

SITUATING ‘MAGISTRATE MONITORED INVESTIGATION’ IN INDIAN ADVERSARIAL SYSTEM: AN APPRAISAL

Abstract

Unlike inquisitorial system, the Indian adversarial system is premised on exclusive functional distribution among various criminal justice agencies. These agencies perform their allocated functions for example, police perform investigation functions, prosecutorial functions are assigned to public prosecutors and courts are conferred with adjudicatory functions. In the pre-trial setting, the stage of investigation is considered of utmost importance. The inquisitorial feature of ‘investigating Magistrate’ is alien to the Indian adversarial tradition and the investigation process remains in the exclusive domain of the police. Though judicial interference in investigation process is generally not appreciated but in case of excessive or erroneous exercise of investigative powers by the police the court cannot remain mute spectator and allow the miscarriage of criminal justice to continue. Hence, the constitutional courts have been discharging their solemn function of keeping a check on the police powers. However, in last two decades the judicial decisions have redefined the functional allocation at the pre-trial stage among various criminal justice agencies by situating Magistrate in the police investigation. Over and above the ‘aiding’ and ‘overseeing’ role assigned to a Magistrate, the Magistrate is conferred with the ‘supervisory’ role over the police investigation. The Supreme Court has invoked both statutory and constitutional approaches to confer the Magistrate with such supervisory power. Such supervisory or monitoring role of the Magistrate is unique to the Indian adversarial system. It poses question to the exclusivity and supremacy of police over the investigation process *vis-à-vis* the requirement of a just and fair investigation. This paper makes an attempt to explore the theoretical underpinnings of ‘Magistrate monitored investigation’, its necessity and viability in the Indian criminal justice system.

I Introduction

WORLD OVER the administration of criminal justice is governed by majorly two highly influential systems- adversarial and inquisitorial.¹ The functions of investigation, prosecution and adjudication exist in both these criminal justice systems, but the ways in which these functions are allocated to various criminal justice agencies is not the same. In other words, the allocation of functions among various criminal justice functionaries largely depends on the criminal procedure system (adversarial or inquisitorial) embraced by any jurisdiction.² For example, the unique characteristic of the inquisitorial system is the supervision of the investigation by the *Juge d’instruction*. The pre-trial investigation in serious cases is conducted and supervised by the Magistrate commonly known as *Juge d’instruction* which provides a judicial character

1 For more on the adversarial and inquisitorial system, see Rene David, *French Law: Its Structure, Sources, and Methodology* 116-22 (Michael Kindred trans., La. State Univ. Press, 1972).

2 See, Jacqueline Hodgson, *The Metamorphosis of Criminal Justice: A Comparative Account*, Oxford University Press (2020).

to the investigation and places the Magistrate at the center of the investigation.³ In contrast, the prominent attribute of the adversarial system is that the police retain the sole responsibility for the investigation which is neither supervised by the prosecutor nor by any other authority equivalent to *Juge d'instruction*. In the adversarial system the focus is on the adversary parties striving to establish their accusation or defense before the judge who decides as a neutral umpire.⁴ As against this in the inquisitorial system the prosecution, the defense and the judge are all treated as equal parties in a quest or search for the truth.

India follows the common law traditions which originated from her British colonial history. As a follower of the common law traditions, the Indian criminal justice system is inherently adversarial in nature. The Indian adversarial model has a specific set of criminal justice institutions with defined role of criminal justice agencies and elaborate criminal processes and procedures. The administration of criminal justice is done through a multi-agency model which comprises of the police, prosecution, courts and prison authorities.

II Statutory scheme of investigation

The Bharatiya Nagarik Suraksha Sanhita, 2023 (hereinafter referred to as the 'BNSS') (formerly Code of Criminal Procedure, 1973) is the chief law setting out the powers and functions of various criminal justice agencies.⁵ The erstwhile Code of Criminal Procedure (hereinafter referred to as the 'Code') continued the colonial legacy and has conferred the police with exclusive and far-reaching investigative powers. The police agency is vested with power to perform a wide range of investigative functions like arrest, search, seizure, recording of statements, filing of reports *etc.* Investigation

3 Jacqueline Hodgson, *French Criminal Justice: A Comparative Account of the Investigation and Prosecution of Crime in France* 143 (Hart Publishing, 2005). See Also, Abraham S. Goldstein and Martin Marcus, "The Myth of Judicial Supervision in three 'Inquisitorial' Systems: France, Italy and Germany", 87 *Yale Law Journal* 240 (1977); Stewart Field, "Judicial Supervision and the Pre-trial Process", 21(1) *J. L. & SOC'Y* 119 (1994).

4 Jan M. Smits (ed.), *Elgar Encyclopedia of Comparative Law* (Edward Elgar Publishing, 2nd edn. 2014) "According to the adversarial model, prevalent in common law jurisdictions, the (private or public) prosecutor and the defendant are regarded as co-equal parties presenting their dispute to the trier of fact (a lay jury or a professional judge). Each party is responsible for presenting evidence favourable to its case; the judge has no proactive role at the trial but has to make sure that each side plays according to the rules. The inquisitorial model, by contrast, conceives of the criminal process as an official investigation conducted by a neutral magistrate or judge. The judge is responsible for finding the facts (as well as the applicable law) and he has broad powers to make the state prosecutor as well as any private person come forward with relevant information. Only if the court has come to the conclusion that the defendant is guilty will the judges convict him".

5 In this paper the author has referred the sections of the Code of Criminal Procedure, 1973 with the corresponding section of the Bharatiya Nagarik Suraksha Sanhita, 2023.

holds prime significance in the trial of a case. The entire case rests and revolves on the foundation built in the course of investigation. The supremacy vested in police in the matter of investigation has also been manifested in a bunch of rulings from *King Emperor v. Khwaja Nazir*⁶ to *Neeharika Infrastructure Pvt. Ltd. v. State of Maharashtra*.⁷

The statutory scheme of the Code (same can be found in the BNSS as well) incorporates six possible ways for the commencement of investigation, out of which in two instances the police officer can conduct the investigation without the magisterial order⁸ and in remaining four situations the investigation is triggered on a prior permission or order from the Magistrate.⁹

As investigation is considered to be the primary function of the police, both the method and manner of conducting the investigation are left absolutely to the police officer investigating the case. This may be gathered from the definition of the term 'investigation' which refers to all those proceedings which are aimed towards collection of evidence conducted by a police officer or by any person (other than a Magistrate) duly authorised by a Magistrate in this behalf.¹⁰ Further, non-requirement of the prior permission of the jurisdictional Magistrate to launch an investigation into any cognizable offence speaks volumes of the exclusivity and supremacy of the police in the matter of investigation.¹¹

The Supreme Court in *State of Bihar v. P.P. Sharma*¹² has reckoned the investigating officer as the arm of the law who plays a significant role in the administration of criminal justice on the one hand and maintenance of law and order on the other. The police investigation is "*the foundation stone on which the whole edifice of criminal trial rests, as error in the chain of investigation may result in miscarriage of justice and the prosecution entails with acquittal.*"¹³

6 AIR1945 PC 18. The following observation of the Privy Council is worth quoting: "...[I]t is of the utmost importance that the judiciary should not interfere with the police in matters which are within their province and into which the law imposes upon them the duty of enquiry... The functions of the judiciary and the police are complementary not overlapping and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function."

7 MANU/SC/0272/2021.

8 On the basis of information received under s. 154 and as per s. 157 if the police officer has reason to believe that a cognizable offence has been committed.

9 On the directions of the Magistrate under s. 156(3), or on the directions of the Magistrate in non-cognizable cases under s. 155(2), or on a direction of the Magistrate under s.159, and on a direction of the Magistrate under s. 202.

10 Code of Criminal Procedure, 1973, s. 2(h).

11 Code of Criminal Procedure, 1973.s. 156(1).

12 1992 Supp. (1) SCC 222.

13 *Id.*, para 48.

The Supreme Court in *Abhinandan Jha v. Dinesh Mishra*¹⁴ has underscored the prerogative of police in the matter of investigation in following terms:¹⁵

The formation of an opinion by the police as to whether or not a case is made out to place the accused before the Magistrate to face the trial, and consequently either a charge-sheet or a final report is to be submitted, has been left to the station house officer.

The discussion above clearly underlines the exclusivity of police over the investigation process. The power of police to investigate is not ordinarily impinged by any fetters and in that sense police enjoy exclusivity in the investigation process.

III Role of magistrate during investigation

The Code/BNSS does not contemplate magisterial interference in the investigation process which is essentially considered a police function. However, it does not completely bar the magisterial interface with the investigation process. From the standpoint of investigation, the Magistrate acts both as an 'aiding agency' in the investigation process and as an 'oversight agency' of police functions. As the definition of 'investigation' suggests, the police officer is expected to gather material relevant for the case. The documents, materials and statements collected during the investigation become the foundation for the case to establish the guilt of the accused person. Hence, it becomes very crucial that *firstly*, the required evidence is collected with due regard to the constitutional safeguards of every individual and *secondly*, the credibility is attached to the evidence so gathered. For this purpose, the Code/BNSS has envisioned the interventionist role of the magistracy to extend their aid to facilitate the smooth collection of evidence (securing appearance of persons and production of materials, search, seizure *etc.*)¹⁶ and also provide credibility to certain kinds of evidence (recording of confession, test identification parade, signature and handwriting sample *etc.*)¹⁷ It is in that sense the Magistrate performs the role of aiding agency which brings credibility and fairness in the process of collection of evidence during investigation.

As a criminal justice functionary, independent from the executive, the magistracy performs certain oversight functions under the Code/BNSS which is separate from their role as an aiding agency. The oversight role of magistracy acts as a check on the exercise of police power which in turn protects the rights and interests of the accused, the victim and the society at large. The structural basis for conferring Magistrate with such overseeing function on police actions is founded on the jealousy of law in protecting personal liberty which cannot be taken away without a just and fair cause.

14 MANU/SC/0054/1967.

15 *Id.*, para 13.

16 Code of Criminal Procedure, 1973, Chapter V, VI, VII and XII.

17 Code of Criminal Procedure, 1973, Ss. 54A, 164 and 311A.

The Magistrate discharges the overseeing role primarily in the matter of crime recording, arrest and investigation process in general.¹⁸

IV Magisterial supervision of investigation process: Departure from adversarial tradition

Investigation is considered to be the domain of the executive and judicial interference is generally not appreciated. The idea of pre-trial magisterial supervision of the investigation process appears to be contrary to the fundamental character of the adversarial tradition which believes in functional separation among various agencies. Such functional separation is with an object to ensure that the Magistrate should not get prejudiced or influenced in dealing with a case in which he was directly involved in the process of investigation which might get reflected in his decision-making process. Such demarcation of functions between the police and the magistracy was maintained under all the previous versions of the Code of Criminal Procedure (same has been largely continued in the BNSS) and the police was given unfettered powers to investigate cognizable offence without the permission of the Magistrate.

Despite such clear statutory scheme on allocation of functions among criminal justice agencies, the idea of placing the investigation under the magisterial vigil surfaced in various reports. Soon before the enactment of the Code of Criminal Procedure, 1973, the Law Commission in its 41st Report made the observation that “*a Magistrate is kept in the picture at all stages of the police investigation, but he is not authorised to interfere with the actual investigation or to direct the police how that investigation is to be conducted.*”¹⁹ The view was a reflection of Privy Council’s decision in *King Emperor v. Khwaja Nazir Ahmed*²⁰ wherein the Privy Council had clearly laid down the supremacy of police at the investigation stage. The Law Commission had resorted to Supreme Court decision in *Abhinandan Jha v. Dinesh Mishra*²¹ to further substantiate their views. Lastly, the Law Commission concluded that “*there is nothing to be gained by giving the Magistrate further powers of supervision and control over the police during investigation*”.²²

It is interesting to note that the Law Commission did not make any observation on newly inserted section 156(3) in the Code of Criminal Procedure, 1898 (identical to section 156(3) of the Code and modified section 175(3) BNSS) which allowed the Magistrate to order investigation by the police.

18 The Magistrate performs overseeing function over crime recording in two ways- through receiving an occurrence report as per s. 156(3) and through s. 156(3). The overseeing role in arrest process is ensured through s. 50A(4) and s. 167.

19 Law Commission of India, “41st Report on Code of Criminal Procedure, 1898” (Sep., 1969) at para 14.2.

20 AIR 1945 PC 18.

21 (1967) 3 SCR 668.

22 *Supra* note 18.

It is quite interesting that around four decades later, the Law Commission while dealing with the issue of ‘expeditious investigation and trial of criminal cases against the influential personalities’ has noted that though there is no doubt that investigation under the Code is the exclusive domain of the police, however the Magistrate should be conferred with a limited role to take steps against those who attempt to disrupt the process of effective investigation by using their influential positions.²³

It is with this object in mind, the Law Commission has recommended the insertion of a provision in the Code after the existing section 157 [section 176, BNSS] to tackle the issue of delay in completion of the investigation. The proposed provision empowered the Magistrate to seek information on the progress of the investigation and allowed to issue necessary directions to facilitate speedy investigation. Interestingly, the proposed provision specifically provided that such direction in no way affect the ‘manner of investigation’ which remains the exclusive domain of the police. The invocation of such power by the Magistrate was proposed on his own initiatives or at the instance of the public prosecutor or the victim.²⁴

Even the Malimath Committee on ‘Reforms in Criminal Justice System’ recommended immediate addition of a new provision in the Code conferring power on the Court to issue investigation related directions.²⁵ The proposed recommendation provided for such issuance of direction at the stage of inquiry or trial only. It is not clear whether the Committee intended to confer such power on courts during the investigation stage. The ultimate object of exercising such power is to assist the court in ‘*search for truth*’. The Malimath Committee, in making such a recommendation, appeared to have been inspired by the efficiency of the inquisitorial system which provides for the participation of all functionaries in the ‘quest for truth’. The Committee suggested incorporation of some of the best practices of inquisitorial system in the Indian adversarial system.²⁶

The recommendations were aimed at bringing investigation under the magisterial vigil either generally or for specific crimes. Such a step was suggested to ensure fairness in the investigation process and timely completion of the investigation. It cannot be denied that the investigation becomes a part of the judicial process as the court adjudicates over the evidence collected and collated by the police during the course of the investigation. In this way police help courts to reach the finality in a case. Conduct of fair and proper investigation is the hallmark of any criminal

23 Law Commission of India, “239th Report on Expeditious Investigation and Trial of Criminal Cases against Influential Public Personalities” (Mar, 2012) at para 7.

24 *Id.* at 35.

25 Government of India. “Report of the Committee on Reforms of Criminal Justice System” (Ministry of Home Affairs, 2003) at 266-267, *available* at: https://www.mha.gov.in/sites/default/files/criminal_justice_system.pdf (last visited on May 29, 2023).

26 *Id.* at 265-266.

investigation.²⁷ A fair trial can be achieved only when the investigation is just and fair. Both fair trial and fair investigation are concomitant to preservation of the fundamental right of the accused enshrined under Article 21 of the Constitution of India.²⁸ Hence, it becomes crucial that the investigative function is discharged in a fair and proper manner in accordance with the provisions of the Code. So long as the principles of fair investigation are adhered to by the police and the investigation is carried within the boundaries of law, the judicial interference is not warranted. However, where the police agency is not performing their statutory duty at all or exercising their power erroneously or excessively, the duty lies on the judiciary to step in and bring back the investigation in the right direction. For long, the Supreme Court and high courts have been discharging their constitutional duty to prevent miscarriage of justice as an outcome of a faulty or erroneous exercise of investigative powers by the police and the magisterial role in investigation process remained insignificant. It was only with the Supreme Court ruling in *Sakiri Vasu v. State of U.P.*²⁹ that the magistracy came in the forefront and enjoined with the supervisory and monitoring role over the investigative process.

V *Sakiri Vasu v. State of Uttar Pradesh* – Footprint of magistrate monitored investigation mechanism

A major shift in the adversarial character of the pre-trial process has been witnessed when the Supreme Court in *Sakiri Vasu v. State of U.P.*³⁰ expanded the horizons of the magisterial power under section 156(3) of the Code (now section 175(3), BNSS). In this case the Supreme Court interpreted the magisterial power under section 156(3) beyond the mere issuance of direction for investigation and stated that the power to direct ‘proper investigation’ is incidental to the power to direct an investigation under section 156(3) which even extends to the ‘monitoring’ of such investigation for the purpose of ensuring ‘fair and proper investigation’. The magisterial inroads to police investigation as established in *Sakiri Vasu* case can be understood to mean that the Magistrate can issue direction for a ‘proper investigation’ or take suitable steps for ensuing a ‘proper investigation’. It is interesting that the *Sakiri Vasu* case has allowed

27 *Vinay Tyagi v. Irshad Ali* (2013) 5 SCC 762.

28 *Nirmal Singh Kahlon v. State of Punjab* (2009) 1 SCC 441.

29 (2008) 2 SCC 409.

30 *Ibid.* The footprint of *Sakiri Vasu* line of approach could be seen in the cases of *K. Gopal v. State of Tamil Nadu*, (2005 SCC Online Mad 466) and *Parivartan v. M.C.D.*, (MANU/DE/4296/2006) authored by Justice Markandey Katju (the then Chief Justice). In *K. Gopal* case noting the seriousness of the allegations in the petition filed under Art. 226 of the Constitution the court directed the Magistrate to treat the petition as a ‘complaint’ under s. 156(3) of the Code and “direct the police to make a proper investigation and shall also monitor the investigation to ensure that it is properly conducted.” In *Parivartan* case Justice Katju went a step ahead and opined that the Magistrate may even direct change of investigating officer/agency under s. 156(3) of the Code to achieve the goal of proper investigation.

the Magistrate to invoke such power at both the stages- during and post the completion of the investigation.³¹ The briefly worded section 156(3) was never before given such an expansive interpretation to confer on the Magistrate the power to check the performance of investigative duties by the police and further allow him to issue directions in cases where the police has not performed its investigative functions at all or has done it unsatisfactorily. To sum up, the Supreme Court in *Sakiri Vasu* case has conferred the Magistrate with the monitoring power to ensure proper investigation by the police.³²

The paradigms of the expression ‘fair and proper investigation’ can be gathered from the Supreme Court ruling in *Vinay Tyagi v. Irshad Ali*³³ which has prescribed two core attributes for the same. The first one gives emphasis on the investigation being unbiased, just and honest and conducted as per the procedure prescribed in law. The second one gives stress on the outcome of a fair investigation which is to bring out the ‘truth of the case’.³⁴ Hence, the ‘quest for truth’ is the ultimate aim of a fair and proper investigation.

It is interesting to note that unlike Supreme Court and high courts, the Magistrate lacks inherent powers under the law but the Supreme Court ruling in *Sakiri Vasu* by applying the ‘doctrine of implied power’ read the implied/incidental powers within the ambit of section 156(3) which is quite significant a development due to its future implication on the police supremacy over the investigation process.³⁵ For the first time, the Supreme Court made a departure from the *Khawaja Nazir Ahmed* line of approach which had conferred exclusivity to the police in the matter of investigation devoid of magisterial interference. The Supreme Court has given primacy to the fundamental right to ‘fair and proper investigation’ over the sanctity of police supremacy in the matters of investigation which has remained a constant element in all the previous versions of the Code.³⁶ The idea of ‘fair and proper investigation’ is covered under the broader umbrella of ‘fair trial’ guarantee and it is the responsibility of all the pre-trial criminal justice functionaries to ensure that the investigation is conducted in a fair and proper manner.

The exercise of unfettered investigative powers by the police completely devoid of magisterial vigil has its own shortcomings. Every now and then the courts lament on the defective and poor quality of investigation leading to acquittal of possibly guilty

31 *Supra* note 28 at para 13.

32 *Id.* at para 15.

33 (2013) 5 SCC 762.

34 *Id.* at para 48.

35 Santosh Kumar Pathak, “Monitoring of Investigation by Magistrate and Doctrine of Implied Power”, XLIII (4) *Indian Bar Review* 115 (2016).

36 BB Pande, *Criminal Law and Criminal Justice: Advanced Legal Writings* 207 (EBC, Lucknow, 1st edn., 2022).

or conviction of possibly innocent.³⁷ In many occasions the investigation is marred by inordinate delay which makes the entire criminal proceeding a futile exercise. There is no doubt that the 'Magistrate monitored investigation mechanism' as evolved in *Sakiri Vasu* ruling can prove significant in curbing the danger of excessive or erroneous exercise of investigative powers by the police which will help in improving the quality and timely completion of investigation.

It needs to be emphasized that since the Magistrate is conferred with the monitoring power over the police investigation, any direction issued by the Magistrate, as per the *Sakiri Vasu* ruling, would not amount to interference with the investigative powers of the police as the goal of both the pre-trial agencies same *i.e.*, delivering 'fair and proper investigation'. Though a word of caution must be placed for the magistracy to not exercise such monitoring powers in a causal or cavalier manner as the primary function to investigate a cognizable offence lies with the police which cannot be divested by the Magistrate in any scenario.

VI Judicial acceptance of *Sakiri Vasu* approach

It is pertinent to note that the *Sakiri Vasu* line of approach has seen disagreement in two subsequent cases³⁸ wherein SB Sinha J., had questioned the correctness of such approach. Be that as it may, Justice Markandey Katju in *Sudhir Bhaskarrao Tambe v. Hemant Yashwant Dhage*³⁹ reaffirmed the law laid down in the *Sakiri Vasu* ruling and opined that 'to ensure a fair and proper investigation the Magistrate may even recommend the change of the investigating officer in a particular case.' In the subsequent ruling of *T.C. Thangaraj v. V. Engammal*⁴⁰ the magisterial check over police investigation as laid down in the *Sakiri Vasu* ruling has been discussed and the court followed the same line of approach. Further, in *Hemant Yashwant Dhage v. State of Maharashtra*⁴¹ Supreme Court did not approve the high court's approach of entertaining the writ petition for

37 Some instances of faulty investigation may be accessed on, *available at*: <https://www.livelaw.in/news-updates/minor-rape-case-allahabad-high-court-orders-disciplinary-actions-cop-ensuring-accused-absolved-charges-216341>; *available at*: <https://www.livelaw.in/news-updates/madhya-pradesh-high-court-orders-disciplinary-action-against-police-officer-faulty-probe-seizure-21kg-cannabis-205954>; <https://www.livelaw.in/news-updates/jharkhand-high-court-bail-police-investigation-not-fair-judicial-academy-scheme-training-198394>; *available at*: <https://www.livelaw.in/news-updates/calcutta-high-court-quashes-chargesheet-de-novo-investigation-inherent-power-of-court-section-482-177257>; <https://www.livelaw.in/madras-hc-acquits-man-of-rape-charges-blames-faulty-investigation-directs-training-of-investigation-officers-read-judgment/>; *available at*: <https://www.livelaw.in/news-updates/madhya-pradesh-high-court-enquiry-against-police-officer-investigation-wrong-direction-193550> (last visited on Jan. 30, 2025).

38 *Kishan Lal v. Dharmendra Bafna* (2009) 7 SCC 685 and *Nirmal Singh Kahlon v. State of Punjab* (2009) 2 SCC 441.

39 2010 SCC OnLine SC 463.

40 (2011) 12 SCC 328.

41 (2016) 6 SCC 273.

change of investigating officer and stressed that the complainant must avail the alternate remedy in the form of section 156(3) where under the Magistrate can not only direct the registration of FIR but also ensure proper investigation including monitoring of the investigation. Finally after a long interval, a three Judge Bench in *Vinubhai Haribhai Malaviya v. State of Gujarat*⁴² adopted the *Sakiri Vasu* line of approach to decide on the issue of magisterial power to direct further investigation at the post-cognizance stage. This was the first occasion since 2007 when a larger Bench has approved the *Sakiri Vasu* line of approach. Subsequently, the case of *M. Subramaniam v. S. Janaki*⁴³ (a three judge bench) has further strengthened the *Sakiri Vasu* line of approach by quashing the high court's order directing the police to register the FIR on the ground that in view of *Sakiri Vasu* case the first recourse for the complainant is to approach the Magistrate under section 156(3) and not to invoke writ jurisdiction of the high court.

It may appear that the *Sakiri Vasu* approach writing the role of the magistracy in the investigative process is indicative of the transformation towards the inquisitorial model where the Magistrate takes part in the investigation process. However, the magisterial powers expounded in *Sakiri Vasu* case differs from the inquisitorial Magistrate who directly participate in the investigation process whereas the expansive role assigned to the magistracy in *Sakiri Vasu* case came with a caveat that the Magistrate cannot himself investigate the case and even the directions issued by the Magistrate should not convey such an impression.

The *Sakiri Vasu* line of approach has its own share of inhibitions primarily based on the principle of 'fair trial' which demands that the trial be conducted before an impartial and unbiased Magistrate/judge. The supervisory and monitoring role of the magistracy may give an impression that the status of the 'Judicial Magistrates' is reduced to 'Police Magistrates' and thereby violating the basic tenets of fair trial standards. The investigator and adjudicator need to be separate. Further, due to the limited resources, lack of expertise and overworked magistracy it would not be possible for the Magistrates to discharge such vital monitoring function without compromising the speedy justice consideration. Lastly, the supervisory and monitoring role of the magistracy over the investigation may pose threat to the supremacy of the police and violate the norms of separation of powers.

It may be observed that the *Sakiri Vasu* line of approach is in consonance with the principles of fair trial and not diluting the standard of impartiality in any manner. The Magistrate, while discharging supervisory or monitoring function, is not taking the side of any party but aiming to achieve the larger goal *i.e.*, 'fair and proper investigation' which is beneficial for every stakeholder. The Magistrate is in no sense

42 (2019) 17 SCC 1.

43 (2020) 16 SCC 728.

directly conducting the investigation or passing orders of such nature. As the fair trial and speedy trial are two sides of the same coin, the ‘quality of investigation’ being the backbone of every inquiry or trial needs to be achieved at any cost. Moreover, the *Sakiri Vasu* line of approach nowhere suggests magisterial encroachment on police supremacy over the investigation process. Rather it directs non-interference in the matter of investigation as long as the police agency is properly conducting the investigation. The *Sakiri Vasu* line of approach is in no way substituting the police with the Magistrate in the matters of investigation. It reflected the concerns of the criminal justice system facing poor quality of the investigation and provided a dynamic interpretation to section 156(3) to remedy such situation. As long as the investigation is being conducted in a proper manner, the occasion of magisterial supervision or monitoring does not arise. It is only in cases where the investigating officer is failing or has failed in discharge of his statutory duty to conduct the investigation in a fair and proper manner, the Magistrate invokes his jurisdictional competence to save the investigation.

VII Tracing the impact of *sakiri vasu* ruling

The *Sakiri Vasu* ruling has made two significant impacts on the administration of criminal justice. *Firstly*, it has established the jurisdiction of the Magistrate under section 156(3) as an alternative to the writ jurisdiction of the high courts. It allowed the high courts to breathe and focus on important cases rather than passing orders like registration of FIR or change of investigating officer *etc.*, which can be addressed at the level of the jurisdictional Magistrate under section 156(3). As a consequence, even in cases where the aggrieved party approached the high court under the writ jurisdiction or under section 482 of the Code for any such request, the high court refused to invoke its extraordinary writ jurisdiction or inherent power and referred the party to the jurisdictional Magistrate to avail the alternate remedy under section 156(3).⁴⁴

Secondly and more importantly, it allowed the magistracy to be more proactive in order to ensure ‘fair and proper’ investigation. The Magistrate need not wait till the police report is placed before him after conclusion of the investigation; he can intervene to remove the difficulties or inadequacies while the investigation is still progressing.

44 *Kaniz Fatima Khustar Abbas v. State of Maharashtra*, 2020 SCC OnLine Bom 8194; *MSR LAB v. State of Maharashtra*, 2018 SCC OnLine Bom 11354; *Kuldeep Kausbik v. State of U.P.*, 2016 SCC OnLine All 722; *Kusum Devi v. State of U.P.*, 2022 SCC OnLine All 322; *Taslima v. State of U.P.*, 2022 SCC Online All 159; *Namita Naskar v. State of West Bengal*, 2014 SCC OnLine Cal 4555; *Narayan Prasad Verma v. State of Chhattisgarh*, 2016 SCC OnLine Chh 207; *Mohammad Ismail Mohammad Hanif v. State of Gujarat*, 2021 SCC OnLine Guj 1050; *Mukesh Kumar v. State of Himachal Pradesh*, 2022 SCC OnLine HP 1696; *Sanjay Kumar Mahato v. State of Jharkhand*, 2021 SCC OnLine Jhar 920; *John v. State of Kerala*, 2008 SCC OnLine Ker 377; *Vasanthi Devi v. S.I. of Police*, 2008 SCC OnLine Ker 47; *Shweta Bhadoriya v. State of M.P.*, (2017 (1) MPLJ (Cri) 338).

The aggrieved party may approach the Magistrate or even the Magistrate may on his own take appropriate steps to prevent abuse or misuse of investigative powers by the police. For example, if the investigating officer is shielding the accused person or framing the wrong person or not examining the key witnesses or not considering the crucial piece of evidence or showing personal bias in conducting the investigation or unduly long time is taken in completion of the investigation, the Magistrate may intervene to correct the course of the investigation.⁴⁵ The *Sakiri Vasu* line of approach can prove to prevent the criminal justice system from becoming casualty of wrongs committed during the course of investigation which many a times become the sole reason for the gap between the factual guilt and the legal guilt. The high courts have contributed to a great extent in giving push to the *Sakiri Vasu* line of approach either by refraining to pass any directions pertaining to investigation or by specifically directing the Magistrate to follow the dictum of *Sakiri Vasu* ruling.

In *Ajay Kumar Pandey v. State of U.P.*⁴⁶ the High Court of Allahabad disposed of a bunch of writ petitions seeking a direction to the police authorities for fair and proper investigation with the observation that the parties may approach the Magistrate who is under a duty to follow the principles laid down in *Sakiri Vasu* case to ensure fair and proper investigation.

In *Madhan Singh v. State of U.P.*⁴⁷ the grievance of the complainant was that the investigation was not being conducted in a fair manner. The statements of the complainant and witnesses were not recorded by the investigating officer. The complainant had approached the Magistrate with a request to forward the statements to the investigating officer which was turned down by the Magistrate. The High Court of Allahabad, relying on the *Sakiri Vasu* case, observed that “*it is a duty of the Magistrate to ensure that investigation is done impartially and in a fair manner... The Magistrate cannot wash his hands of the case after passing an order under Section 156 (3) Cr.P.C.*”⁴⁸

In *Namita Naskar v. State of West Bengal*⁴⁹ the High Court of Calcutta directed the party to avail the alternate statutory remedy under section 156(3) in the first place and observed that:⁵⁰

In course of investigation/further investigation, if the Magistrate is of the opinion that effective investigation is not being done by the Officer-

45 Bharat Chugh, “Role of a Magistrate in a Criminal Investigation”(2016) available at: <https://delhicourts.nic.in/ejournals/Roleofmagistrate-Final-Bharatchugh.Pd> (last visited at Dec. 20, 2024).

46 2021 SCC Online All 77.

47 MANU/UP/0713/2022.

48 *Id.*, para 6.

49 2014 SCC OnLine Cal 4555.

50 *Id.*, para 5.

in-charge of a police station, he may monitor the same and issue directions upon the latter to effectively investigate the crime. Such power in a given case where complexities of investigation require better forensic skill or technique shall include direction upon the officer in charge to take recourse to such skill or technique, if necessary in the interest of justice. (Emphasis added)

The High Court of Chhattisgarh in *Md. Ajj v. State of Chhattisgarh*⁵¹ while expressing the view on the ambit of section 156(3) observed that:⁵²

If there is undue delay on the part of the police authorities in investigation of the matter, that can also be directed by the Magistrate. The power of the Magistrate under section 156(3) of the Code, 1973 to order such investigation, as empowered under section 190 of the Code, 1973 includes a direction to investigate the matter within a reasonable time without causing undue delay, on receiving a complaint for slow and undue delay in the investigation. (Emphasis added)

In *Balachandran v. State of Kerala*⁵³ the High Court Kerala was approached to decide whether the magisterial power under section 156(3) includes the power to order inclusion of a particular offence and investigation into the same while the investigation is progressing. The high court referred the Supreme Court ruling *Shariff Ahmed v. State (NCT of Delhi)*⁵⁴ which in its turn relied on the *Khawaja Nazir Ahmad* and not on the *Sakiri Vasu* case. The high court answered the question in the negative and concluded that “by exercising the power of monitoring or supervising the investigation as declared by the Apex Court in *Sakiri Vasu* case, a Magistrate cannot exercise a power, which is not otherwise available to him under the Code... If the Magistrate cannot direct the Investigating Officer to submit a final report on a particular offence, the Magistrate cannot direct the Investigating Officer to incorporate a particular offence and investigate that offence.”⁵⁵

The high court erred in appreciating the ‘implied power’ doctrine introduced by the Supreme Court in the *Sakiri Vasu* case while expanding the scope of section 156(3) of the Code. The magisterial supervision and monitoring to ensure ‘proper investigation’ should extend to cover instances where the investigation is not being done in proper manner. Moreover, when the Magistrate can direct further investigation into the particular offence on the basis of a protest petition after the submission of the police report then why the Magistrate is not allowed to invoke the ‘implied power’ and direct the investigation into the particular offence on an application of the complainant

51 2011 SCC OnLine Chh 105.

52 *Id.*, para 2.

53 2009 SCC OnLine Ker 6544.

54 (2009) 14 SCC 184.

55 *Id.*, para 8.

during the course of the investigation. The Supreme Court in *Sakiri Vasu* case expands the magisterial supervision and monitoring to both the situations where “*proper investigation has not been done, or is not being done.*” It appears that the courts have not yet come out of the clutches of *Khwaja Nazir Ahmad* ruling despite it being a pre-constitutional era case. The constitutional interpretation of criminal procedure by the Supreme Court in various prominent rulings has allowed the magistracy to intervene in the investigation process to achieve the larger goal of ‘fair and proper investigation’ without encroaching upon the investigative autonomy of the police.⁵⁶

VIII Magisterial power to direct ‘further investigation’: The ‘pre’ or ‘post’ cognizance dilemma

It can be gathered from the discussion made so far that the Code confers exclusive powers on the police in the matter of investigation into a cognizable offence. At the same time the statutory scheme of the Code empowers the Magistrate to direct investigation at different stages.⁵⁷ As far as ‘further investigation’ is concerned, the police officer derives the power to conduct further investigation under section 173(8) of the Code (section 193(9), BNSS) post submission of the police report to the Magistrate.⁵⁸ There is no explicit provision in the Code enabling the Magistrate to direct ‘further investigation’. However, it can be derived from various authoritative pronouncements of the Supreme Court that the Magistrate possesses the power to direct further investigation under section 156(3) at pre-cognizance stage after the presentation of section 173(2) (section 193(3), BNSS) report by the police officer.⁵⁹ If the Magistrate is not convinced with the decision formed by the police and conveyed through the police report, he may order further investigation invoking his supervisory capacity. In *State of Bihar v. JAC Saldanha*⁶⁰ the Supreme Court has categorically stated that the magisterial power under section 156(3) to direct further investigation is an independent one and it does not have any conflict with the authority of the police to conduct further investigation under section 173(8).⁶¹

In *Vinay Tyagi v. Irshad Ali*⁶² the Supreme Court further elaborated the scope of magisterial power to direct further investigation and concluded that there is no bar

56 It is important to mention that the Magistrate in Tis Hazari clash matter followed the principles laid down in *Sakiri Vasu* case and directed the police to submit the status report qua the ongoing investigation and to preserve the CCTV footage which was a crucial piece of evidence in the case. See, “Tis Hazari Clash: Magistrate Asks Delhi Police to submit status report regarding the Investigation”, available at: <https://www.livelaw.in/news-updates/magistrate-asks-delhi-police-to-submit-status-report-149695> (last visited on Jan. 10, 2025).

57 Code of Criminal Procedure, 1973, Ss. 159, 156(3) and 202.

58 Code of Criminal Procedure, 1973, s. 173(8).

59 *Abhinandan Jha v. Dinesh Mishra*, MANU/SC/0054/1967; *Bhagwant Singh v. Commissioner of Police*, (1985) 2 SCC 537.

60 (1980) 1 SCC 554.

61 *Id.*, para 19.

62 (2013) 5 SCC 762.

on the magisterial jurisdiction to direct further investigation after filing of the police report. The court has located the source of such power by giving conjoint reading to section 156(3) and section 173(8) of the Code.⁶³ The Magistrate can invoke its power to order further investigation to clear doubts, if any, or to further substantiate the police report. The magisterial satisfaction is considered to be paramount for taking the case forward.⁶⁴

Hence, the magisterial power to direct further investigation is well established through judicial dictum. However, what needs to be examined further is the question whether the magisterial power to direct further investigation hangs on the act of 'taking cognizance' or it has its own independent existence. The *Sakiri Vasu* ruling has already established the wide power of the magistracy under section 156(3) to ensure 'fair and proper investigation'. But whether the duty to ensure 'fair and proper investigation' ceases with the act of 'taking cognizance' by the Magistrate or not came for consideration before a three Judge Bench of the Supreme Court in *Vinubhai Haribhai Malaviya v. State of Gujarat*.⁶⁵ The Bench in *Vinubhai* case has concluded that the magisterial power to ensure a 'fair and proper investigation' is not coterminous with the act of taking cognizance by the Magistrate. Such power remains with the Magistrate until the trial commences.⁶⁶ Commenting on the significance of the magisterial authority to order further investigation at post-cognizance stage, the Bench opined that it will be travesty of justice if the supervisory jurisdiction of the Magistrate in the matter of investigation ceases halfway through the pre-trial stage, particularly when the police is authorized to exercise such power to conduct further investigation at post-cognizance stage. The Bench encouraged the magistracy to exercise such power on their own in the interest of justice.⁶⁷

The expansive interpretation given to magisterial power under section 156(3) in *Sakiri Vasu* case was further expanded in *Vinubhai* ruling when the court brought the magisterial power on par with the police in the matter of further investigation at the post-cognizance stage.

The Supreme Court in *Vinubhai* case made two significant contributions- *firstly*, it brought the magisterial supervisory and monitoring power of ensuring 'proper investigation' within the ambit of 'just, fair and reasonable' procedure under Article 21 of the Constitution and *secondly*, it has expanded the scope of magisterial supervisory jurisdiction over police investigation beyond the stage of cognizance. The minimal procedural requirement under article 21 demands that not only the trial but also the investigation needs to be just and fair. To achieve the goals of fair and just investigation, it is important that any defect in the investigation is cured at the pre-trial stage itself.

63 *Id.*, para 40.

64 *Supra* note 61 at para 51.

65 (2019) 17 SCC 1.

66 *Id.*, para 25.

67 *Supra* note 64 at para 42.

There may be chances of fresh material coming to light later on at post-cognizance stage which might implicate persons not previously charged or absolve those who were earlier shown as accused. As the final decision on police investigation lies with the Magistrate hence, the magisterial authority to ensure 'fair and proper investigation' should be stretched to the post-cognizance stage till the commencement of the trial to cater those cases where further investigation is needed. It will act as a sufficient safeguard against erroneous or excessive use of investigative powers by the police. The *Vinubhai* ruling has empowered the magistracy to order further investigation on his own at the post-cognizance stage, independent from the views of the police which is again a significant development exhibiting the expansive role of the magistracy in the investigation process.

IX BNSS, 2023 and magistrate monitored investigation

On July 1, 2024 India has witnessed implementation of the new criminal laws which have replaced century old criminal laws. The introduction of BNSS, 2023 has put the curtain on the Code of Criminal Procedure, 1973 which had completed 50 years. As far as the role of magistracy in the pre-trial setting is concerned, the BNSS has brought some relevant changes. First and foremost, the police officer is made responsible to forward the daily diary entry to the Magistrate with respect to the non-cognizable cases.⁶⁸ It expands the magisterial supervisory role over non-cognizable cases as well which was earlier limited to the cognizable offence only. Another significant overseeing function is prescribed in cases of audio-video recording of the search and seizure by the police. In such cases the police officer is required to forward the recording to the Magistrate within 48 hours.⁶⁹ The aiding role of the Magistrate has seen an increase under the new law wherein the collection of finger impression and voice sample have been permitted with the order of the Magistrate.⁷⁰

The key section 156(3) of the Code has been reintroduced as section 175(3) in the BNSS. Now under the changed provision, the Magistrate is required to seek an explanation from the police officer before issuing a direction for the registration of the FIR. This is a welcome change which not only reinforces the *Lalita Kumari* dictum of putting a check on the police for non-registration of FIRs but also provides a potential check on the frivolous and ill motivated complainant who uses magisterial power to bypass police for registration of the FIR. Further, the modified provision has given statutory recognition to the *Priyanka Srivastava* ruling of the Supreme Court wherein the requirement of affidavit was made mandatory for invocation of magisterial powers under the said provision.⁷¹

68 Bharatiya Nagarik Suraksha Sanhita, 2023. s. 174(1)(ii).

69 Bharatiya Nagarik Suraksha Sanhita, 2023. s. 185.

70 Bharatiya Nagarik Suraksha Sanhita, 2023. s. 349.

71 Bharatiya Nagarik Suraksha Sanhita, 2023. s. 175(3).

X Conclusion

The *Sakiri Vasu* ruling has changed the face of the magistracy. It has redefined the pre-trial power dynamics by introducing the 'Magistrate monitored mechanism' in the investigation process which was earlier considered to be the exclusive domain of the police agency. The magistracy is conferred with the power to make meaningful interventions in the investigation process. The 'implied power' doctrine has placed the Indian magistracy closer to the inquisitorial *Juge d' instruction* with greater responsibility to protect the object of 'fair and proper' investigation which will eventually result in speedy and fair trial. The *Vinubhai* ruling has further strengthened the magisterial role in ensuring 'fair and proper' investigation by stretching the magisterial inroad in investigation even at post-cognizance stage. However, the onus lies on the Magistrates to make full use of their redefined powers to ensure 'just and fair investigation' which goes beyond the mere issuance of directions for the registration of the FIR and conduct of investigation.

Recently, the Supreme Court pondered upon the feasibility of having a separate cadre of Magistrates to monitor the police investigation. The concept was discussed in the backdrop of ensuring '*fool-proof collection of evidence*' at the crucial pre-trial stage. The Bench expressed the view that the magisterial monitored investigation will infuse greater sense of responsibility on the police. The Bench considered assigning the Magistrate a more intrusive role akin to the inquisitorial Magistrate which appears to be a step ahead of *Sakiri Vasu* ruling. The Chief Justice of India was of the opinion that participation of Magistrate in the investigation process will improve the 'quality of investigation' and thereby increase the public confidence in the criminal justice system. The Bench proposed to take up this issue in future.⁷² If the idea of a separate cadre of the Magistrates for the purpose of investigation is materialized in future, it will surely impact the power dynamics at the pre-trial stage and will further dilute the police supremacy over the investigative process. It is interesting to note that the Supreme Court is indicating a shift towards inquisitorial tradition at a time when the prominent inquisitorial jurisdictions have made a move from the 'Magistrate supervised investigation' to the 'Prosecutor supervised investigation'.⁷³

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72 Live Law News Network, "Supreme Court discusses Concept of Separate Magistrates Cadre to Monitor Evidence Collection by Police" available at: <https://www.livelaw.in/top-stories/supreme-court-separate-magistrates-cadre-monitor-evidence-collection-police-170343> (last visited on Dec. 12, 2024).

73 Jacqueline Hodgson, *The Metamorphosis of Criminal Justice: A Comparative Account*, Oxford University Press (2020). It is interesting to mention the Supreme Court ruling in *State of Gujarat v. Kishanbhai*, (2014) 5 SCC 108 wherein the court has proposed a procedural mechanism conferring the duty on the prosecutorial agency to apply its independent mind and rectify the shortcomings/defects in the investigation post completion of the investigation by resorting to further investigation, if required. This approach may be seen in contrast to the approach of 'Magistrate monitored investigation' as propounded in *Sakiri Vasu* case.

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