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DRIFT OR SHIFT? FROM ADVERSARIAL TO

INQUISITORIAL

SYSTEM OF CRIMINAL JUSTICE IN INDIA

Authored By- Charu Atri

Introduction

“In the adversary system of trial, the judges unfortunately assume the role of referee or umpire, and allow the trial to develop in a contest between the prosecution and the defence with the inevitable distortions flowing from combative and comparative elements entering in the trial procedure. The judge must cease to be a spectator and mere recording machine if a criminal court is meant to be dispensing justice. The judge must become a participator in the trial by putting questions to the witnesses to ascertain the truth”.

The above remarks were made by the Supreme Court of India in the case of Ram Chander v. State of Haryana¹. In number of cases the role of a judge being more than a mere spectator has been highlighted. The ultimate goal of any country’s criminal justice system is to protect the life and property of its citizen and punish those who invade these rights through a fair procedure. The methods to obtain this goal could be different in different countries. Primarily there are two models of criminal justice system one is the Adversarial criminal justice system and the other is the Inquisitorial criminal justice system.

¹ Ram Chander v. State of Haryana (1981) 3 SCC 191

Difference Between Adversarial And Inquisitorial Criminal Justice System

The differences in these two models can be found with respect to every functionary of a criminal justice system. From police, courts, judges to counsels, victim and accused. In an Inquisitorial criminal justice system the court and the public prosecutor has a full control over the investigation and presentation of the case in a trial. The court plays an active role in procurement of the evidences, investigation of the case and examination of the witnesses. The judge himself investigates the complaint. Accused is presumed to be innocent according to a maxim “in dubio pro reo” i.e. all doubts are resolved in favor of the accused and it is the duty of the judge to discover the truth. The exclusionary rules do not exist in this justice system and nor the hearsay rule. Even the statements of the witnesses made during the investigation process are admissible in the trial. One more distinguishing feature of inquisitorial justice system is that here the questions are asked from the witnesses by the judge. Also, there is no formal cross examination. Here the court plays an affirmative role and is not like an umpire or mere spectator. And therefore it is the satisfaction of the judge plays a very important role though the standard of proof is beyond reasonable doubt here also just like in the adversarial system. The victim also plays a vital role in this system. He helps the court in finding the truth by suggesting the questions that might be asked from the witnesses by the court he is also permitted to ask the questions. And this therefore shows that victim is a full party. The judge has a vast power to obtain and access the evidences. This system is also known as Romano Germanic System of Law and is common in European countries like France, Italy and Germany.

On the other hand, in Adversarial criminal justice system both the parties i.e. defence and prosecution have to present their evidences before a neutral judge, and the facts that are culled out from those evidences establish the truth. One could say that the structure is so to just reach at a settlement between the two contesting parties and not to investigate into the truth. The role of the judge is that of a referee only, unlike the inquisitorial system, here the judge is passive who leaves the entire duty of presenting the case on the prosecution. The court is heavily dependent on the evidences produced in the trial by the parties. Also, as the offence is deemed to be taken place against the society as a whole therefore the contest is also between the accused and the State and therefore the victim is sort of excluded unlike in the inquisitorial system. The parties cross examine each other to impeach the credibility of the evidence produced by them (whether oral or

documentary). Also, the police have a lot of power in this system unlike the inquisitorial system where the police work under the prosecution as their agents.

The difference in the approaches of these two systems is mainly due to the very fact that in adversarial system, the truth is supposed to be emerged by the two contesting sides having equal rights and resources. Here the justice is “procedural justice” i.e. where the procedure is laid down for justice through a fair procedure where both parties are on equal platform competing before a neutral judge/umpire. But in the inquisitorial criminal justice system more emphasis is on the truth finding by the judge. So, one can say that where adversarial system is party oriented the inquisitorial system is judge oriented.

Indian Criminal Justice System: Primarily Adversarial System

Indian criminal system is mainly based on the adversarial system which was taken from the British model. The Criminal Procedure Code, 1973 (hereinafter referred to as Code) had adopted the adversary system based on the accusatorial method. If we see the provisions of the Code, the judge has majorly a non interventionist role in the trial. The judge has to just ensure by being a mere spectator whether the evidences that have been produced are relevant for the case in hand or not and if they are relevant whether they are admissible or not and whether the guilt of the accused is established beyond any reasonable doubt by the prosecution or not. The judge has less freedom as he has to abide by the provisions of the Indian Evidence Act, 1872 and the Criminal Procedure Code, 1973 during the whole trial. The relevancy of a fact depends from the section 6 to 55 of the Evidence Act, whereas the facts that are relevant are only admissible (except few exemptions as under section 65B and 155 of the Act) under section 5 of the Evidence Act. Also the mode of proof is also provided in the Evidence Act, which leaves almost no choice with the judges. But this is not the complete picture. As discussed through the following cases and legislative provisions.

The Malimath Committee², had showed its concern over the pendency of criminal cases and the low conviction rate due to the flaws in Indian criminal justice system which is time taking and is full of unnecessary procedures. The committee had observed that as the judges play a neutral role in the trial, the whole system inevitably inclines towards the accused. The Supreme Court has also on multiple occasions exhibited its concern over this problem. While making a remark about the

² Malimath Committee on Reforms of Criminal Justice, 2003

criminal justice system of India and the right to fair trial, the Supreme Court in the case of *Zahira Habibulla H. Sheikh v. State of Gujarat*³, had said that “the main purpose of the judicial system is the “discovery, vindication and establishment of truth. Since, the object of a criminal trial is to mete out justice, convict the guilty and protect the innocent the trial should be a ‘search for truth’ and not worry about over technicalities”.

In the case of *Meera Devi v. Jitender*⁴, the Supreme Court had emphasized upon the Malimath Committees’ suggestion for a judicial reform and iterated the findings of the committee that “the judge in his anxiety to demonstrate his neutrality, opt to remain passive and truth often becomes a casualty”.

In the case of *Shivani Sharma v. Ram Chander*⁵, the court said that “the judge is not a mere umpire at a wit-combat between the lawyers for the parties whose only duty is to enforce the rules of the game and declare at the end of the combat who has won and who has lost. He is expected, and indeed it is his duty, to explore all avenues open to him in order to discover the truth and to that end, question witnesses on points which the lawyers for the parties have either overlooked or left obscure or willfully avoided. A Judge, who at the trial merely sits and records evidence without caring so to conduct the examination of the witnesses that every point is brought out, is not fulfilling his duty”. Further in the case of *Raj v. Ajay Kumar* (SC 2011), the court had remarked that “not just the judges but all presiding members of the bar have a duty towards the litigant to seek justice”. In the case of *Mohd Iqbal v. Uttarakhand*⁶ (Uttarakhand HC 2012) the court had reiterated that “any trial without the pursuit for justice makes no sense”. In the case of *Ram Chander v. State of Haryana*⁷ (SC 1981) also the Apex Court had advocated for the role of judge being more than a spectator for effective dispensation of justice.

Inquisitorial Features In Indian Criminal Justice System

If we closely look at the provisions of the Criminal Procedure Code and the Indian Evidence Act, we will notice that there are some provisions that do not adhere to the adversarial system strictly. Like section 311 of the Criminal Procedure Code, where the court has the power to summon or re-summon any witness at any stage of the proceeding. Where under this section the court could only call the witnesses, under section 165 of the Evidence Act, the court can even ask for the production of any document or a thing. As per the section 165 of the Act, the judge has the power to ask any

³ *Zahira Habibullah Sheikh & Anr v. State of Gujarat & Ors* (2004) 4 SCC 158

⁴ *Meera Devi v. Jitender* (2016) 7 SCC 737

⁵ *Shivani Sharma v. Ram Chander* (2013) 3 SCC 164

⁶ *Raj v. Ajay Kumar* AIR 2013 Delhi 633, 2013 (1)

⁷ *Mohd Iqbal v. State of Uttarakhand* (2019) SCC OnLineUtt 653

question to the parties or to the witnesses at any stage of the proceeding. The ultimate purpose of these inquisitorial proceedings is to do the complete justice by finding out the real truth of the matter. These two sections are complementary to each other in a sense that under section 311 of the Code, the court can summon the witness and once the witness is before the judge he can examine him under section 165 of the Evidence Act. The opposite party gets the right to cross examine that witness only on the discretion of the court.

The court under section 165 of the Evidence Act, could even ask irrelevant questions or questions on hearsay from the witnesses or the parties. But according to the proviso of this section the judgment has to be based only on relevant facts duly proved. But there are three some restrictions on this power of the court, that the court cannot ask the questions that fall under privileged communication, or are improper under section 148 and 149 and cannot allow secondary evidences of document unless allowed under section 65 of the Act. In the case of *Raghunandan v. State of UP*, it was held by the Apex court that even the bar of section 162 of the Code Criminal Procedure does not apply on the section 165 of the Act and the court could ask even the questions on statements made to the police in the course of the investigation.

In the case of *Nepal Chandra Roy v Netai Chandra Das*⁸ (SC 1977), the court had remarked that in order to do complete justice the court has to be active and it has the power to interfere at any point of time and ask questions to the witnesses or to the parties. However, the judge should not be over zealous. He should not unnecessarily interfere at the early stages of the examination and should wait till the examination of the parties has got over. Further in the case of *Himanshu Singh Sabharwal v. State of MP*⁹ (SC 2008), the apex court observed that if fair trial is not imparted to the parties and court has the reason to believe that the prosecutor is not acting in a proper manner the court can exercise the power under section 311 of the Code and 165 of the Evidence Act to call the evidences for the sake of justice.

Further under section 313 of the Criminal Procedure Code, the court has the power to examine the accused. The court can at any stage of the trial question the accused, the purpose behind this provision is to enable the court to interact personally with the accused without the interference of the lawyer. Here also the court tries to cull out the truth, but the oath is not administered to the accused under this provision. And therefore the opposite party cannot cross examine him, and therefore is not considered as substantial piece of evidence in the case. The accused is free to speak whatever he wants to speak as he won't held liable if he refuses to give answer to a question asked by the court or if he gives a false answer.

⁸ *Raghunandan v. State of UP* (1974) 4 SCC 186

⁹ *Nepal Chandra Roy v. Netai Chandra Das* (1977) SC 652

Further, it was held in the case of Sakiri Vasu v. State of UP¹⁰, that section 156 (3) of the Criminal Procedure Code includes all such powers that are required for a proper investigation to ensure fair trial. This means that the judicial magistrate could supervise the investigation done by the police. As per the section 169 of the Code the magistrate is not bound by the closure report of the police and can proceed with the case if he feels so.

Again, under section 173(8) of the Code the court can order the police for further investigation after the charge sheet is filed by the police if the court is of the view that the investigation was not conducted properly.

One cannot ignore the very fact that the role of the magistrate starts from the very point when the FIR is lodged, as an occurrence report has to be filed with the magistrate under section 157 of the Code, and then further the accused has to be produced before the magistrate within 24 hours of arrest and then after every 15 days under sections 57 and 167 of the Code. And therefore the court acts as a check at every step of the investigation and trial of the criminal case. Therefore it would be wrong to assume that in India the judge only sits as a mere spectator. Rather the judges are proactive and responsive in Indian criminal justice system.

Conclusion

Though, in the Criminal Procedure Code, 1973 and the Indian Evidence Act, 1872 more emphasis is laid on the “proof” rather than on the “truth” as our criminal justice system is based on the principle that it is better that nine criminals escape than convicting one innocent person. And therefore the judge acts as a check post for the evidences that are laid before him at various stages. But as the protectors of the rights of the people the Indian judges have ensured fair investigation and fair trial by making a shift especially in the last few years from passive adversarial system to the participative inquisitorial system.

Inquisitorial system has undoubtedly some benefits it is a truth seeking system unlike the adversarial system where in a competition to win the case truth is left uncovered. And therefore it becomes the duty of the Indian judges to unveil the truth by employing the appropriate tools they have under the legislative provisions. As the pursuit of truth should only be the guiding star of the Justice system.

¹⁰ Sakiri Vasu v. State of Uttar Pradesh 2008 2 SCC 409