circumstances and under what kinds of controls. Perhaps all these conflicting philosophies might have caused an untoward approach on the part of a legal system towards the electronics surveillance mechanism.

Now let us have a look at the newly introduced provisions of electronics surveillance in the Prevention of Terrorism Act, 2002. Defining in terms of the Act, electronic surveillance means interception of wire, electronic or oral communication by the investigating officer when he believes that such interception may provide, or has

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6 Berger v. New York, 388 U.S. 41 (1967), Mr. Justice Clark writing for the Supreme Court of the United States: "Sophisticated electronic devices have now been developed (commonly known as "bugging") which are capable of eavesdropping on anyone in most any given situation. They are to be distinguished from "wiretapping" which is confined to the interception of telegraphic and telephonic communications. Miniature in size- no longer than a postage stamp (3/8" x 3/8" x 1/8")- these gadgets pick up whispers within a room and broadcast them half a block away to a receiver. It is said that certain types of electronic rays beamed at walls or glass windows are capable of catching voice vibrations as they are bounced off the latter. Since 1940, eavesdropping has become a big business. Manufacturing concerns offer voices under most any conditions by remote control. A microphone concealed in a book, a lamp, or other unsuspected place in a room, or made into a fountain pen, tie clasp, lapel button, or cuff link increases the range of these powerful wireless transmitters to a half-mile. Receivers pick up the transmission with interference free reception on a special wave frequency. And, of later, a combination mirror transmitter has been developed which permits not only sight but voice transmission up to 300 feet. Likewise, parabolic microphones, which can overhear conversations without being placed within the premises monitored, have been developed."

provided evidence of any offence involving terrorist acts.\textsuperscript{8} Interception means the aural or other acquisition of the contents by wire, electronic or oral communication through the use of any electronic, mechanical or other device.\textsuperscript{9} The evidence so collected is admissible as evidence against the accused.\textsuperscript{10} There are however several restrictions and limitations on the procedure to collect evidence by electronic surveillance. An interception can only be conducted by a public servant acting under the supervision of the investigating officer authorised to conduct interception.\textsuperscript{11}

Several stages are involved in obtaining an order authorising interception.

The Competent Authority to issue order authorising interception is appointed by the Central Government or the State Government.\textsuperscript{12} An application shall be submitted before

\begin{itemize}
\item The Prevention of Terrorism Act, 2002, s.37.
\item Id., s.36(b); s.36(a) provides: "electronic communication" means any transmission of signs, signals, writings, images, sounds, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photo electronic or photo optical system that affects land or foreign commerce but does not include:
\begin{enumerate}
\item the radio portion of a cordless telephone communication that is transmitted between the wireless telephone hand-set and the base unit; or
\item any wire or oral communication; or
\item any communication made through a tone only paging device; or
\item any communication from a tracking device;
\end{enumerate}
s.36(c) provides: "oral communication" means any oral communication uttered by a person exhibiting an expectation under such communication is not subject to interception under circumstances justifying such expectation but such term does not include any electronic communication; s.36(d) provides: "wire communication" means any aural transmission made in whole or part through the use of facilities for the transmission of communications by the aid of wire, cable or other like connection between the point of origin and the point of connection, between the point of origin and the point of reception (including the use of such connection in switching station) and such term includes any electronic storage of such communication."
\item Id., s.45; There are two proviso to the section. The first proviso stipulates that any such evidence shall not be received unless each accused has been furnished with a copy of the order of the Competent Authority, and accompanying application, under which the interception was authorised or approved not less than ten days before trial, hearing or proceeding. The second proviso however, enables the judge trying the matter to waive the period of ten days, if he comes to the conclusion that it was not possible to furnish the accused with the above information ten days before the trial and that the accused will not be prejudicial by the delay in receiving such information.
\item Id., s.42(1); Sub-sec. (2) provides that the order may require reports to be made to the Competent Authority who issued the order showing that progress has been made towards achievement of the authorized objective and the need for continued interception and such report shall be made at such intervals as the Competent Authority may require.
\item Id., s.37: The State Government may only appoint an officer not below the rank of Secretary to the Government and the Central Government may only appoint an officer not below the rank of Joint Secretary to the Government as the Competent Authority.
\end{itemize}
the Competent Authority in search of the order authorising interception.\(^\text{13}\) A police officer not below the rank of Superintendent of Police supervising the investigation of any terrorist act may only submit the application.\(^\text{14}\) The Competent Authority may require additional oral or documentary evidence in support of the application.\(^\text{15}\)

The Competent Authority to issue an order an order as requested or as modified authorising or approving interception if it determines that there is probable cause to do so.\(^\text{16}\) It may reject the application as well.\(^\text{17}\) It shall specify all the required particulars in the order authorising or approving interception.\(^\text{18}\)
The Competent Authority shall submit a copy of the order immediately after it is passed but in any case not later than seven days from the passing of the order to the Review Committee for its consideration and approval. The copy of order shall accompany all relevant underlying papers, record and his own findings in respect of the said order. The Central Government or the State Government constitutes one or more Review Committee whenever necessary. Every such Committee consists of a Chairperson and such other members not exceeding three and possessing such qualifications as may be prescribed. The Chairperson shall be a person who is, or has been, a Judge of a High Court. The interception shall be finished at the earliest pursuant to the order.

The Act imposes undue restriction on the authority even when it voyages to compact terrorism.

8.2 Working of Crime Control Features in India

The issue of prime importance is as to how the crime control features adopted by us are working in combating terrorism, which is one of the classes of the offences against national security. There is no choice of optimism, rather it would bring us into abysmal desperation.

The fate of the Terrorists and Disruptive Activities (Prevention) Act, 1987 which was the anti-terrorism law in force till it got lapsed in 1995. That Act also

19 Id, s.40(1).
20 Id, s.60(1).
21 Id, s.60(2).
22 Id, s.60(3); When a sitting Judge is appointed Chairperson, the concurrence of the Chief Justice of the High Court shall be obtained.
23 Id, s.41(1). It provides: "No order issued under the section may authorise or approve the interception..., for any period longer than is necessary to achieve the objective of the authorisation nor any event longer than sixty days and such sixty days period shall begin on the day immediately preceding the day on which the investigating officer first begins to conduct an interception under the order or ten days after order is issued whichever is earlier.
contained almost all provisions of crime control features which are in the Prevention of Terrorism Act, 2002. There were provisions in the TADA Act as to making confessions made in police custody admissible in evidence, presumption of guilt, conducting trial in camera, etc. Nevertheless the reality is that out of over 75,000 persons arrested and proceeded under the Act only a little over 1% ended in conviction.

We could perceive the terribleness of the disaster when we look into this history of adjudication in the light of the statistics prepared by the Law Commission of India. It gleans that during the period from 1988 till August 1999 there were 50,641 incidents of terrorist violence involving 24,761 killings in our country.

Furthermore, it is highly disturbing to find that this was the law to combat the well-trained militants. The fact that most of them were mercenaries and fanatic fundamentalist terrorists inducted into India from Afghanistan, Sudan, Pakistan and other countries aggravate our concern. It is pertinent to note that the terrorism in India is a part of the international terrorism. India is one of the prime targets of international terrorists like Osama Bin Laden. In view of the failure of our criminal justice system, a perception has developed among the terrorist groups that the state is inherently incapable of meeting their challenge that it has become soft and indolent. Remember that this is the plight only one class of the category of offences against national security.

24 The Terrorist and Disruptive Activities (Prevention) Act, 1987, ss.15, 21, 10.
26 Out of which 45,182 incidents of terrorist violence involving 20,506 killings were in Jammu and Kashmir during the period from 1988 till March, 1999, while remaining 5459 incidents involving 4255 killings were in other states such as Assam, Manipur, Nagaland, Tripura and Meghalaya during the period from 1996 till August, 1999. The statistics was prepared by the Law Commission of India for the purpose of its 173rd Report on the Prevention of Terrorism Bill, 2000. The portion of the working paper containing the statistics as quoted in the chapter II is appended to this thesis as Annexure-II.
28 Ibid.
29 Ibid.
8.3 No Judicial Interference in Investigation - Merit or De-merit?

Another indelible imprint of the criminal justice system in India is that the judiciary shall not interfere in investigation during the course of it. The principle has been reiterated in umpteen numbers of decisions.30

Patrick Devlin has stated that an accusatory system is primarily meant for law-abiding citizens.31 The statement besides it being a reality, is a concern of legal luminaries that such systems are impotent in a society consisting of hardcore criminals perpetrating in organized crimes. In Vineeth Narain v. Union of India, 32 the Supreme Court adopted a strange criminal procedure, where the court took over the absolute control of the Central Bureau of Investigation, which was deputed to investigate into hawala related crimes and barred the executive authorities.33 Here the judicial discourse would show that our criminal justice is utterly inadequate to counter or even handle not only offence affecting national security but also other offences, so far as investigation process is concerned.

In inquisitorial criminal justice systems whose underlying philosophy can very well be identified with that of the crime control model achieving in procuring much higher rate of conviction. Then what would have been the reasons for having such a ridiculous and desperately poor rate of conviction here when we made experience with the same principle of criminal justice process. No doubt, inquisitorial systems such as in France, Italy and Germany, these crime control values are handled by a trained legal actor called as the examining magistrate. The examining magistrate conducts the investigation of serious offence. In such cases the examining magistrate himself initiates investigation and collects all the available evidence. He is a very good

30 For example see State of W.B. v. Sampat Lal, AIR 1985 SC 195
32 (1998) 1 SCC 226
33 This order was passed on 01.03.1996 by the Supreme Court.
investigator as well as adjudicator. He examines the witnesses. Upon the completion of investigation he himself prepares dossier or charge if there are sufficient grounds to send the accused for being tried.

The judicial police and the prosecutor assist the examining magistrate. The examining magistrate has full control over the proceedings as well as over the other two legal actors. The collection of evidence is never a concern of the party. The proceeding of the examining magistrate is not performed in public. Those are deemed to be judicial proceedings.

The examining magistrate collects all available evidence irrespective whether it favours or prejudices the accused. He determines the relevance and reliability of the evidence on the basis of the principle of 'intimate conviction'. Thus a principle of 'free proof' operates itself in appreciating the evidence. Thus he evidence collected by the examining magistrate is fully admissible in evidence when it is relevant for the case. Thus when the examining magistrate submits the evidence collected along with the dossier prepared by him, the adjudicating court accepts it for its face value and the chance for further examination of witnesses and collection of evidence is usually very low. The trial is nothing more than a mere scrutiny of the records and statement prepared and evidence collected by the examining magistrate so as to adjudicate the matter.

The advantage of the functioning of the examining magistrate substantively reduces the chance for prosecuting the probably innocent and escaping the probable guilty from the clutches of the criminal process.

What we need in India for effectively enforcing these crime control measures is such an examining magistrate. Thus the investigation of the offences against national
security shall be conducted by an examining magistrate who appreciates the relevance and reliability of evidence with the skill of intimate conviction.

The presence of such an examining magistrate will simplify the delicacy involved in the mode of collection of evidence such as electronic surveillance. Now we have under the Prevention of Terrorism Act, 2002, a number of authorities for imposing greater degree of accountability and restriction. If all those responsibilities are entrusted with him a lot of convenience can be achieved. He being a qualified judicial magistrate certain better credibility and responsibility can be expected and that would definitely give a better outcome.

The mechanism of electronic surveillance shall be adopted as a mode of collecting evidence in relation to the investigation of all the offences against national security.

Procuring witnesses in the trial of the cases involving organised crimes is a great task before the administration of criminal justice system. Now by virtue of the operation of Section 162 of the Code of the Criminal Procedure, 1973, statement recorded by the police during investigation can only be used for the purpose of contradicting such person if and when examined in the course of trial. The Law Commission of India was constrained to recommend not to use such statements for contradicting the witness. Impact of this recommendation as stated by the commission itself if that such statement recorded under section 161 of the Code of Criminal Procedure would be useful only as a record of investigation proceedings and it would not have any evidentiary value in any manner what so ever.

34 The Indian Evidence Act, 1872, s. 145.
In the light of this situation, the perpetrators of the organised crimes can very well manage to get any person having acquaintance of facts away from the court for his being examined during trial. Thus if the examining magistrate conducts as mentioned above can very well examine any person having acquaintance of the facts, confidentially and the statements recorded by him will have every authenticity for its being admissible in evidence during trial, without further examination of such witnesses.

In such situations where an examining magistrate is in action, the legislature can adopt more open approach towards adopting any crime control measures to our administration of criminal justice system so as to combat the category of offences against national security.

The Law Commission of India wide its 43rd Report on Offences Against National Security recommended to have a consolidated enactment for dealing with all the offences against national security. It even prepared and submitted a bill called the National Security Bill, 1971 towards achieving this object. However the legislature has not acted upon that bill. This remains as a gross negligence on the part of legislature as the subsequent development of organised crimes indicate. Thus we do have a consolidate statute containing substantive and procedural provisions for combating the offences against national security.

8.4 Investigating agency

The expeditious and effective investigation is an important function in the criminal justice. The role of investigating agency is thus very much significant. The investigation is highly specialized process requiring a lot of patience, expertise, training

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and clarity about the legal position of the specific offences and subject matter of investigation and socio-economic factors.\textsuperscript{37}

Our investigating agency, namely the police, is yet to perceive fully the specialisation and professionalism required for the investigation.\textsuperscript{38} For discharging such a task efficiently, a separate investigating wing of the police which replenishes its knowledge and skills from developing technology is a desideratum.\textsuperscript{39}

Now the police department is understaffed and has a heavy duty to perform. The requirements of the law and order situation, bandobast duties, escort of prisoners to courts, patrol duties, traffic arrangements, security to VIPs, rise in crime graph in the country in general and the creation of new kinds of substantive offences have increased manifold the work of the police. Further, many a time while the investigating officer is in the midst of the investigation, he would be called away in connection with some other duty. Consequently he would be forced to suspend the investigation or hand it over to junior officer. Moreover, it happens that investigating officers are transferred without being allowed to complete the investigation in hand. Even in grave offences there is piecemeal investigation by different police officials in the hierarchy which inevitably results in variation of statements the witnesses examined and recorded at different times. Such variation would ultimately destroy the efficacy of the evidence of witnesses when examined in the court. This is a defect in the investigatorial process, advantage of which is taken by the defence.\textsuperscript{40}

\textsuperscript{37} Id, para 2.
\textsuperscript{38} Ibid.
\textsuperscript{39} Ibid.
\textsuperscript{40} Id, para 3.
The Law Commission of India in its 14th Report on Reform of Judicial Administration, vol.II, para 24, pp.741, 762:

“We think on the whole that there is great force in the suggestion that, as far as practicable, the investigating agency should be distinct from the police staff assigned to the enforcement of law and order. We do not, however, suggest absolute separation between the two branches. Even officers of the police department have taken the view that if an officer is entrusted with investigation duties, his services should not be required for other work while he is engaged in investigation. The separation of the investigating machinery may involve some additional cost. We think, however, 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 of our proposal is necessary. The adoption of such a separation will ensure undivided attention to the detection of crimes. It will also provide additional strength to the police establishment which needs an increase in most of the States.”

The National Police Commission bemoaned the lack of exclusive and single minded devotion of police officials in the investigation of crimes for reasons beyond their control. The Commission found on a sample survey carried out in six states in different parts of the country that an average investigating officer is able to devote only 37 percent of his time to investigatorial work while the rest of his time is taken up by other duties. Thus there is an urgent need for increasing the cadre of investigating officers and for restructuring the police hierarchy to secure, inter alia, a large number of officers to handle investigation work.\[41\]

\[41\] The National Police Commission, the Fourth Report, p.3, para 27.7.
The Law Commission has recommended that the police officials entrusted with the investigation of grave offences should be separate and distinct from those entrusted with the enforcement of law and order and other miscellaneous duties. Separate investigating agency directly under the supervision of a designated Superintendent of Police be constituted. The hierarchy of the officers in the investigating police force should have adequate training and incentives for furthering effective investigations. When a case is taken up for investigation by an officer of such agency, he should be in charge of the case throughout till the conclusion of the trial. He should take the responsibility for production of witnesses, production of accused and for assisting the prosecuting agency.

The reasons given by the Law Commission in support of its suggestion that a separate investigating police shall be established, are as follows: Firstly, it will bring the investigating police under the protection of judiciary and greatly reduce the possibility of political or other types of interference. Secondly, with the possibility of greater scrutiny and supervision by the magistracy and the public prosecutor as in France investigation of police cases are likely to be more in conformity with the law than at present which is often the reason for failure of prosecution in courts. Thirdly, the efficient investigation of cases will reduce the possibility of unjustified and unwarranted prosecutions and consequently of a large number of acquittals. Fourthly, it will result in speedier investigation which would entail speedier disposal of cases as the investigating police would be completely relieved from performing law and order duties, VIP duties and other miscellaneous duties, which not only cause unnecessary delay in the investigation of

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43 Ibid.
44 Id., para 7.
cases but also detract from their efficiency. Fifthly, separation will increase the expertise of investigating police. Sixthly, since the investigating police would be plain clothes men even when attached to police station will be in a position to have good rapport with the people and thus will bring their cooperation and support in the investigation of cases. Seventhly, not having been involved in law and order duties entailing the use of force like tear gas, lathi charge and firing, they would not provoke public anger and hatred which stand in the way of police-public cooperation in tracking down crimes and criminals and getting information, assistance and intelligence which the police, have a right to get under the provisions of ss.37 to 44 of the Code of Criminal Procedure.45

The quality of criminal justice is closely linked with the caliber of the prosecution system and many of the acquittals in courts can be ascribed not only to poor investigations but also to poor quality of prosecution.46 There is a general complaint that the public prosecutors in lower court do not prepare cases carefully and that the quality of prosecutions is poor. Therefore, there should be careful selection and appointment of prosecutors who can closely coordinate with investigation. No doubt, they have to closely coordinate with the police system since prosecutions are conducted on behalf of the police. There should not be communication gap between the police and the prosecutors during the investigation stage. Investigation and prosecution form a continuous link process in the administration of justice and, therefore both should be closely coordinated in order to ensure successful prosecution of criminal cases. Total detachment of prosecution department from the police will not only create conflicts between the two but also result in each throwing the responsibility on the other with the

45 Id, para 6.
46 Id, chapter III, para 2.
result that there will not be any effective control over the maintenance of law and order or prosecution of criminals.\(^{47}\)

For ascertaining whether the criminal justice system in India has the characteristic features of the Crime Control or the Due Process model, we have to observe its various stages in action.

\(^{47}\) Ibid.