ROLE OF COURTS IN THE ADMINISTRATION OF CRIMINAL JUSTICE

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It is the prime duty of a State to protect the rights and liberties of its people. To secure the innocent and punish the guilty. In every civilized society governed by rule of law there is a criminal justice system in place for this purpose. In India the criminal justice system has been performing much below the par and many would say that it has failed to inspire the confidence of the citizens. Some would say that it has failed. When the guilty go unpunished the faith of a common man in the system is shaken. It is both a common perception and a reality that crime continues to increase in India, in fact it proliferates.

The two major problems with the criminal justice system in India can be identified as follows:

(a) Huge pendency of cases and the inordinate delay in their disposal.

(b) Law rate of conviction even in serious crimes.

A highly respected senior advocate of Supreme Court and a jurist Mr. Fali S. Nariman, in his first book "India's Legal System: Can it be Saved", gives instances when two of the Hon'ble Chief Justices of Supreme Court, while demitting their office had said that the criminal justice system in India is either collapsing or has already collapsed! It was time that this problem had to be tackled, and tackled fast.

The Government of India did recognize this problem. In fact it was precisely for these reasons that it constituted a committee in the year 2000, to examine the Fundamental Principles of criminal jurisprudence in the country, to identify its weaknesses and suggest remedies.

This committee known as the Malimath Committee underwent a very extensive and painstaking research and ultimately came out with its Report in the year 2003. some of the recommendations of the committee have already been implemented and are now the law of the land. To give

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an example the chapter on "Plea Bargaining" introduced in CrPC was a recommendation of the Committee. All the same, many of its recommendations have still not been accepted. Nevertheless "Malimath committee report", is the starting point of reference whenever we discuss on "Criminal Justice System in India".

The Criminal Justice System in India is what is known as the "Adversarial System". It is a legacy of a long gone colonial era, with its underlying principle that "it is better that all guilty persons go unpunished that one innocent person suffer".

The Malimath Committee points out several flaws in the adversarial system and recommendation changes. Though to be fair the Committee concludes that a fair trial, in particular fairness to the accused is better protected under the adversarial system. Yet the Committee favours adopting same aspects of the "inquisitorial system", particularly in heinous and terrorist related crimes. the report continuously points at the weaknesses in our present system, and it states as under:

> "The adversarial system lacks dynamism because it has no lofty ideal to inspire. It has not been entrusted with a positive duty to discover truth as in the inquisitorial system. When the investigation is perfunctory or ineffective, Judges seldom take any initiative to remedy the situation. During the trial, the judges do not bother if relevant evidence is not produced and plays a passive role as he has no duty to search for truth. As the prosecution has to prove the case beyond reasonable doubt, the system appears to be skewed in favour of the accused. It is therefore necessary to strengthen the adversarial system by adopting with suitable modifications some of the good and useful features of the inquisitorial system."

Jurists like Fali S. Nariman have argued that whereas in an adversarial system like ours, the insistence of Court is on the search for Proof rather than the search for truth. "The search for proof pays obeisance to due process values". The effort should be somehow to make proof and truth as synonymous. "The ideal lies somewhere in between, but we have not been able to find it. This, then, is the great dilemma of a fair criminal justice system."

Having said this, however, I feel that inspite of its faults and weaknesses, the present system contains provisions and "tools" for a positively motivated judicial officer, which must be used in order to enhance the effectiveness of the system, and more importantly in order to reach a just and fair decision.

The first and foremost is Section 165 of the Evidence Act. It reads as follows:

"Section 165. Judge's power to put questions or order production - The judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question:

Provided that the judgment must be based upon facts declared by this Act to be declared by this Act to be relevant, and duly proved:

Provided also that this section shall not authorize any Judge to compel any witness to answer any question or to produce any document which such witness would be entitled to refuse to answer or produce under Sections 121 to 131, both inclusive, if the question were asked or the document were called for by the adverse party; nor improper for any other person to ask under Section 148 or 149; nor shall he dispense with primary evidence of any document, except in the cases hereinbefore excepted."

The above provision gives power to the Court to ask a witness any question it pleases, in any form, at any time. It can ask any parties about a fact relevant or irrelevant and also to order the production of any document or thing.

In Indian Penal Code there are two further provisions which give immense power to the court which must be used in appropriate cases, to reach to the truth of the matter. These provisions are Section 311 and Section 319 CrPC.

Section 311 of CrPC reads as under:

"Section 311. Power to summon material witness, or examine person present. - Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decisions of the case."

Section 319 of CrPC reads as under:

"Section 319. Power to proceed against other persons appearing to be guilty of offence.- (1) where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

(2) Where such person is not attending the Court, he may, be arrested or summoned as the circumstances of the case may require, for the purpose aforesaid.

(3) Any person attending the Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appeared to have committed.

(4) Where the Court proceeds against any person under sub-section (1), then-

(a) The proceedings in respect of such person shall be commenced afresh, and the witness re-heard;

(b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the court took cognizance of the offence upon which the inquiry or trial was commenced.

These are but few of the major tools before the Court which must be utilized for a just decision of the case. And the Supreme Court has observed time and again that a just decision is not limited for the interest of the accused but equally for the benefit of the prosecution.

But these provisions remain almost a dead letter. Very rarely does a trial magistrate or even a sessions judge summons on his own a material witness in a criminal case. It is almost always left to the prosecution and if the prosecution fails to call such a witness, the accused is acquitted.

Judges have to first change their mindset. They must become seekers of truth instead of "proof". When a trial proceeds with this aim, I think there are still enough tools to work on. There is an important decision of the Supreme Court on Section 165 of the Evidence Act. It is Ram Chandra v. State of Haryana (1981) 3SCC 191. Justice O. Chinnappa Reddy in the said judgment says about the Presiding Judge in a criminal trial, that:

> "If a criminal court is to be an effective instrument in dispensing justice, the presiding justice, the presiding judge must cease to be a spectator and mere recording machine. He must become a participant in the trial by evincing intelligent active interest by putting questions to witnesses in order to ascertain the truth."

At another place the learned Judge says, "It is the duty of a Presiding Judge to explore every avenue open to him in order to discover the truth and to advance the cause of justice."

A Presiding Judge is not like an umpire in a cricket match - detached and silent, but as put by Justice O. Chinnappa Reddy, he has to be alert and proactive and dispense justice. He is more like a referee in a football match. It is this precise attitude that a Presiding Judge must change. With this change in mindset and approach now horizons will open before a Presiding Officer.

In another decision of the Supreme Court and again in the context of Section 165 of the Evidence Act, While endorsing Justice Chinnappa Reddy's judgment it says, and I quote - **State of Rajasthan vs. Ani alias Hanif & others (1997) 6 SCC 162.**

> "Reticence may be good in many circumstances, but a judge remaining mute during trial is not an ideal situation. A taciturn Judge may be the model caricatured in public mind. But there is nothing wrong in his becoming active or dynamic during trial so that criminal justice being the end could be achieved. Criminal trial should not turn out to be a bout or combat between two rival sides with the judge performing the role only of a spectator or even an umpire to pronounce finally who won the race. A Judge is expected to actively participate in the trial, elicit necessary materials from witnesses at the appropriate context which he feels necessary for reaching the correct conclusion. There is nothing which inhibits his power to put questions to the witnesses, either during chief examination or cross-examination or even during re-examination to elicit truth. The corollary of it is that if a judge felt that a witness has committed an error or a slip it is the duty of the judge to ascertain whether it was so, for, to err is human and the chances of erring may accelerate under stress of nervousness during cross-examination. Criminal justice is not to be founded on erroneous answers spelled out by witnesses during evidence collecting process. It is a useful exercise for trial judge to remain active and alert so that errors can be minimised."

But once you have decided to take up this path, which I advise you should, you must also be warned!

An extreme care needs to be taken and a balance must be maintained, at all cost. He should at all time remain a Judge and must never take the mantle of an advocate, either the public prosecutor or the defence counsel. As Justice Chinnappa Reddy cautions in the above judgment such a path must be pursued "without any hint of partisanship and without appearing to frighten or bully witnesses". Or else you will be known as that judge "who talked too much". Lord Denning in "Due Process" warns about the dangers becoming one.

So without being a 'talkative Judge' one has to proceed with the matter carrying the confidence of the litigants as well as the Bar. Remember, a Presiding Judge in a trial court is the "linchpin" in the whole

system, as noted by Fali S. Nariman (India's Legal System: Can it be Saved). He is like a conductor of a choir. He must take the whole team together. As Justice Chinnappa O. Reddy says he has to "subdue the raucous, encourage the timid, conspire with the young, flatter and old".

Again this attitude must be the same in every case! It should not be that a judge takes the mantle of a "robust" proactive judge in one case and that of a silent laid back spectator in another. If this happens then there are chances that both the bar as well as the litigants may get unnerved or it may create controversies. To avoid this the same attitude and the same approach must be adopted in each and every case.

In the end I would like to emphasize, what I normally emphasize to all young judicial officers. As you know, in the Continent the highest respect given in a society is to a professor, particularly if he is a professor of Philosophy. But if you go to the island i.e. England that position in society is reserved only for a Judge. Since we have also adopted the same system i.e. the common law system, we too give the same respect to a Judge. Always keep in mind that you are the last hope of a man, who has been driven to litigation. The society has entrusted a great faith in you. You therefore have a great responsibility and a great challenge before you. Finally remember that the whole art of being a judge rests on the "balance" you maintain - in your work as well as in your manners.

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