IN THE COURT OF SESSIONS FOR GREATER BOMBAY

AT MAZGAON

SESSIONS CASE NO. 315 OF 2004

The State of Gujarat]
[at the instance of PI D.C.B.]
Police Station, Vadodara]
City, Gujarat State. [C.R.]
No.82/2002 of Panigate]
Police Station]] Complainant.

Versus

1. Rajubhai Dhamirbhai Baria.]
Hanuman Tekdi, Daboi Road,]
Vadodara, State-Gujarat.]

2. Mahendra @ Langdo]
Vishwasrao Jadhav.]
Hanuman Tekdi, Daboi Road,]
Behind Naikpura Woodland,]
Vadodara, State-Gujarat.]

3. Haresh @ Tino Virendragir]
Gosai.]
Hanuman Tekdi, Daboi Road,]
Vadodara, State-Gujarat.]

4] Pankaj Virendragir Gosai.]
Hanuman Tekdi, Daboi Road,]
Vadodara, State-Gujarat.]

5] Yogesh @ Painter]
Laxmansinh Varma.]
Behind Vihar Theatre,]
Near Jain Temple,]
Pratapnagar, Vadodara,]
State-Gujarat.]

6] Pratapsinh Ravjibhai]
Chauhan.].. [Orig. A/10]
Hanuman Tekdi, Daboi Road]
Vadodara, State-Gujarat.]

7] Sanjay @ Bhopo Ratilal]
Thakkar.].. [Orig.A/11]

Mahesh Mangal Society,]
Waghodia Road, Vadodara,]
State-Gujarat.]

8] Bahadursinh @ Jitu]
Chandrasinh Chauhan.].. [Orig. A/12]
Behind Bhabha Plan,]
C. Ramnagar Road,]
Sainathnagar, Mohd. Talao]
Vadodara, State-Gujarat.]

9] Yasin Alibhai Khokhar.].. [Orig. A/13]
Hanuman Tekdi, Daboi Road]
Vadodara,]
State-Gujarat.]

10]Jagdish Chunilal Rajput.].. [Orig. A/14]
Ranmukteshwar Road,]
Tejab Mill Chawl,]
Pratap Nagar,]
Opp. Bhataji Temple,]
Vadodara, State-Gujarat.]

11]Dinesh Phulchand Rajbhar.].. [Orig. A/15]
Daboi Road, Ansuya Nagar,]
Opp. Bhataji Temple,]
Vadodara, State-Gujarat.]

12]Shanabhai Chimanbhai Baria.].. [Orig. A/16]
Soma Talao, Daboi Road,]
Zopadpatti, Vadodara,]
State-Gujarat.]

13]Tulsi Bhikabai Tadvi.].. [Orig. A/17]
Hanuman Tekdi, Daboi Road,]
Vadodara,]
State-Gujarat.]

14]Shailesh Anupbhai Tadvi.].. [Orig. A/18]
Hanuman Tekdi, Daboi Road,]
Vadodara, State-Gujarat.]

15]Kamlesh Bhikabhai Tadvi.].. [Orig. A/19]
Hanuman Tekdi, Daboi Road,]
Pratap Nagar Road,]
Vadodara, State-Gujarat.]

16]Suresh @ Lalo Devjibhai]
Vasava.].. [Orig. A/20]
Daboi Road, Ansuya Nagar]
Pratap Nagar, Vadodara,]
State-Gujarat.]

17]Ravi Rajaram Chauhan.].. [Orig. A/21]
Yamuna Mill, Juna Jakat]
Naka, Daboi Road,]
Anusaya Nagar,]
Vadodara, State-Gujarat.]

CORAM :- HIS HONOUR THE ADDL. SESSIONS JUDGE SHRI A.M.THIPSAY.

DATED :- 24/02/2006.

Smt.Manjula Rao, Special Public Prosecutor for the State of Gujarat with Advocate Shri A.R.Pandey and Advocate Shri J.P.Yagnik, to assist her.

Shri Adhik Shirodkar, Senior Advocate, with Shri D.S.Jambaulikar, Advocates for accused Nos. 1 to 5, 10, 11 and 12.

Shri Mangesh Pawar, Advocate for accused Nos.16, 17, 18, 19 and 21.

Shri V.D.Bichu, Advocate for accused Nos.13, 14, 15 and 20.

O R A L J U D G M E N T

1. The above named accused were tried by the Additional Sessions Judge, First Fast Track Court,

Vadodara, State of Gujarat, in Sessions Case No.248 of 2002, and were acquitted. This is a retrial of the said case.

2. The retrial has been held pursuant to the directions given by the Supreme Court of India, in the circumstances mentioned below.

3. The prosecution launched against the accused is on the basis of a report under Section 173 (2) (i) of the Code of Criminal Procedure [hereinafter referred to as 'the Code' for the sake of brevity], submitted by the Inspector of Police, D.C.B. Police Station, Vadodara City, State of Gujarat, on the allegation that they have committed offences punishable under sections 143, 147, 148, 149 of the Indian Penal Code read with sections 452, 302, 307, 323, 324, 326, 337, 342, 395, 435, 436, 427, 504, 506, 201 and 188 of the Indian Penal Code, as also an offence punishable under section 135 of the Bombay Police Act.

4. The incident giving rise to the aforesaid offences is a fallout of the communal riots that took place in Vadodara city – and elsewhere also in the State of Gujarat – pursuant to the incident of the burning

of bogie of *Sabarmati Express* on 27/02/2002, carrying '*kaar-sevaks'* returning from Ayodhya. The belief that Muslims had burnt the bogie carrying '*kaar-sevaks*', was spread in Vadodara city through various sources and mediums. This gave rise to excitement and feelings of anger against the Muslims, resulting in the atmosphere in the Vadodara city becoming tense and communally charged.

5. The prosecution case, in a nutshell, is that during the period between about 8.30 p.m. on 01/03/2002 and 11.00 a.m. on 02/03/2002, residential building and bakery belonging to a Muslim family, was set on fire and burnt down by members of an unlawful assembly, the object of which, was to attack and kill the Muslims and to snatch, or damage, or destroy their properties. In the fire set to the said building, a number of persons were burnt to death. Those who survived till the morning, were made to get down from the terrace of the said building, after which they were attacked with deadly weapons causing serious injuries to them. Some of them succumbed to those injuries. The movable property such as vehicles, etc., had also been set on fire by the mob of rioters. Articles such as *ghee* and *maida,* etc., were robbed and looted. The accused persons were members of the said unlawful assembly, in prosecution of the common object of which, the aforesaid offences were committed by

its members. The accused were, therefore, the offenders. In the course of investigation, they were arrested and prosecuted, as aforesaid.

6. During the original trial, a number of witnesses - including the first informant Smt.Zahira Shaikh and other victims - turned hostile and as aforesaid, the case resulted in acquittal of all the accused. After the acquittal, a grievance was made by the victims that they had been threatened not to speak the truth and not to implicate the accused persons; and that due to such threats, they had been forced to speak lies in the Court. The first informant – Smt.Zahira Shaikh – appeared before the National Human Rights Commission, stating that she had been threatened not to depose against the accused persons. A number of allegations, including the allegation of improper conduct of the trial, were made. The role played by the investigating agency was criticized. When the matter was taken to the Supreme Court of India by some of the victims and one N.G.O. - Citizens for Justice and Peace -, the Supreme Court of India, by holding that there was ample evidence on record, demonstrating the sub-version of justice delivery system; and that no congenial or conducive atmosphere was till then prevailing, directed retrial to be done by the Court under the jurisdiction of the Bombay

High Court. The Supreme Court requested the Chief Justice of the Bombay High Court to fix up a Court of competent jurisdiction to hold the retrial. Pursuant to the said order and direction of the Supreme Court of India, the present retrial is being held by this Court.

7. It would be proper to mention here the prosecution case, by giving necessary details covering the background, the incident leading upto the registration of the F.I.R., the arrests of the accused persons, the investigation carried out thereafter, as can be gathered from the police report, and the narration of the prosecution witnesses unfolded during the present trial.

T H E B A C K G R O U N D

8. On 27/02/2002, at about 8.00 O'Clock, a mob belonging to Muslim community set fire to Bogie No.6 of *Sabarmati Express* train, which had been reserved by '*kaar-sevaks'* who were returning from Ayodhya to Gujarat. The said bogie was set on fire near Godhra Railway Station. About 59 persons died and 48 were seriously injured, as a result of the said fire. The news that the Muslims had burnt the *kaar-sevakas,* was widely spread through media, which resulted in feeling of anger and revenge. The *Vishva Hindu Parishad* gave a call for *bandh*

on 28/02/2002. Following the news that the Muslims had burnt bogie of the *Sabarmati Express* Train resulting in deaths of several *kaar-sevaks*, there was a spate of communal riots throughout the State of Gujarat, including the city of Vadodara. The Commissioner of Police, Vadodara City, passed an order under section 144 of the Code imposing indefinite curfew in the entire city, except the area under Jawahar Nagar Police Station. A notification [Ex.253] issued under the powers conferred by Section 37(1) of the Bombay Police Act, prohibiting, *inter-alia*, the carrying of weapons, inflammable articles, etc. was already in force upto 2400 hours on 01/03/2002; and on 28/02/2002, a similar notification [Ex.254], under the same provisions of law, was issued for a period from 0000 hours on 02/03/2002 to 2400 hours on 16/03/2002, by the Commissioner of Police, Vadodara City.

9. On 28/02/2002, incidents of communal riots started taking place in Vadodara city. A number of such incidents took place also within the jurisdiction of Panigate Police Station, Vadodara. Precautions were being taken by the police and police patrolling was going on in the area of Panigate Police Station since 27/02/2002. However, in spite of the same, there were several incidents of communal riots on 28/02/2002.

Repeatedly, messages and reports were being received by the Panigate Police Station from the Police Control Room regarding incidents of attack on the persons and properties of the Muslims, by mob of Hindu persons. PI Shri H.G.Baria [P.W.72] was the Inspector in-charge of the Panigate Police Station, at the material time.

10. There is a locality known as '*Hanuman Tekdi locality*' within the jurisdiction of Panigate Police Station. In the said locality, there was a building consisting of a bakery known as 'Best Bakery' and residential premises having ground plus first floor and terrace above the first floor. The building was belonging to one Habibulla Shaikh and was being used as their residence by the owner of the Best Bakery and his family. There were rooms on the first floor of the building. Wood required for the bakery used to be stored on the ground floor of the building.

11. Habibulla had died about a month prior to the incident that took place on 01/03/2002 and 02/03/2002. His wife Saherunnisa [P.W.40], his two sons – Nafitulla [P.W.31] and Nasibulla [P.W.30] -, his three daughters - Sahera [P.W.35], Zahira [P.W.41], Sabira- and Yasmin [P.W.29] - wife of Nafitulla - were residing in the said building - i.e. the 'Best Bakery building' - at the

material time. A number of servants were employed in the Best Bakery. They also used to reside in the same building and they used to sleep on the terrace of the said building. Among the servants, there were Taufel Siddiqui [P.W.26], Raees Khan Nankau Khan [P.W.27], Shehzad Khan Pathan [P.W.28], Sailun Hasan Khan Pathan [P.W.32], one Prakash, one Baliram and one Rajesh. After the death of Habibulla, one Kausarali - brother of Saherunnisa - had come to reside in the Best Bakery building in order to help the family in running the bakery. One Nasru, though not employed in the 'Best Bakery', also used to reside in the said building.

12. By the side of the Best Bakery building, there was a house of one Aslam Shaikh [P.W.42] who, at the material time, was residing there with his brothers Ashraf [P.W.33] and Arshad alias '*Lulla*', his wife Shabnam, daughters Sipli and Babli. In front of the Best Bakery building, there was a godown/*wakhar* of one Lal Mohammed Shaikh [P.W.36].

T H E I N C I D E N T

13. On 01/03/2002, at about 19.30 hours, a Hindu mob of

about 100 to 150 people assembled and formed an unlawful assembly with the object of taking revenge of the Godhra incident by causing damage and loss to the properties and lives of Muslims. The mob assembled near Shivnagar Sewage Pumping Station, Gajarawadi, violating the curfew order, the order prohibiting and carrying of arms and weapons, and the order prohibiting assembly of more than 4 persons. The mob was armed with deadly weapons and was carrying inflammable liquid. The mob was giving slogans against the Muslims. The mob went to Shivnagar, ransacked and looted the residence and godown of one Liyakat Gulam Hussain Shaikh and set the godown on fire. Thereafter, the unlawful assembly, in prosecution of the common object of the assembly, continued rioting and ransacked the residence and godown of certain Muslims in Shivnagar locality. Property worth lacs of rupees belonging to Muslims was damaged and destroyed.

14. Thereafter, the members of the unlawful assembly proceeded towards Hanuman Tekdi via Ganesh Nagar. They were giving slogans. Several persons joined the unlawful assembly and the members of the said assembly gathered near Hanumanji Temple situated on Hanuman Tekdi. Other persons, from Hanuman Tekdi, Ansuyanagar and surrounding areas - including the accused - joined the assembly and finally the assembly became of about 1000 to

1200 members. The members of the assembly were armed with deadly weapons and also carrying inflammable liquid. The mob started pelting stones at the Best Bakery building.

15. Bhimsinh Solanki [P.W.61], Assistant Sub Inspector of Police, was attached to Wadi Police Station, at the material time. On 01/03/2002, he was In-charge of Wadi-I Mobile. He was a Head Constable then. While he was patrolling in the Wadi-I mobile van, a message was received from the Vadodara City Police Control Room, at about 20.35 hours, that stone throwing was going on at Daboi Road, Hanuman Tekdi and that the mobile van should reach there. On the basis of this message, the mobile van was taken to Hanuman Tekdi area and was stopped near Hanuman Mandir. Announcement was made on the loudspeaker of the mobile van, asking the members of the unlawful assembly to disperse and reminding them that the curfew had not been lifted. On noticing the police van and because of the announcement, the members of the unlawful assembly dispersed.

16. After the police van - Wadi-I mobile - left, the members of the said unlawful assembly once again assembled with deadly weapons and inflammable liquid.

17. Kausarali came out of the Best Bakery and tried to

pacify the mob, but the mob did not pay any heed to the appeal of Kausarali. The accused No.11 Sanjay Thakkar and some others poured inflammable liquid over the saw mill/*wakhar* of Lal Mohammed [P.W.36] and set it on fire.

18. Apart from the members of the family of late Habibulla Shaikh and the servants working in the bakery, family members and relatives of the Aslam Shaikh [P.W.42] had also taken shelter in the Best Bakery building at the material time. One Firoz Mohammed Khan, his wife Smt.Ruksana, his son Subhan aged five years, his daughter Mantasha aged 3 years, Shabnambibi, wife of Aslam Shaikh, Aslam's daughters Sipli and Babli aged 4 years, one Arshad @ Lulla were also in the Best Bakery building at that time.

19. The mob of rioters, after setting fire to the mill/*wakhar* of Lal Mohammed [P.W.36] ransacked and looted the Best Bakery premises. The articles including tins of oil, *ghee*, *maida* bags and gunny bags of sugar totally valued at about Rs.75,000/- were looted by the said mob of rioters. The rioters were pelting stones at the Best Bakery building and were shouting that 'these are Muslims', 'set them ablaze', etc. The rioters were throwing boxes, bulbs of inflammable fluid like petrol, kerosene and diesel on the first floor of the residential

premises of the Best Bakery building. Inflammable liquids were poured over the wood stored on the ground floor and it was set on fire. Inflammable liquids were poured over other rooms also. Inflammable liquids were poured on the vehicles parked outside the Best Bakery building - i.e. Sunny moped, a scooter, a Hero Honda Motorcycle, two three wheeler tempos - and these vehicles were set on fire, totally resulting in the loss and/or destruction of the property worth rupees more than ten lacs.

20. Thereafter, the members of the assembly ransacked the residential premises of Aslam Shaikh [P.W.42], set it on fire, destroying household articles and vehicle, causing damage to the property worth about Rs. 1,50,000/- .

21. The four children of Aslam and Firoz, and the three women Ruksana, Shabnambibi and Sabira got trapped on the first floor of the building. Due to the fire that was caught, they were burnt to death. The others had rushed to the terrace of the Best Bakery building to save their lives and were hiding themselves there.

22. The mob of rioters - consisting of the accused persons - kept surrounded the Best Bakery building

through out the night. The rioters were throwing stones, soda water bottles, burning bottles filled with petrol and/or diesel, burning wood stored downstairs towards the terrace. This went on through out the night. In the night itself, Kausarali and Lulla were assaulted by swords. They were dragged down from the first floor by the rioters. Both of them were thrown in the fire and were killed.

23. In the morning, the rioters asked inmates of the Best Bakery building - i.e. the family members of the Habibulla Shaikh -, servants of Best Bakery - i.e. Taufel [P.W.26], Raees [P.W.27], Shehzad [P.W.28], Sailun [P.W.32] and others, who were on the terrace - to come down. The persons trapped on the terrace requested the mob not to kill them and to allow them to go to their native places. The said persons - i.e. members of family of Habibulla, the aforesaid witnesses and others - were made to get down from a ladder that was put to the wall of the Best Bakery building. The object of the mob of rioters – which included the accused persons - behind requiring the persons trapped on the terrace of the building to get down, was to kill them.

First, the women got down and thereafter, the male members got down one by one. However, Saherunnisa's mother – an old lady of 80 years – could not get

down and remained trapped on the terrace only. From among the mob, someone snatched gold chain which Sahera [P.W.35] was wearing around her neck. Accused No. 21 Ravi Chauhan snatched the silver chain of Yasmin [P.W.29], which she was wearing around her neck.

24. Firoz and Nasru tried to run away. However, some persons from the mob of rioters chased them, caught both of them in an open field near the said building, tied their hands and legs with rope, brutally attacked them with deadly weapons and also burnt them, causing their death.

25. The hands and legs of others - i.e. Nafitulla, Nasibulla, Taufel, Raees, Shehzad, Sailun, Baliram, Prakash and Rajesh - who were made to get down from the terrace were also tied with ropes and they were brutally attacked with sharp weapons causing serious – and in some cases, fatal – injuries to them. Some members of the assembly dragged the women a little away towards the jungle and were threatening to rape them one by one after beating the male members brutally. The mob of rioters, consisting of the accused persons, put wooden planks on the limbs of Nafitulla, Nasibulla, Taufel, Raees, Shehzad and Sailun and set them on fire.

26. When this was going on, Chandrakant @ Battu Shrivastav [P.W.58], Municipal Corporator from the local area, on learning about the incident, telephoned Panigate Police Station, informing the police about the same. PI H.G.Baria [P.W.72], immediately informed PSI Balwantsinh Rathod [P.W.63], who was at that time patrolling in the area within the jurisdiction of Panigate Police Station by wireless mobile van, that, at Hanuman Tekdi,houses of Muslims were burning; and that Rathod should go to that place to verify the same and report to the police station. Balwantsinh Rathod went there. On seeing the mobile van of the police, the mob of rioters ran away. The mobile van was parked near the Hanuman Temple. Rathod noticed that the Best Bakery building was burning. He heard the voice of some people crying. He noticed that 9 persons whose hands and legs were tied, who had sustained injuries by sharp edged weapons and also burn injuries, were lying on the rear side of the Best Bakery building. PSI Rathod immediately gave a message to Police Control Room and also to PI Baria, informing about this and calling for the fire brigade and ambulance. Rathod and the others with him, then started untying the hands and legs of the said 9 persons. At that time, Shri Piyush Patel [P.W.67], the then Deputy Commissioner of Police, South Zone, Vadodara, and PI Baria [P.W.72] arrived there. PSI Rana also came there with DCB crime-I Mobile

van. Alongwith Piyush Patel and the other officers, fire brigade personnel consisting of Dayaram Pal [P.W.9], Leading Fireman, two other Firemen and one driver, also rushed to the Best Bakery building. Dayaram Pal started spraying water to extinguish the fire caught to the Best Bakery building. However, as the fire was considerable, he sent a message to Panigate fire station for help. The Fire Brigade staff also called for an ambulance. K.D.Patel, Fire Officer [P.W.10] who was on duty at Dandia Bazar Fire Station, also went to Hanuman Tekdi area, on receipt of a call from Dayaram Pal [P.W.9]. He observed that the situation was serious. He gave a call to Ishwarbhai Sutar [P.W.11], Deputy Chief Fire Officer at Dandia Bazar Fire Station. On receipt of the message from Shri K.D.Patel, Ishwarbhai Sutar also came to the spot with ambulance.

27. When the police - PSI Balwantsinh Rathod [P.W.63], Piyush Patel [P.W.67], PI Baria [P.W.72] - and others were there, three Muslim women came from the bushes, met D.C.P. Piyush Patel and PI Baria and disclosed certain facts about the incident. The Fire Brigade was extinguishing the fire. Seven dead bodies were brought down from the first floor. The said nine injured persons, as also the dead bodies, were put in ambulance and taken to S.S.G. Hospital. The old woman who had been

trapped on the terrace of the building was also brought down by the Fire Brigade staff.

28. PI Baria was accompanied by a Videographer Gautam Chauhan [P.W.69], Gautam Chouhan did video shooting of the scene, after reaching the spot.

29. The injured Taufel [P.W.26], Raees [P.W.27], Shehzad [P.W.28], Nasibulla [P.W.30], Nafitulla [P.W.31], Sailun [P.W.32], Rajesh, Prakash and Baliram were brought to S.S.G. Hospital. They were examined by Dr.Smt.Meena Robin [P.W.46] who was on duty at that time. Dr.Meena Robin made the necessary entries [Ex.182, Ex.175, Ex.178, Ex.179, Ex.183, Ex.176, Ex.177, Ex.180 and Ex.181] in the E.P.R. register [X-79 for identification].

30. Rameshbhai Vajubhai Rathwa [P.W.16], A.S.I., was posted on duty at the S.S.G. Hospital at the material time for conveying the information, in respect of medico legal cases coming to the hospital, to the concerned police stations. Dr.Smt.Meena Robin [P.W.46] called him and dictated the relevant information to him which was written down by Rameshbhai Rathwa in the Casualty Police Register, [also called as Dawakhana *Vardi* Register] [X-6 for identification] by making entries [Ex.57/1] therein. Rameshbhai Rathwa then gave a message to the Panigate

Police Station on telephone. ASI Manharbhai Waria [P.W.68] was on duty as the Police Station Officer at that time, who received the said message and made an entry [Ex.273] regarding it in the station house diary [X-90 for identification].

31. Manharbhai Waria [P.W.68] directed ASI Abhaysinh Patel [P.W.66], who was attached to Panigate Police Station at the material time, to go to the hospital and investigate regarding the information that had been received. Abhaysinh Patel [P.W.66] went to the S.S.G. Hospital.

32. Taufel [P.W.26], Raees Khan [P.W.27], Shehzad [P.W.28], Nasibulla [P.W.30], Nafitulla [P.W.31] and Sailun [P.W.32] were later referred to Dr.Dilip Choksi [P.W.62], Associate Professor of Surgery in S.S.G. Hospital and Medical College, Vadodara, who was In-Charge of Surgical 'F' Unit and on duty in D-4 Ward. The said 6 persons were referred to him for expertise surgical treatment and were admitted in the D-4 Ward. They were examined and treated by Dr.Choksi and his colleagues doctors in the said ward under his supervision.

33. After the fire was extinguished and the injured and the dead bodies were sent to S.S.G.Hospital, PI Baria

left for S.S.G. Hospital alongwith Zahira [P.W.41], the said old woman and Videographer Gautam Chauhan [P.W.69]. On the way, he dropped the old woman at the Panigate Police Station, and took his two writers alongwith him to the hospital. When PI Baria reached the hospital the injured were being given treatment. PI Baria recorded *'fariyad'* [Ex.136] of Zahira [P.W.41] at the place outside the emergency treatment department. The said '*fariyad*' was sent to the Panigate Police Station, on the basis of which the C.R.No. 82 of 2002, was got registered at 1515 hours.

34. Jagdishbhai Choudhary [P.W.70] who was the P.S.O. at Panigate Police Station at the material time made the necessary entry [Ex.278] in the Station House Diary [X-90 for identification] and also an entry in the F.I.R. Register, in connection with the registering of the F.I.R.

35. Special report, together with a copy of the '*fariyad',* was forwarded to superior police officers as per the procedure. Commissioner of Police, Vadodara City, sent a fax message [X-100 for identification] to the Additional Director General of Police [Intelligence] and to the Additional Chief Secretary [Home], Gandhinagar and Director General of Police, Gandhinagar on

02/03/2002, itself.

36. Injured Ramesh [Raju Sharma] died at about 11.55 a.m., Injured Prakash died at 12.20 p.m. and injured Baliram died at about 2.00 p.m. This information was conveyed by the doctors concerned to Rameshbhai Rathwa [P.W.16] and Gordhanbhai Makwana [P.W.17] who were on duty for conveying information of Medico Legal Cases to concerned Police. They conveyed the information to Panigate Police Station. Appropriate entries in the record were made.

37. In the meantime, Abhaysinh had reached the S.S.G. Hospital pursuant to the directions given by Manharbhai Waria. In order to ascertain whether any of the injured were in a condition to make any statement, Abhaysinh gave a written communication [Ex.262] to Dr.Hiren Judal [P.W.71] who was on duty at that time, seeking his opinion on that. Dr.Judal noted that none of the injured were in a condition to give any statement and made an endorsement to that effect [Ex.262/1] on the said communication [Ex.262]. However, about half an hour or 45 minutes thereafter, Abhaysinh Patel [P.W.66] recorded the statement [Ex.264] of Raees Khan who was conscious.

I N V E S T I G A T I O N

38. After getting the F.I.R. registered, PI Baria went

to the post-mortem room with Zahira, who identified the dead bodies and thereafter PI Baria drew inquest panchnamas in respect of the dead bodies of Son of Firoz, Raju, Baliram and Prakash, [Ex.16 to Ex.19] with Vijay T. Waghela [P.W.5] and Shabbir A.Purawala [P.W.14] acting as panchas. Inquest Panchnamas in respect of the dead bodies identified as Zainabbibi [wife of Aslam], daughter of Firoz, Babli [daughter of Aslam Shaikh], Sipli [daughter of Aslam Shaikh], Shabnambibi [wife of Firoz] and Sabira and [Ex.48 to Ex.53] were also drawn at that time itself with Shabbir A.Purawala [P.W.14] and Smt.Veeraben A.Kawle acting as panchas.

39. Arrangements were made for Zahira's and her Nani's stay with one Iqbal Ansari [P.W.39] at Bahar Colony. The injured were admitted in hospital.

40. Post-mortem examination of the dead bodies were carried out by the different doctors. Dr.Smt.Sutappa Basu [P.W.47] performed post-mortem examination on the dead bodies of Zainabbibi, Son of Firoz, and Raju @ Ramesh; Dr.Bijaysinh Rathod [P.W.48], performed post-mortem examination on the dead bodies of Sabira, Shabnambibi and Prakash; Dr.K.P.Desai [P.W.49] performed post-mortem examination on the dead bodies of Babli [daughter of Aslam] and Baliram; and Dr.K.H. Chavle [P.W.54]

performed post-mortem examination on the dead bodies of Sipli [daughter of Aslam] and daughter of Firoz. The doctors filled in the printed prescribed proforma in respect of the post-mortem examinations, carried out by them, respectively. [Ex.Nos.192, 193, 194, 198, 199, 201, 202, 204, 207, 208, 218, 219 respectively.]

41. On 03/03/2002, the 7 dead bodies identified as -

i] Zainabbibi,

ii] Sabirabibi,

iii] Shabnambibi,

iv] Girl Sipli,

v] Girl Babli

vi] son of Firoz, aged 5 years,

vii] daughter of Firoz, aged 3 years -

were handed over to Zahira [P.W.41] and Iqbal Ansari [P.W.39] for performing funeral rites. After the burial of dead bodies, by taking Zahira with him, PI Baria went to the place of incident, along with panchas Mohammed Shaikh [P.W.3] and Kalumiya Shaikh [P.W.4] and drew a panchnama [Ex.13]. Zahira pointed out certain places and gave some information to the police in the presence of PI Baria and the said panchas. Bricks, stones, bottles, wooden planks, bulbs, mattresses, etc. were lying on the terrace of the Best Bakery building. The walls of the building had developed cracks due to

heat and had been blackened. Some vehicles – viz. Rickshaw, Hero Honda, tempos etc. were lying outside the bakery in fully burnt condition.

42. After drawing the panchnama [Ex.13] PI Baria recorded the statements of Smt.Jyostnaben Bhatt [P.W.43] and Kanchanbhai Mali [P.W.44], who are residing in the neighbourhood of the Best Bakery building.

43. On the same day – i.e. on 03/03/2002 - after 8.30 p.m., dead bodies of Nasru and Firoz were found in an open space near Hanuman Tekdi, which were taken charge of by PI Baria and taken to the S.S.G. Hospital, in the ambulance of the fire-brigade, driven by Satish Rawal [P.W.12]. On the next day, PI Baria called panchas Karimbhai Painter [P.W.13] and Yusufmiya G. Shaikh and drew a panchnama [Ex.46] in respect of the place where the dead bodies had been found lying. Zahira identified the dead bodies of Firoz and Nasru in the presence of panchas - Vijaybhai T. Waghela [P.W.5] and Irfanbhai Vora. Inquest panchnamas [Ex.20 and Ex.21] in respect of the said dead bodies were drawn.

44. On 04/03/2002, PI Baria recorded the statements of Taufel [P.W.26], Raees [P.W.27], Smt.Yasmin [P.W.29], Nasibulla [P.W.30],Nafitulla [P.W.31], Sahera [P.W.35]

and Saherunnisa [P.W.40] in the S.S.G. Hospital. PI Baria also recorded the further statement of Zahira [P.W.41] on that day.

45. The Doctor performing post-mortem examination on the dead bodies of Nasru and Firoz had forwarded the *katha rope* and the wire [Articles R/15 (colly)], that were on the said bodies, to PI Baria, who took charge of the same in the presence of panchas Hanif Mehboob Sayyad [P.W.7] and Noor Mohammed Shaikh and drew Panchanama [Ex.37].

46. On 06/03/2002, the statements of Shehzad [P.W.28] and Sailun [P.W.32] were recorded.

47. On 06/03/2002, 07/03/2002 and 08/03/2002 inquiries were made about the accused persons, but nobody was found.

48. On 09/03/2002, further statements of Zahira [P.W.41] and Aslambhai [P.W.42] were recorded by PI Baria. The offenders were not found in spite of making search for them.

49. PI Baria made search for the accused, in the area surrounding the Best Bakery, but he was not able to find out anybody.

50. On 10/03/2002, in the course of further investigation,further statements of certain persons - including that of Nafitulla [P.W.31]- were recorded.

51. On the same day, the investigation was entrusted to PI Shri P.P.Kanani [P.W.74] of the D.C.B. Police Station, by an order [Ex.392] of the Commissioner of Police, Vadodara, pursuant to which, PI Baria handed over the case diary and original case papers of investigation to PI Kanani.

52. On 11/03/2002, PI Kanani obtained notes of the post-mortem examination performed on the dead bodies of Smt.Shabnam w/o Aslambhai Haroon Shaikh [Ex.192], Sabira [Ex.198], Smt.Rukhsana w/o Firoz Akhtar Khan [Ex.199], Sipli [Ex.218] d/o Aslam, Subhan s/o Firoz Akhtar Khan [Ex.193], Mantasha d/o Firoz Akhtar Khan [Ex.219], Ramesh @ Raju Baijanath Badhai [Ex.194] and Prakash [Ex.201] from the office of the Deputy Commissioner of Police, South Division, along with his forwarding letter [Ex.393 (colly)].

53. Apart from other investigation, PI Kanani searched for the wanted accused in the area surrounding the 'Best Bakery', but did not succeed as most of the houses in the

locality were locked. Thereafter, PI Kanani obtained notes of the post-mortem examination in respect of the dead bodies of Babli [Ex.207], Firoz Akhtar Mohammad Israel Khan [Ex.202] and Nasruddin Mohammad Idris Khan [Ex.204], from the S.S.G. Hospital. PI Kanani visited the spot of offence in the evening. Smt.Saherunnisa [P.W.40] and Smt.Sahera [P.W.35] were kept present on the spot at that time. PI Kanani made inquiries with them.

54. On 12/03/2002, PI Kanani went to the S.S.G. Hospital and made inquiries with Smt.Saherunnisa [P.W.40] and Smt.Sahera [P.W.35] and recorded their statements. Thereafter, PI Kanani made a report [Ex.394] to the Judicial Magistrate, 1st Class, for adding the charges of offences punishable under sections 395 and 201 of the I.P.C. in this case.

55. On the same day, PI Kanani took search of the house of Jayanti [original accused no.6] in the presence of his wife Smt.Champaben, but nothing incriminating was found. Thereafter, PI Kanani searched for other accused, including Sanjay Thakkar [accused no.11], but did not find any of them. In the presence of Bharat Thakkar, brother of Sanjay Thakkar [accused no.11] and in the presence of panchas, the search of the house of Sanjay

Thakkar was taken, but nothing incriminating was found.

56. On 12/03/2002 also, most of the houses in the locality, were locked. PI Kanani found out the houses of accused Yasin Khokhar [accused no.13] and Yogesh Painter [accused no.5] but both the houses were locked.

57. On 13/03/2002, notes of the post-mortem examination [Ex.208] in respect of deceased Baliram were obtained.

58. Thereafter, PI Kanani wrote a letter [Ex.395] to City Survey Superintendent No.4, for preparing a sketch plan of the place of offence, enclosing therewith a copy of the panchanama of scene of offence.

59. On the same day, PI Kanani prepared a list [Ex.396] of 18 absconding accused whose names had been revealed during the investigation carried out till then and circulated the same to all the Police Stations within the city and also to some other branches of the police.

60. Attempts were also made to get information regarding the accused who were wanted in the case.

61. On 14/03/2002, PI Kanani recorded the statement of B.U.Rathod [P.W.63] and some others who were with Rathod

in Panigate-[I] mobile and had visited the place of incident on 02/03/2002. PI Kanani also recorded the statements of the police staff from Crime-I mobile, who had reached the place of incident on 02/03/2002. In spite of making efforts neither Kausarali nor Lulla were found. Search for the wanted accused was taken, but none was found.

62. On 22/03/2002, PI Kanani sought certain information from the Assistant Commissioner of Police, [Control Room], and collected the certified copies of the relevant messages. To explore the possibility of getting a support to the theory of Kausarali and Lulla having been burnt in the w*akhar* or in the *bhatti* of the bakery by the mob of rioters, PI Kanani contacted the authorities from Forensic Science Laboratory [F.S.L.], for finding out, by searching the bakery and the *wakhar* with their help, whether any remains of human body could be found at these places. He gave a memo [Ex.397] to PSI Dave [P.W.75] to bring the officers from F.S.L. to the place and to search along with them, to see whether any parts of human body could be found. PSI Dave [P.W.75] went to the Best Bakery by taking the F.S.L. team consisting of Ashokkumar R. Waghela [P.W.19] Scientific Officer and others. In the presence of panchas Mukhtyar Mohammed Shaikh [P.W.6] and Shantilal Desai, a number of samples of walls scrapings

and earth, etc., were taken from the Best Bakery premises. In the heap of burnt coal and wood, on the steps on the rear side of the Best Bakery building, a jaw bone and pieces of burnt bones [Art.R/14(colly)] were found. All the samples collected, were properly taken charge of, sealed and labeled, under a panchanama [Ex.24]. The samples were kept in a safe custody. [Articles R/1 to R/10 (colly)]

63. On 24/03/2002, among other steps in the course of investigation, inquiries were made by PI Kanani with D.C.P. Shri Piyush Patel [P.W.67] and A.C.P. ['A' Division] Shri S.M.Katara and their statements were recorded.

64. PI Kanani searched for the wanted accused in the locality of Hanuman Tekdi, Ansuya Nagar, Gajarawadi and Padam Talao on 25/03/2002, but none was found. PI Kanani obtained copies of wireless messages given to Wadi – (I) Mobile, Panigate - (I) Mobile at the material time.

65. On 27/03/2002, samples [Articles R/1 to R/10 (colly)] collected by PSI Dave on 22/03/2002 under panchnama [Ex.24] were delivered to the F.S.L. by PI Kanani personally with a forwarding letter [Ex.93] and a forwarding note together with the authorization

certificate [Ex.94] issued by the A.C.P. ['A' Division].

66. In order to ascertain, whether the burnt bones [part of Art.R/14 (colly)] collected under the said panchnama were human bones and other relevant details, PI Kanani personally handed over the relevant samples to the Head of the Department of Anatomy, Medical College, Vadodara, with a forwarding letter [Ex.69].

67. Sureshchandra Vitthalbhai Sithpuria [P.W.25], Assistant Director in the F.S.L., Biology Division, received the said samples in 10 sealed parcels on 27/03/2002 from Inspector of Police, D.C.B., Vadodara city, along with the said documents [Ex.93] and [Ex.94]. The parcels were opened in his supervision. Parcels marked as Ex.A to Ex.F [Articles R/1 to R/6] were forwarded to the Chemistry Section with the original seal. The remaining 4 parcels having Ex.G to Ex.J [Articles R/7 to R/10] were opened and contents were examined for ascertaining the presence of bloodstains.

68. On the same day, during the combing operation, accused No.1 - Rajubhai Dhamirbhai Baria, accused No.2 - Mahendra @ Langado Vishwasrao Jadhav, Accused No.3 - Harish @ Tino Virendragir Gosai, Accused No.4 - Pankaj Virendragir Gosai and Accused No.5 - Yogesh @ Painter

Laxmansinh Verma were apprehended. PI Kanani interrogated all these 5 accused with the assistance of his Sub Inspector. PI Kanani [P.W.74] made inquiries with these accused about their names and their addresses, physically examined their bodies in the presence of two panchas - Paresh Bramhabhatt [P.W.50] and Deepak Sharma. Panchnama [Ex.210] in that respect was drawn. The accused nos.1 to 5 were placed under arrest. PI Kanani took the search of the respective houses of the said 5 accused in the presence of their family members and panchas.

69. The search of the residence of accused no.13 - Yasin Khokhar - was also taken and panchnama in respect of the same was drawn. Search for the other wanted accused continued and PI Kanani made inquiries in Hanuman Tekdi, Ansuya Nagar and Padam Talao Area.

70. On 28/03/2002, inquiries were made about accused Jitu. On the same day, inquiries were also made with Chandrakant @ Battu Srivastav [P.W.58] and his statement was recorded.

71. Dr.Saiyad [P.W.20], Associate Professor of Anatomy in the Medical College, Vadodara, and Dr.Jagdish Soni [P.W.60], who was working as Assistant Professor of

Anatomy in the said college, on 28/03/2002, examined the bones [part of Art.14(colly)] and came to the conclusion, *inter-alia,* that the incompletely burnt bones were of human origin; and that all the bones were not of the same person; and that a few identified bones were belonging to a person aged above 18 years. Dr.Saiyad and Dr.Soni recorded their conclusion in a certificate [Ex.71/A] dated 16/04/2002.

72. Search for the wanted accused was continued.

73. On 01/04/2002, the accused No.6 - Jayanti Jamsinh Gohil - [absconding], accused No.7 - Ramesh @ Rinku J. Gohil [absconding], accused no.8 - Mafat @ Mahesh M. Gohil [absconding], accused no.9 - Harshad @ Munno R. Solanki [absconding], accused no.10- Pratapsinh Chauhan, accused no.11 - Sanjay @ Bhopo @ Bobdo Ratilal Thakkar and accused no.12 -Bahadursinh @ Jitu Chandrasinh Chauhan, all came together to the D.C.B. Police Station and surrendered themselves. PI Kanani then interrogated all these 7 accused. He called 2 panchas Habibbhai Arab [P.W.51] and Bhupendra Rana and in their presence he inquired with the said accused regarding their names etc. Examination of the bodies of the accused was done in the presence of the said panchas. After drawing a panchnama [Ex.212] in that regard, the said accused were placed

under arrest.

74. Further statements of Zahira [P.W.41] and Nafitulla [P.W.31] were recorded.

75. On 03/04/2002, medical certificates in respect of Raees [P.W.27], Nasibulla [P.W.30] Taufel [P.W.26], Shehzad [P.W.28] [Ex.163, Ex.169, Ex.171 and Ex.167 respectively] were obtained.

76. During interrogation absconding accused Jayanti Gohil voluntarily disclosed certain information, pursuant to which a sword [Art.R/23] was recovered from a field near Padam Talao, near which the said accused was residing, under a panchnama [Ex.129] with Abdul Rehman Kadiwala [P.W.38] and Sandeep Patel acting as panchas.

77. The accused No.7 - Ramesh @ Rinku Jayantibhai Gohil [absconding] - also disclosed certain information, pursuant to which two weapons - a *Sura* [Art.R/24] and a pipe [Art.R/25] - were recovered from the tin roof of the hut of the said accused under a panchnama [Ex.130] in the presence of panch Abdul Rehman Kadiwala [P.W.38].

78. During his interrogation, accused No.8 - Mahesh @ Mafat Manilal Gohil [absconding] - also disclosed certain

information, pursuant to which a sword [Art.R/16], hidden in the bunch of creepers near the hand pump on the bank of Padam Talao, was recovered in the presence of panchas Jagdish Desai [P.W.8] and Mohammad Rafique Mansuri, under a panchnama [Ex.40].

79. On 04/04/2002, Accused No.9 - Harshad @ Munno Ravjibhai Solanki [absconding]- disclosed certain information, pursuant to which a sword [Art.R/21] was recovered from the roof of the rear portion of the house of the accused in the presence of panchas Kamlesh Darji [P.W.24] and Mohammed Iqbal under a panchnama [Ex.88].

80. During interrogation, the accused No.10 - Pratapsinh Ravjibhai Chauhan - voluntarily disclosed some information, pursuant to which the police party and panchas Kamlesh Darji and Mohammad Iqbal Noor Mohammad were led to his house situate in the lane, opposite Best Bakery. The said accused took out an iron pipe [Art.R/22] from the roof of his house, in the presence of the said panchas. Panchnama [Ex.90] in respect of the information disclosed by the accused and the recovery in consequence thereof was drawn. Search of the house of the accused, under section 165 of the Code was also carried out in the presence of the said accused, but nothing incriminating was found.

81. The interrogation of the accused persons was continued. The accused No.11 - Sanjay Ratilal Thakkar - disclosed certain information which was recorded in the presence of panchas - Devendra Thakore [P.W.22] and Chandbhai Supariwala. Pursuant to the information disclosed, the police party and the panchas were led to an open plot on the south of Mahendrabhai's godown, situate opposite the house of the accused Sanjay Thakkar. From the *Babool* bushes, in the North East corner of the plot, the said accused took out a sword [Art.R/18] and an iron rod [Art.R/17] and produced the same. Panchnama [Ex.81] in respect thereof was drawn.

82. After returning to the Police Station, PI Kanani got the information that accused No.12 - Bahadursinh @ Jitu Chauhan - also wanted to disclose certain information in connection with the weapon and therefore, PI Kanani asked the same panchas - i.e. Devendra Thakor [P.W.22] and Chandbhai Supariwala - to wait. Inquiries were made with accused No.12 - Bahadursinh @ Jitu Chauhan. In the presence of the panchas, the said accused disclosed certain information, which was recorded in the preliminary portion of the panchnama [Ex.83] and pursuant to the information, the police party and the panchas were led to the house of the accused, situate in the lane

on the right side of Mahendrabhai's godown in Ansuya Nagar locality. The said accused went to the kitchen room on the rear side and took out a Gupti [Art.R/19]. The same was taken charge of, by the police. The search of the house of the said accused under the provisions of section 165 of the Code was also taken, but nothing incriminating was found. The panchnama [Ex.83] was completed.

83. The investigation continued. It was observed by PI Kanani that the residents of the locality were reluctant to give information to the police; and that they were not ready to make a statement before the police.

84. On 09/04/2002, inquiries were made with Iqbal Ansari [P.W.39] and his statement was recorded.

85. On 11/04/2002, PI Kanani got the names of deceased Firoz and his wife corrected in the post-mortem notes [Ex.202 and Ex.199 respectively] by sending memos [Ex.203 & Ex.200] to Dr.Bijaysinh Rathod [P.W.48]. The post-mortem notes were sent to Dr.Rathod [P.W.48] through ASI Fakirabhai [P.W.15]. Corrections were carried out in the post-mortem notes.

86. Similarly, PI Kanani sent a memo [Ex.220] to

Dr.Chavale [P.W.54] along with relevant post-mortem notes through ASI Fakirbhai [P.W.15]. Accordingly, correction was carried out in the post-mortem notes [Ex.219] of daughter of Firoz.

87. On 12/04/2002, in order to get corrections in the names of Aslam's wife, son of Firoz, Servant Raju made in the post-mortem notes, PI Kanani wrote memos [Ex.404,Ex.195 and Ex.196 respectively] to Dr.Smt.Sutappa Basu. For getting the name of Nasru corrected in the post-mortem notes, PI Kanani wrote a memo [Ex.205] to Dr.Bijaysinh Rathod. The relevant original post-mortem notes were sent to the concerned Doctors along with memo through ASI Fakirbhai [P.W.15]. The necessary corrections were made in the *post-mortem* notes [Ex.204]

88. On 13/04/2002, in the course of investigation, a letter was written by PI Kanani to the Chief Fire Officer, to which a reply was received by him. Certain information was collected by PI Kanani.

89. On the same day, inquiries were made regarding accused No.13 - Yasin Khokhar.

90. The investigation was proceeding and inquiries regarding Kausarali and Lulla were also being made, but

no information showing that they or any of them, were or was alive, was received.

91. On 15/04/2002, certain directions were given to Head Constable Bhimsinh Solanki [P.W.61] to go to the spot and verify where, in fact, the fire was noticed by him on 01/03/2002.

92. On the same day, accused No.13 - Yasin Khokhar - was apprehended by ASI Kanaksingh. Accused No.13 - Yasin Khokhar - was brought to the police station and interrogated. On the same day, PSI Patel apprehended Accused No.14 Jagdish Rajput and Accused No.15 Dinesh Rajbhar. PI Kanani started interrogating these two accused also with the assistance of his Sub-Inspector. At about that time, accused No.16 - Shanabhai Baria - came to the Police station and surrendered himself. PI Kanani started interrogating him also.

93. Panchas Abdul Rehman A. Pathan [P.W.56] and Shoukat Mansuri were called and in their presence, panchnama [Ex.224] in respect of the physical examination of all the aforesaid 4 accused was drawn. After the panchanama, the accused were placed under arrest.

94. Thereafter, PI Kanani took the search of the

residences of accused nos.14, 15 and 16 in the presence of panchas and the relatives of the said accused who were present in the respective houses at that time.

95. Some further investigation was carried out, including the search for the wanted accused in that locality.

96. On the same day - i.e. 15/04/2002 - inquiries were made about the whereabouts of accused no.17 - Tulsi Tadvi, accused no.18 - Shailesh Tadvi and accused no.19 – Kamlesh Tadvi. PI Kanani learnt that the accused no.19 had been arrested on 21/03/2002 in connection with C.R.No.I-42/02 of Wadi Police Station, which was in respect of setting on fire one cabin on Daboi Road, during the riots.

97. On 16/04/2002, further investigation, including the constant interrogation of accused nos.13, 14, 15 and 16, was carried out by PI Kanani.

98. On 17/04/2002, during the course of further investigation, PI Kanani, among the other things, made further inquiries with Shri Chandrakant @ Battu Shrivastav [P.W.58] and recorded his further statement. Certain information was called from the

companies - Cellphone and A.T. & T – regarding the details of calls made from telephone nos.9825046226 and 9824006881 on 01/03/2002 and 02/03/2002 respectively. On the same day, an application was made by PI Kanani to the Judicial Magistrate, First Class, 1st Court, for handing over to him, the custody of accused no.19 - Kamlesh Tadvi, who was in judicial custody then.

99. Accused no.17 - Tulsi Tadvi - and accused no.18 - Shailesh Tadvi were arrested by PSI C.B.Patel and brought to PI Kanani. PI Kanani started interrogating the accused. For drawing a panchanama in respect of physical examination of the bodies of accused no.17 and accused no.18, two panchas [Salimbhai Ganibhai Vohra and Rajakbhai Noorbhai Vohra (P.W.52)] were called and a panchanama [Ex.214], as per the narration of the panchas, was written and drawn. At the conclusion of the said panchanama, accused no.17 - Tulsi Tadvi - and accused no.18 - Shailesh Tadvi - were placed under arrest.

100. Custody of accused no.19 -Kamlesh Tadvi- was obtained. For drawing a panchanama in respect of physical examination of the body of accused no.19 - Kamlesh Tadvi, two panchas - Rajesh Shantilal Rana [P.W.53] and Babumiya Mohsinmiya Arab - were called and a panchanama, as per the narration of the facts, was

written and drawn [Ex.216]. At the conclusion of the panchanama, accused no.19 - Kamlesh Tadvi - was placed under arrest.

101. Interrogation of the accused nos.13 to 19 continued.

102. On 18/04/2002 and 19/04/2002 also, along with others, investigation/interrogation of the accused persons continued.

103. During his interrogation, on 19/04/2002, accused no.19 - Kamlesh Tadvi - disclosed certain information which was recorded under a panchanama [X-148 for identification]. Pursuant to the said information, the police party and panchas - Salimbhai Ismailbhai Patni and Sureshbhai Shanabhai Padiya - were led by accused no.19 - Kamlesh Tadvi - to a plot of land where construction of houses was being carried out; and from the passage between the last construction work on the East-South corner of the plot and the fence, Kamlesh Tadvi took out a stick [Art.R/26] and produced the same. The said stick was taken charge of, examined, properly packed, labelled and sealed.

104. On 20/04/2002 and 21/04/2002, investigation continued.

105. On 24/04/2002, a letter [Ex.409] was written by PI Kanani to PI, Panigate Police Station, to give the photographs and/or video shooting, if any, in respect of 'Best Bakery' incident. A letter was also written by PI Kanani to the Commissioner of Police, Vadodara City, in order to find out as to at whose instance, the message at 8.30 p.m. on 01/03/2002 was given by the Control to Wadi–I mobile. Inquiries were made with several residents of the locality and their statements were recorded. Search for the wanted accused continued.

106. On 25/04/02, PI Kanani received a video cassette [Art.R/27, later on marked as Ex.283] in respect of the video shooting done at the Best Bakery, from the P.I., Panigate Police Station, along with a letter [Ex.410].

107. From 26/04/2002 onwards, PI Kanani remained busy through out the week, in maintenance of law and order.

108. On 04/05/2002 and 07/05/2002, search for the wanted accused was made, but none was found.

109. On 08/05/2002, certain further investigation was carried out by making inquiries with certain persons.

110. On 15/05/2002, the weapons recovered at the instance of accused no.6 - Jayantibhai Jamsingh Gohil [absconding], accused no.7 - Ramesh @ Rinku Jayantibhai Gohil [absconding], accused no.8 - Mafat @ Mahesh Manilal Gohil [absconding], accused no.9 - Harshad @ Munno Ravjibhai Solanki [absconding], accused no.10 - Pratapsinh Ravjibhai Solanki, accused no.11 - Sanjay @ Bhopo Ratilal Thakkar, accused no.12 - Bahadursinh @ Jitu Chandrasinh Chauhan, accused no.19 - Kamlesh Bhikhabhai Tadvi, [Articles R/16 to R/19 and R/21 to R/26] were forwarded to the F.S.L. with a forwarding letter [Ex.97] and forwarding note along with the authorization certificate from the ACP, 'A' Division, [Ex.98 (colly)] through ASI Fakirbhai [P.W.15]. ASI Fakirbhai reported to PI Kanani about having delivered the said note and parcels to F.S.L. in accordance with the memo which had given by PI Kanani to him and ASI Fakirabhai made his endorsement on the said memo and handed it over along with the receipt [Ex.58] from the F.S.L., to PI Kanani.

111. The said parcels together with the document [Ex.97] and [Ex.98] were received by Shri Sureshchandra Sithpuria [P.W.25]. Shri Sithpuria did the necessary analysis for the purpose of ascertaining the presence, if any, of bloodstains thereon. After analysis, he prepared his

report and forwarded the same to P.I., D.C.B., along with a forwarding letter [Ex.99(colly)].

112. On 16/05/2002, PI Kanani went to Medical College, Vadodara and obtained the Certificate [Ex.71/A] in respect of the examination of bones as had been carried out by Dr.Saiyad and Dr.Soni.

113. On 17/05/2002, by sending ASI Fakirabhai [P.W.15] to Medical College, Vadodara. PI Kanani got back sealed parcels containing bones.

114. PI Kanani made Inquiries with 44 persons residing in Hanuman Tekdi and Ansuyanagar locality and recorded their statements.

115. On 18/05/2002, again letter was faxed to the Companies – Cellphone and A. T. & T. - for getting the required information.

116. PI Kanani wanted to carry out D.N.A. test in respect of the missing persons Kausarali and Lulla; and in that connection, in order to ascertain their blood relations, for Kausarali he contacted Nafitulla and for Lulla, he tried to contact his brother Aslam [P.W.42] on telephone.

117. On 19/05/2002, during the search for the wanted accused, Suresh @ Lalo Devjibhai Vasava [accused no.20] was found at his residence. He was brought to the police station and interrogated. Panchanama [Ex.222] in respect of physical examination of the body of the said accused was drawn with Arvindbhai Rana [P.W.55] and Rafiq Fatehmohmmad Malek acting as panchas. At the conclusion of the panchanama, the said accused was placed under arrest.

118. On 21/05/2002, search for the wanted accused was continued. On that day, PI Kanani received information which had been called for by him from companies – Cellphone and A.T. & T. PI Kanani also received printouts in respect of all the calls relating to certain mobile telephone numbers with regard to a particular period.

119. In the search for the wanted accused, PI Kanani apprehended Ravi Rajaram Chauhan @ Marathi [accused no.21] at his residence and brought him to the police station. In the presence of panchas Kanubhai Kalidas Thakore and Gulam Mohammad Usmanbhai Memon [P.W.57], panchanama [Ex.226] in respect of the physical examination of the body of the said accused was drawn.

At the conclusion of the panchanama, the said accused was placed under arrest. He was interrogated.

120. During his interrogation, on 22/05/2002, Ravi Chauhan [accused no.21] voluntarily disclosed certain information which was recorded in the presence of panchas Abdulsameen Abdulgani Mansuri [P.W.37] and Avdhut Nagarkar [P.W.23]. Pursuant to the said information, the said accused led the police party and panchas to his house in Ansuya Nagar and from a hollow place at the lower portion of a *Babhool* tree in the North-East corner outside the rear portion of his house, the accused took out a stick [Art.R/20] and produced the same. The said stick was taken charge of, properly labelled and sealed. PI Kanani took search of the house of the accused in the presence of the accused himself and his mother, but nothing incriminating was found. The preliminary part of the panchanama [Ex.85] had already been drawn before leaving the police station with the accused no.21. The further part of the panchanama [Ex.85] was written on the spot and the panchanama was concluded.

121. On 27/05/2002, PI Kanani made certain further inquiries in the course of investigation, which included preparation for getting the D.N.A. test performed for

fixing the identity of missing persons Kausarali and Lulla.

122. On 28/05/2002, along with the sealed parcels containing bones and the relevant papers, PI Kanani went to Ahmedabad along with Smt.Saherunnisa Shaikh [P.W.40], Harun Shaikh and Aslam Shaikh [P.W.42]. PI Kanani got the samples of the blood of Smt.Saherunnisa and Harun Shaikh, taken by the Chief Medical Officer, Civil Hospital, Ahmedabad. The samples of the blood and the relevant documents which included a copy of the report given by Dr.Saiyad [P.W.20] and Dr.Soni [P.W.60], were handed over to Dr.A.K.Mehta in the D.N.A. Section. Dr.Mehta asked PI Kanani for a detailed report of the examination of the bones carried out at Department of Anatomy, Medical College, Vadodara. PI Kanani also obtained the blood sample of Aslam and handed over that sample also, with relevant documents to Dr.A.K.Mehta.

123. PI Kanani then returned to Vadodara, with the said three persons.

124. As per the advise given by Dr.A.K.Mehta on 28/05/2002, PI Kanani on 30/05/2002 called Kausar Ali's wife - Smt. Sharjahan [P.W.34]- and son – Salman - to come to Ahmedabad on the next day.

125. PI Kanani wrote letter to Chief Medical Officer, Civil Hospital, Ahmedabad for taking the blood sample of Smt.Sharjahan [P.W.34] and Salman. He also wrote a letter to F.S.L., Ahmedabad, for accepting the blood samples. He then instructed ASI Fakirabhai [P.W.15] by giving him the said letters to take Smt.Sharjahan and Salman to Ahmedabad, obtain their blood samples at Civil Hospital, Ahmedabad and then deliver the said blood samples in the F.S.L., Ahmedabad.

126. On 31/05/2002, ASI Fakirabhai [P.W.15] went to Ahmedabad, did the needful, came back and made a report to PI Kanani.

127. On 01/06/2002, PI Kanani sent a reminder to F.S.L. Vadodara, in respect of the report of the examination of articles sent to them on 27/03/2002 and 15/05/2002.

128. As per the requirement of Dr.Mehta, PI Kanani wrote a letter to Medical College, Vadodara.

129. On 02/06/2002, PI Kanani made inquiries with 44 residents of Shivnagar and Ganeshnagar localities and recorded their statements. The investigation continued and on 03/06/2002, and 04/06/2002 also, inquiries were

made with certain persons and their statements were recorded. Among others, statements of Smt. Sharjahan Kausarali Shaikh [P.W.34], wife of Kausarali and Mohammad Ashraf Mohammad Haroon Shaikh [P.W.33] were recorded.

130. On 10/06/2002, on examination of the said articles, Sureshchandra Vithaldas Sithpuria [P.W.25] submitted a report in respect of the analysis done by him, along with a forwarding letter [Ex.95(colly)].

131. On 11/06/2002, PI Kanani received a report from the F.S.L. [Ex.95(colly)] in connection with the articles sent for examination on 27/03/2002.

132. On 12/06/2002, PI Kanani went personally to the F.S.L. alongwith a letter [Ex.77] and sought some clarification from the F.S.L. in connection with the report.

133. On 12/06/2002, the weapon [Art.R/20] recovered from Ravi Chauhan [accused no.21] was sent to the F.S.L., Vadodara, through ASI Fakirabhai [P.W.15] along with a forwarding letter [Ex.100] and a forwarding note [Ex.101]. It was received by Shri Sithpuria [P.W.25] in a sealed parcel marked as 'K', along with the said

documents. After examination and analysis, Shri Sithpuria could not detect blood on the article [Art.R/20]. He gave a report accordingly.

134. On the same day, PI Kanani went to Dandiya Bazar Fire Station, made inquiries with Kiritbhai Patel [P.W.10], Ishwarbhai Suthar [P.W.11] and Satish Rawal [P.W.12] and recorded their statements. Thereafter, he went to Gajrawadi Fire Station, made inquiries with Dayaram Pal [P.W.9] and recorded his statement.

135. The investigation continued.

136. On 19/06/2002, PI Kanani received the necessary clarification from the F.S.L. vide letter [Ex.78].

137. On 20/06/2002, PI Kanani made inquiries to find out as to from whom the Control Room had received information, on the basis of which, message was given by them to Wadi-I Mobile at 8.35 p.m. on 01/03/2002. PI Kanani gave a memo to ASI Fakirabhai [P.W.15] to trace one Jitendra Jadhav and one Rajesh.

138. On 21/06/2002, PI Kanani contacted the City Survey Office and City *Mamlatdar* Office for getting sketch plan of the place of offence prepared.

139. On 24/06/2002, chargesheet [Ex.417] was filed against 21 arrested accused in the Court of Judicial Magistrate, 1st Court, Vadodara. However, further investigation in the matter continued in spite of the filing of the charge-sheet.

140. On 29/06/2002, the sketch plan [Ex.7] prepared and approved by Ratilal Variya [P.W.1] and Chandrakant Patel [P.W.2] was obtained.

141. On 02/07/2002, reports were obtained from the F.S.L. in respect of the weapons sent for examination on 15/05/2002 and 12/06/2002.

142. After this Court was nominated by the Hon'ble The Chief Justice of the Bombay High Court for holding retrial, in due course, the record of proceedings in respect of the trial held by the Sessions Court at Vadodara was received by this Court.

143. Even after the receipt of the record of proceedings, the retrial could not be commenced, as the presence of the accused persons could not be secured immediately. It took some time to secure the presence of the accused persons. The original accused no.6 – Jayantibhai Jamsinh

Gohil, accused no.7 – Ramesh @ Rinku Jayantibhai Gohil, accused no.8 – Mafat @ Mahesh Manilal Gohil and accused no.9 – Harshad @ Munno Ravjibhai Solanki, however, could not be found in spite of issuing coercive process and publication of proclamation requiring their presence before the Court. Warrants of arrest against them were directed to the Mumbai police also, but those accused could not be traced. The case of the said 4 accused was therefore separated and the trial proceeded against the above-mentioned accused only. Procedure as contemplated under Section 299 (1) of the Code, was followed and it was declared that the evidence of the witnesses recorded in this case would be treated as the record of evidence against the said absconding accused. Accused Ravi Rajaram Chauhan [original accused no.21], who was on bail during the previous trial and who surrendered before this Court, was allowed to remain on bail during the retrial also.

144. Though the case against the said 4 accused has been separated, for the sake of convenience, all the accused persons are being referred to by the same numbers which were given to them originally – i.e. during the previous trial.

145. After going through the police report, accompanying

documents and record of the case, it was thought proper to frame appropriate charges against the accused persons, instead of proceeding to record evidence on the basis of the charge framed during the previous trial.

146. The charge of offences punishable under Sections 143 of the I.P.C., 147 of the I.P.C., 435 of the I.P.C. r/w. 149 of the I.P.C., 436 of the I.P.C. r/w. 149 of the I.P.C., 395 of the I.P.C., 395 of the I.P.C. r/w. 397 of the I.P.C., 342 of the I.P.C. r/w. 149 of the I.P.C., 448 of the I.P.C. r/w. 149 of the I.P.C., 449 of the I.P.C. r/w. 149 of the I.P.C., 450 of the I.P.C. r/w. 149 of the I.P.C., 451 of the I.P.C. r/w. 149 of the I.P.C., 324 of the I.P.C. r/w. 149 of the I.P.C., 326 of the I.P.C. r/w. 149 of the I.P.C., 302 of the I.P.C. r/w. 149 of the I.P.C. and 188 of the I.P.C. was framed against all the accused. Additionally, the charge of an offence punishable under Sections 144 of the I.P.C. and 148 of the I.P.C. was framed against accused nos.10, 12, 19 and 21.

147. At that time – i.e. on 22/09/2004 –, accused no.11 Sanjay Ratilal Thakkar had not been apprehended. After his apprehension, a separate charge of offences punishable under Sections 143 of the I.P.C., 147 of the I.P.C., 435 of the I.P.C. r/w. 149 of the I.P.C., 436 of

the I.P.C. r/w. 149 of the I.P.C., 395 of the I.P.C., 395 of the I.P.C. r/w. 397 of the I.P.C., 342 of the I.P.C. r/w. 149 of the I.P.C., 448 of the I.P.C. r/w. 149 of the I.P.C., 449 of the I.P.C. r/w. 149 of the I.P.C., 450 of the I.P.C. r/w. 149 of the I.P.C., 451 of the I.P.C. r/w. 149 of the I.P.C., 324 of the I.P.C. r/w. 149 of the I.P.C., 326 of the I.P.C. r/w. 149 of the I.P.C., 302 of the I.P.C. r/w. 149 of the I.P.C. and 188 of the I.P.C. was framed against him also.

148. The charge was read over and explained to all the accused persons. All the accused pleaded not guilty to the charge and claimed to be tried.

149. In order to establish its case against the accused persons, the prosecution has examined, in all, 75 witnesses, all of whom, except P.W.18, P.W.59, P.W.64, P.W.65 and P.W.73, have been referred to earlier while narrating the details of the prosecution case. Dinubhai Ambalal Patel [P.W.18] is the Chief Fire Officer through whom certain documents were got produced. Rajendra Chavan [P.W.59] is an Inspector of Police who had, on 16/12/2003, recorded the statement of first informant Zahira Shaikh [P.W.41] in connection with the question of protection to be provided to her. He was examined to prove certain previous statements made by Zahira and for

the purpose of contradicting her testimony on certain points. Prakash Pathak [P.W.64] is the Assistant Sub-Inspector of police attached to the Special Branch, through whom the notifications against forming of assemblies [Ex.253], prohibiting the possession of arms [Ex.254] and imposing curfew [Ex.255] issued by the Commissioner of Police, have been produced. Parimal Keshabhai Velera [P.W.65], Deputy Commissioner of State Intelligence, State of Gujarat, has been examined to establish that certain video shooting was officially done by the Gujarat Police during the riots in question. Pankaj Shankar [P.W.73] is a Journalist who voluntarily appeared before the Court and who was examined by the prosecution for proving certain statements of Zahira [P.W.41], Nafitulla [P.W.31], Saherunnisa [P.W.40] and Nasibulla [P.W.30], said to be recorded by this witness on a video during their interview taken by this witness on 18/04/2002. The witness has produced a video cassette [Ex.389] containing the record of the said interviews.

150. The accused have examined 5 witnesses in defence. D.W.1 - Kumar Swami, Inspector General of Police, State Intelligence Bureau, State of Gujarat, has been examined for proving some previous statements made by Smt.Yasmin [P.W.29] to him, with the object of contradicting Smt.Yasmin. D.W.2 – Deepak Swaroop is the Commissioner of Police, Vadodara City, who was apparently examined to

establish the existence and maintenance of a lock-up register by the D.C.B. Police Station, Vadodara, at the material time. D.W.3 – Ramjibhai Jagjibhai Pargi, Assistant Commissioner of Police, Vadodara City, was also examined for establishing certain previous statements made by Smt.Yasmin to him with the object of contradicting the testimony of Smt.Yasmin. D.W.4 – Mrs.Khyati Pandya – is the Chief Executive Officer of a local T.V. channel in Vadodara. She also has been examined for the purpose of proving certain previous statements made by Smt.Yasmin in an interview given to local T.V.channels. The C.D. [Art.R/38] containing a record of the relevant interview and its transcription marked as Ex.514(colly.) is said to be prepared by her. D.W.5 – Ajay Jasubhai Patel – is the Videographer who had done the video shooting in respect of an interview of Smt.Yasmin in which she had made the statements contained in the said C.D. [Art.R/38]. It is on the basis of the shooting done by him by using a Mini D.V. camera and cassette, the said C.D. [Art.R/38] came to be prepared by Smt.Khyati Pandya [D.W.4].

151. Apart from the oral evidence, a number of documents have been tendered in evidence, marked and exhibited. These include photographs, video cassettes and video C.D.s.

152. Local inspection of the place of offences and other places was carried out. The learned Advocates for the accused had made an application even before the commencement of the recording of evidence praying that local inspection should be carried out. However, it was thought not necessary to carry out the local inspection at that point of time. Later on, before the evidence of the Investigating Officer PI Shri P.P. Kanani [P.W.74] was recorded, the learned Advocates for the accused again made an application praying for local inspection. In the said application, it was categorically asserted, *inter-alia,* as follows:

> *"A visit by this Court will conclusively prove that none of the witnesses, who claim to have seen the accused, could have, in fact seen them."*

and that:

> *"A grave prejudice will be caused to the accused if this is not done."*

In view of this emphatic and categorical assertion on behalf of the accused, the application was allowed. Local inspection was carried out on 26th May [in the night] and 27th May 2005 [in the morning], as the learned Advocates for the accused had expressed that it was necessary to inspect the relevant places in the night, as well as in the morning.

153. The memorandum of the facts observed at the said inspection [Ex.402] is on record.

154. The defence of the accused persons, as appearing from the cross-examination of the prosecution witnesses and from their examination under Section 313 of the Code, is of total denial. Though there are certain variations in certain contentions raised by the accused persons – which variations occurred as the trial progressed –, the basic defence of the accused persons is that they have not committed the alleged offences; and that they have been falsely implicated. The accused persons claim to be unaware of the alleged incident. They maintain that they have been falsely implicated, though, there are variations as regards the persons at whose instance they have been falsely implicated and/or the reasons for the false implication.

155. A remarkable aspect of the retrial must be mentioned at this stage itself. It may be recalled that Zahira Shaikh [P.W.41], the first informant, had complained about the threats and about having been forced to depose in favour of the accused because of the threats received by her and her family members from the workers of the *Vishwa Hindu Parishad, Bharatiya Janata Party* and had made allegations against a local Municipal Corporator and

a Member of the Legislative Assembly. It was Zahira at whose instance, the Hon’ble Supreme Court of India had ordered a retrial. Zahira was being helped by an N.G.O. - Citizens for Justice and Peace – and the Secretary of the said N.G.O. - Smt.Teesta Setalvad. Zahira, who had, after the trial, come to stay in Maharashtra and had sought police protection on the ground that she apprehended danger at the hands of persons who were interested in supporting the accused, after the commencement of the retrial, left the police protection and went back to Gujarat. After going there, Zahira obtained police protection from the Gujarat Police. She claimed that she had been earlier kidnapped and kept in confinement by Smt.Teesta Setalvad. She even denied having filed any appeal, or petition in the Hon'ble Supreme Court of India, praying for retrial. She claimed that her signatures had been obtained on some blank papers by Smt.Teesta Setalvad. Her relatives – i.e. brothers Nafitulla [P.W.31], Nasibulla [P.W.30], mother Saherunnisa [P.W.40] and sister Sahera [P.W.35] – also turned hostile and made similar allegations against the said N.G.O. and its Secretary Smt.Teesta Setalvad. Thus, a situation arose where the supposed victims of the crime, who had supposedly approached the Hon'ble Supreme Court of India with a grievance that no fair trial had been held, that they had been threatened and prevented

from deposing the truth and who had secured an order of getting the matter retried on the basis of all these assertions, started saying that they were having no grievance about the previous trial, that they never had any grievance in that regard, that they had not asked for a retrial at all. They made statements suggesting that the retrial had been wrongly ordered; and that the Hon'ble Supreme Court was misled into believing that the previous trial was vitiated. Zahira had, after the original trial, appeared before several authorities, including the National Human Rights Commission, Election Commission, where she had been consistent in her allegations that she had received threats due to which she could not speak the truth during the trial. After turning hostile, she either said that she had never made any such grievance to any authority at all, or said that whatever she stated before the concerned authorities was a result of tutoring by some persons.

156. The matter is so bitterly fought that the process of recording of evidence was marked by a number of objections and a requirement of making elaborate notes in respect of the objections.

157. Smt.Manjula Rao, the learned Spl.P.P., contended that the same forces or powers that had earlier

threatened Zahira and other witnesses not to depose the truth before the Court, had again become active – rather more active - after a retrial was ordered and had tampered with the witnesses. It was contended that the crucial witnesses had been bribed and also kept in confinement or observation so as to keep a check on the possibility of their again changing their minds. She further submitted that in spite of Zahira [P.W.41] and other witnesses again turning hostile, the prosecution has succeeded in proving its case beyond reasonable doubt. Smt.Rao submitted that the occurrence witnesses/eye witnesses who have supported the prosecution case, are reliable and trustworthy; and that their testimony should be accepted. She also submitted that there was undoubted and voluminous other evidence which corroborates the version of the eye witnesses. She also contended that why Zahira [P.W.41] and others from her family had turned hostile was clear from the evidence on record; and that even from them, facts supporting the version of the prosecution, particularly relating to the occurrence, have been elicited.

158. Shri Adhik Shirodkar, the learned Senior Advocate on behalf of accused, on the other hand, contended that the entire prosecution is false and motivated. It was

contended, *inter-alia*, that Zahira and her family members were actually telling the truth before the Court; and that at the instance of the said N.G.O., a false colour was given to the matter with ulterior motives; and that the Hon'ble Supreme Court of India was misled in order to secure an order for retrial. It was submitted that, the investigating agency had been unfair to the accused; and that the investigation is tainted and vitiated. It is contended that the occurrence witnesses who have supported the prosecution case, had been tutored; and that there is a clear indication of the same from the evidence on record. According to him, versions of the witnesses who have supported the prosecution case are contrary to their versions in their respective statements recorded by the police during investigation. According to Shri Shirodkar, all the witnesses have improved upon their original versions, to implicate the accused, as a result of tutoring.

159. Shri Jambaulikar, the learned Advocate for accused nos.1 to 5, 10, 11 and 12, Shri V.D.Bichu, the learned Advocate for accused nos.13, 14, 15 and 20 and Shri Mangesh Pawar, the learned Advocate for accused nos.16 to 19 and 21, have adopted all the arguments advanced by Shri Shirodkar and have also advanced separate oral arguments of their own.

160. In addition to the oral arguments, memorandum of written arguments [Ex.521/A] has been filed by Shri Shirodkar on behalf of all the accused. Though these written arguments/ submissions have been filed on behalf of all the accused, Shri Bichu and Shri Pawar have still thought it fit to file additional and separate written arguments [Ex.522/A and Ex.523/A respectively] on behalf of the respective accused whom they represent.

161. I have carefully gone through the entire evidence on record. I have taken into consideration the arguments advanced by the learned counsel, oral and written. I have taken into consideration the ratio of decisions of the Apex Court and of various High Courts cited by and relied upon by the learned counsel in support of their respective contentions.

162. Upon considering the prosecution case, the evidence adduced, the defence of the accused and the arguments advanced, the points which arise for my determination are mentioned below together with the answers thereto, as follows.

POINTS	**FINDINGS**
1. Whether during the	

period from 27/02/2002 to 02/03/2002 and even thereafter for some time, the situation in Vadodara city had become tense, resulting in various incidents of communal violence?	Yes.
2. Whether during the period from about 8.30 p.m. or 9.00 p.m. on 01/03/2002 to about 10.45 a.m. on 02/03/2002, the Best Bakery building, the *'wakhar'* of one Lal Mohammad, the house of one Aslam, as also some vehicles belonging to the owners of the Best Bakery building, were set on fire by a mob of rioters ?	Yes.
3. Whether the mob of rioters had surrounded the Best Bakery building and had attacked the building and the inmates, *inter-alia,* by throwing stones, bricks,	Yes

soda water bottles, petrol/kerosene filled bulbs, bottles, etc. ?	
4. Whether 7 persons – i.e. 3 women and 4 children – were burnt and died an unnatural death as a result of the burn injuries sustained by them on account of the fire that had been set to the Best Bakery building ?	Yes
5. Whether Nafitulla, Nasibulla, Raees, Shehzad, Taufel, Sailun, Baliram, Ramesh, Prakash, Firoz and Nasru were assaulted by means of weapons – i.e. swords, sticks, rods – causing serious injuries to them, or any of them, in the morning of 02/03/2002 by a mob of persons or some persons forming it?	Yes
6. Whether the mob of rioters robbed the *ghee*,	

maida, sugar, etc., that was in the Best Bakery building ?	Yes
7. Did Baliram, Ramesh, Prakash, Firoz and Nasru [or any of them] die unnatural deaths as a result of the injuries sustained by them on account of the said assault ?	Yes
8. If the answer to Point No.7 above be in the affirmative, then what was the intention and/or knowledge with which they, or any of them, had been attacked?	The intention and/or knowledge was the same as is necessary or required for making the act of causing their deaths an offence of murder.
9. Whether Kausarali and Lulla were, or any of them was, attacked and/or whether they were, or any of them was, put in the fire set to the Best Bakery building by the mob of the rioters or otherwise died an unnatural death, either due to the	Yes

fire set to the bakery, or otherwise ?	
10. Whether the mob of persons that committed the aforesaid acts in the nights of 01/03/2002 and/or in the morning of 02/03/2002, was an unlawful assembly within the meaning of Section 141 of the I.P.C?	Yes
11. If the answer to Point No.10 above be in the affirmative, then whether the aforesaid acts committed by the mob or persons in the night and/or in the morning amounting to various offences, were committed in prosecution of the common object of the said unlawful assembly?	Yes
12. Whether the accused persons, or any of them, was, or were the member or members of the said unlawful assembly at the time when	Accused nos.2, 3, 5, 10, 13, 17, 19 and 21 are not proved to be the members of the unlawful assembly. Accused nos.1, 4, 11,

the offences in question, or any of them, were committed by the members of the said unlawful assembly ?	12, 14, 15, 16, 18 and 20 are proved to be the members of the unlawful assembly.
13. What offence, if any, have been committed by the accused persons, or any of them ?	Accused nos.2, 3, 5, 10, 13, 17, 19 and 21 are not proved to have committed any offences. Accused nos.1, 4, 11, 12, 14, 15, 16, 18 and 20 have committed offences punishable under Sections 143 of the I.P.C., 147 of the I.P.C., 324 of the I.P.C. r/w 149 of the I.P.C., 326 of the I.P.C. r/w 149 of the I.P.C., 302 of the I.P.C. r/w 149 of the I.P.C. and 188 of the I.P.C. Accused nos.4, 11, 12, 15, and 20 have committed offences punishable under Sections 435 of the I.P.C. r/w 149 of the I.P.C., 436 of the I.P.C. r/w 149 of the

I.P.C., 395 of the I.P.C., 448 of the I.P.C. r/w 149 of the I.P.C., 449 of the I.P.C. r/w 149 of the I.P.C., 450 of the I.P.C. r/w 149 of the I.P.C. and 451 of the I.P.C. r/w 149 of the I.P.C.

Accused nos.1, 14, 16 and 18 are not proved to have committed offences punishable under Sections 395 of the I.P.C., 448 of the I.P.C. r/w 149 of the I.P.C., 449 of the I.P.C. r/w 149 of the I.P.C., 450 of the I.P.C. r/w 149 of the I.P.C. and 451 of the I.P.C. r/w 149 of the I.P.C.

Accused nos.11,12, 15 ,16 and 20 have committed offences punishable under Sections 144 of the I.P.C. and 148 of the I.P.C.

14. What Order? As per the final order.

R E A S O N S

As to Point No.1 :-

163. On this point, there is clear and undoubted evidence. In fact, this point is not in dispute at all. I shall, nevertheless, examine the evidence in that regard so as to be able to appreciate the happenings in proper perspective.

164. PI Shri H.G.Baria [P.W.72] has stated that on 27/02/2002, a train was set on fire at Godhra railway station. *'Kaar-sevaks'* returning from Ayodhya who were in that train, were burnt. The Commissioner of Police, Vadodara city, had therefore apprehended that there would be some law and order problem in Vadodara city. The Commissioner of Police, Vadodara city, had called a meeting of the police officers on 27/02/2002. The police officers were asked to be vigilant and maintain law and order. Specific instructions were given to depute police personnel in communally sensitive areas. PI Baria [P.W.72] took several precautions as the Inspector in-charge of Panigate Police Station, with respect to the area under his control. Preventive action was taken against the persons who were involved in previous communal riots. Twenty two points were identified as

communally sensitive points and one armed A.S.I. and two armed constables were deputed on every such police point. Additionally, regular police patrolling in various mobile vans was maintained. PI Baria has stated that repeatedly, messages were being received from the Control Room regarding the incidents of communal riots at different places. Information about the incidents of communal riots used to be received by the police from the public also. According to PI Baria, during the period from 0000 hours on 28/02/2002 to 2400 hours of 01/03/2002, 58 cases of crimes – all regarding communal riots – were registered at the Panigate Police Station. On 28/02/2002, 80 messages were given to Panigate Police Station by the Control Room and on 01/03/2002, about 200 messages were received from the Control Room. Additionally, 45 messages were received at the Panigate Police Station from the public. All these messages were relating to the communal riots and regarding the incidents that were taking place in the area under the jurisdiction of Panigate Police Station. The messages that were being received, were regarding damage caused by Hindu people to the properties of Muslims, such as shops, factories, etc., and were also regarding the bodily offences committed by the Hindus against the Muslims. The incidents were of stabbing, setting shops and houses on fire, etc. PI Baria [P.W.72] has also referred to a

report received on 01/03/2002 at about 8.30 p.m. from the Control Room where the mobs of Hindus and Muslims consisting of 1500 persons on each side had assembled behind Gajrawadi Police Chowki; and that stone throwing was going on on both the sides. The police had to resort to gas gun firing. Thus, the evidence of PI Baria alone is sufficient to indicate that the atmosphere in Vadodara city had become tense; and that various incidents of communal violence were taking place during that period.

165. PI Shri P.P.Kanani [P.W.74] has also described the situation prevailing in Vadodara city during the relevant period. PI Kanani has described how a serious law and order problem arose on 27/02/2002. The news regarding burning of Sabarmati Express train at Godhra and the consequent deaths of '*Kaar-sevaks*' was spread on 27/02/2002 in Vadodara city through various sources and mediums. Because of this news, there was excitement, resulting in the situation in the Vadodara city becoming communally charged. The police authorities took all the precautions and ordered '*bandobast'* in consonance with communal riots scheme. PI Kanani's[P.W.74] evidence shows that additional police force from outside was brought in Vadodara city and to meet the requirement of additional vehicles, private vehicles were hired,

fitted with wireless sets, mikes, etc., making them suitable for use by the police. PI Kanani's evidence also shows that while the affected Sabarmati Express train was required to pass through Vadodara railway station, on the platform of Vadodara railway station, one Muslim person was stabbed to death in a communal incident. There were incidents of truck burning and driver being stabbed, rickshaw driver being stabbed, etc. Curfew was imposed by the Commissioner of Police, Vadodara city, in almost every part of Vadodara. PI Kanani [P.W.74] has stated that due to the publicity that was received by the news regarding the incident of train burning at Godhra, there was a feeling of anger and revenge as a result of which, communal incidents started and properties of isolated Muslims were targeted, damaged and destroyed. PI Kanani has clearly stated that by the evening of 28/02/2002, communal riots were spread in the whole city. On 01/03/2002, there was a call of '*Bharat Bandh*' from '*Vishwa Hindu Parishad*'. On that day also, communal incidents took place on a large scale. Serious communal incidents continued till 05/03/2002 after which the situation came somewhat under control.

166. The evidence of these two witnesses is supported by the evidence of other witnesses, including the occurrence witnesses, but it is not necessary to

discuss the same in this context. This is particularly so because there is no challenge to this evidence and this part of the prosecution case. The evidence of PI Baria [P.W.72] and PI Kanani [P.W.74], which is not challenged and is supported by other evidence, clearly establishes that during the relevant period and even thereafter for some time, the situation in Vadodara city had become tense, that various incidents of communal violence took place during this period; and that serious law and order problems arose during this period.

Hence, point no.1 is answered accordingly.

As to Point Nos.2 to 8 :-

167. The evidence requiring determination of all these points is so connected with one another that it would be necessary to discuss the reasons for the determination of all these points together. The same evidence would be relevant and need discussion for determination of more than one of the aforesaid points. Some of the points, though framed for a need of separate and a specific determination, require discussion on a large volume of evidence covering almost the entire prosecution case. The learned Advocates for the accused have raised certain

general objections and contentions about the reliability of the evidence of occurrence witnesses, impropriety of investigation, conduct of the Investigating Officers, etc., which issues are overlapping one another and require discussion on a great volume of evidence. It would be therefore not only convenient, but also necessary to discuss the evidence for the determination of all the points together, so as to maintain continuity of discussion, and help viewing of evidence in proper perspective. This will also avoid repetition of the discussion.

168. The case of the prosecution rests mainly on the evidence of 5 eye witnesses who have supported the prosecution case. This is true with regard to the happening of the incident which was spread over from the night till the next morning also and not merely with respect to the evidence to connect the accused persons with the alleged offences, though with respect to the happening of the incident, there is corroboration and support to the various parts of the story from other witnesses and even from the hostile witnesses. These witnesses have been extensively cross-examined. As their evidence touches almost all the aspects of the prosecution case, it would be appropriate to discuss the evidence of these 5 witnesses first. [Their evidence which tends to connect the accused, or some of them, with

the alleged offences, may, however, require a more detailed and separate discussion]. In fact, without first having a discussion on and the examination of their evidence, the various contentions raised by the Advocates for the accused, challenging the value on reliability of the prosecution case in general, can not be properly appreciated.

169. The evidence of the hostile witnesses is also direct evidence and is required to be examined for whatever it is worth. The legal principles laid down by the authoritative pronouncements of superior Courts in the matter of appreciating the evidence of hostile witnesses clearly indicate that the evidence of hostile witnesses is nevertheless substantive evidence and it is for the Court to appreciate the evidence considering the entire facts and circumstances of the case and to come to a conclusion whether it is to be wholly discarded or whether a part of it can be relied upon.

170. Before proceeding further to discuss the evidence, a mention must be made of a video cassette [Art.R/27, subsequently exhibited and marked as Ex.283] that has been tendered in evidence. This video cassette was not forwarded to the Court along with the chargesheet and no mention of the same – as a document or object on which

the prosecution would rely – was made in the police report. The background and the manner in which video cassette [Ex.283] came on record, is rather interesting. A number of objections have been raised with respect to the admitting of the said video cassette [Ex.283] in evidence which shall be dealt with by me later at an appropriate stage. For the present, I only observe that the video cassette [Ex.283] is properly proved and is an important piece of evidence which corroborates several aspects of the prosecution case.

171. I shall, now, consider the evidence of each of the occurrence witnesses/eye witnesses who have supported the prosecution case, in depth. Certain general contentions about the evidence of these witnesses which are common to all, may, however, be separately discussed. Further, the evidence of all these witnesses, so far it relates to connecting the accused person with the alleged offences, shall be separately and more meticulously examined later.

172. **It may be kept in mind that none of these witnesses, who are obviously very important witnesses, were examined during the previous trial**.

EVIDENCE OF SUPPORTING OCCURRENCE WITNESSES.

A] Taufel [P.W.26] :-

173. The evidence of Taufel [P.W.26] shows that at the material time, he was working in the Best Bakery and was also residing there. That riots started on 28/02/2002. Taufel has given the date of incident as '28/02/2002', but it is an obvious mistake and no dispute on this has been raised. There is no doubt that the alleged incident took place from the night of 01/03/2002 till the morning of 02/03/2002. Taufel [P.W.26] states that after having their dinner, he along with Shehzad [P.W.28], Raees [P.W.27], Sailun [P.W.32], Baliram and Ramesh, all of whom were working with him in the Best Bakery, were sitting on a cot [*Charpaee*] kept in front of the bakery. That Kausarali – Saherunnisa's [P.W.40] brother and husband of Taufel's sister -, one Prakash - another person working in the Best Bakery - were also with them. Taufel states that at that time, the rioters came there holding *mashals,* swords and giving slogans '*maro, kato'.* According to him, the rioters were about 400 to 500. Taufel and others started going upstairs. Kausarali however, remained behind. Lulla [Aslam's (P.W.42) brother] also remained behind. Kausarali and Lulla were assaulted by swords. Both of them fell down. Taufel and others lifted them and took them up - i.e. on the first floor of the building. That the rioters then set the house of Aslam [P.W.42] on fire. They also set

on fire the vehicles belonging to the owners of the Best Bakery. That *wakhar* of Lal Mohammad [P.W.36] was also set on fire and then house of the owners of the Best Bakery was set on fire. That after keeping Kausarali on the first floor, Taufel and others went to the terrace. The family members of late Habibulla Shaikh - the owner of the Best Bakery - also went to the terrace of the said building. Taufel then speaks of three women and four children being on the first floor, apart from Kausarali and Lulla. Obviously, this refers to the wives of Firoz and Aslam, their children and Sabira.

174. Taufel has described the incident that was going on throughout the night. That rioters were throwing bottles filled with kerosene.

175. Taufel then states how in the morning the rioters asked Taufel and others to come down and that how they made them get down from the terrace by tying two wooden ladders together. Taufel then speaks of the rioters tying down the hands of the women and then the women being taken in a room. Taufel then describes how, after tying the hands and legs of the men, the rioters started assaulting them; and that after assaulting them they poured kerosene over their bodies and set them on fire.

176. It was not asked to Taufel as to how he and others survived, or how the incident ended, but Taufel has stated that after the police had come, they were taken to the hospital. Taufel then describes the injuries sustained by him and also states that they were caused by sword.

177. Taufel also states about Baliram, Prakash and Ramesh being killed in the incident because of the assault on them with swords which took place in the morning.

178. Taufel has identified the swords marked as 'Art.R/16' and 'Art.R/23' as the swords, with which he was assaulted.

179. Taufel was unconscious when he was admitted in the hospital. He was brought in casualty at 12.25 p.m. He was admitted in D/4 Ward, Surgical 'F' Unit at 1.00 p.m. Evidence of Dr.Meena Robin [P.W.46] and Dr.Choksi [P.W.62] shows that Taufel was discharged on 19/03/2002, against medical advice.

180. The evidence shows that Taufel had sustained the following injuries.

i] I.W. on Lt. occipital region – 10 cm x 2 cm x 1/2 cm.

ii] I.W. on parietal occipital region 15 cm x 2 cm x 1/2cm.

iii] Burns on both lower limbs.

181. Taufel went to his native place in U.P. after his discharge from hospital. He was not examined in the previous trial held at Vadodara. He came to Mumbai about 10 to 15 days before the date on which his evidence was recorded.

182. Thus, Taufel's presence during the incident, apart from not being challenged at all, is corroborated not only by the evidence of other witnesses – including the hostile witnesses – but also by the injuries sustained by him. That he is a victim of the incident is clear. The evidence of the happenings of the incident, as given by Taufel, is convincing. It is, apart from being corroborated by the evidence of other witnesses, also supported by the circumstances sufficiently proved.

183. This is the substance of the evidence of Taufel, so far as the incident is concerned. The evidence of Taufel, which seeks to connect some of the accused with the alleged offences or is relevant in that context, may now be seen.

184. Taufel states that in the night he had seen, among the mob of rioters, some persons **who were known to him.** Taufel claimed that he would be able to identify those persons, if he would see them, though he did not know their names. Taufel also claimed that he could identify the persons who assaulted him and the persons who asked him to come down; and that some of them he knew well, though did not know their names.

185. Taufel identified 7 accused [out of 17], by pointing out towards them, in the Court. He identified Sanjay Thakkar [Accused No.11], Ravi [Accused No.21], Dinesh [Accused No.15], Bahadursinh @ Jitu [Accused No.12], Shanabhai [Accused No.16], Kamlesh [Accused No.19] and Suresh Vasava [Accused No.20]. Taufel has identified the said accused, from among all the accused before the Court, after making all of them stand in a row, *at randum.* It may be observed at this stage, that the accused persons were never made to occupy any fixed places during the trial and they were never made to sit in the Court hall according to the serial numbers given to them in the case, or in any other fixed order.

186. A request was made by the learned Advocates for the accused that the name of the accused who would be identified and pointed out by Taufel should not be

disclosed to him. It was submitted that the names of such accused should not be uttered loudly. This request was accepted. As such, the accused were not made to give their names after being pointed out by Taufel, within his hearing. The names of the accused identified by Taufel were not pronounced openly in the Court. The identity of the accused pointed out by him was ascertained not within the hearing of Taufel.

187. Taufel has attributed roles to the accused persons identified by him. According to him, Sanjay Thakkar [accused no.11] was seen by him in the morning; and that he had tied the hands and legs of Taufel and others after they had get down from the terrace. Regarding Ravi [Accused No.21], Taufel states that he had seen him in the morning; and that he was making Taufel and other victims get down from the terrace. Regarding Dinesh [Accused No.15], Taufel claims to have seen him in the night with a sword and *mashal*. Taufel states that he was shouting and giving slogans. Jitu [Accused No.12] was seen by Taufel in the night coming running towards Best Bakery by holding *mashal* and sword in his hand. Shanabhai [Accused No.16] was, according to Taufel, making Taufel and others get down from the terrace in the morning, had tied hands and had thereafter, started assaulting. Kamlesh [Accused No.19] was seen by Taufel

in the morning, standing near the bakery; while Suresh Vasava [Accused No.20] was seen by Taufel in the night, coming running towards the bakery holding *mashal* and sword.

188. Taufel was extensively cross-examined by the Advocates for the accused. He was cross-examined extensively with respect not only to the identification, but about the topography, the happening of the incident itself, etc.

189. The purpose of the extensive cross-examination regarding the topography of the Best Bakery building is difficult to understand and at any rate, nothing which would affect the prosecution case, has been elicited through the cross-examination.

190. It may be observed at this stage, that some of the challenges to the evidence of the occurrence witnesses who have supported the prosecution, are on grounds which are common to all of them. It is contended that these witnesses have come specifically to depose in this case; and that they had come to the Court, not on being served with a summons issued by the Court or because of the information given by the police, but at the instance of highly interested agencies. It is contended that

these witnesses are highly interested in the prosecution; and that community interest is involved in the matter. Suggestions in respect of some other witnesses, [though not in respect of Taufel], have been given that they have been tutored by Smt. Teesta Setalvad, the Secretary of the organization 'Citizens for Justice and Peace' who were instrumental in securing an order of retrial of the case. Since these and some other contentions raised on behalf of the accused by their learned Advocates are common to all the witnesses, it would be convenient to discuss all of them together at a later and appropriate stage. For the present, only the contentions which are raised with reference to the individual witnesses, may be taken into consideration.

191. A contention about the impossibility on the part of the supporting eye witnesses to view or see the mob or any persons therein, because of lack of light, darkness, smoke, etc. has been raised. A contention about the impossibility on the part of the supporting occurrence witnesses to have seen the mob, or some of the rioters, on the basis of the topography of the place has also been raised. As these contentions are general and common with respect to all the supporting occurrence witnesses, I think it proper and convenient to discuss the same later, after having discussed the evidence of all of the

supporting witnesses, rather than repeating the same discussion with respect to the evidence of each witness. At this stage, I only observe, that all these contentions are without any substance.

192. Taufel is sought to be contradicted by referring to his statement [X-18] recorded by the police during investigation. It may be observed that even as regards the other identifying witnesses, the basic challenge to their evidence is by bringing on record the contradictions in their evidence and their statements recorded during investigation and also by pointing out omissions to state certain facts which have been stated by them in their respective statements to the police. In that context, the authenticity of the police record also needs to be discussed. This general aspect of the case which is relevant for appreciating the entire evidence in the case, shall be separately discussed. At this stage, the discussion is being confined to the particular alleged contradictions and/or omissions in the evidence of Taufel.

193. In the cross-examination, it was asked to Taufel whether he stated before the police that 'the bakery was closed in the evening'. According to Taufel, he did state so to the police. On this, Taufel is sought to be

contradicted by the evidence of PI Baria [P.W.72] who states that Taufel had not stated to him, when his statement was recorded that the bakery was closed 'in the evening'. The omission sought to be highlighted is in respect of mentioning about the bakery being closed '**in the evening**'. There is no omission to state that '**the bakery was closed**', but what is omitted to state is that **'it was closed in the evening'**. Such '**omission**' is totally insignificant and immaterial. Apart from this, what is interesting to observe is that it is not as if Taufel had stated in the examination-in-chief about the bakery being closed in the evening. This subject was introduced in the cross-examination by asking Taufel whether the bakery was closed and when he said that it was closed, by adding that it was closed in the evening, immediately the so called omission which relates only to '**in the evening**' has been brought on record. It is a feature of this trial that the version of most of the witnesses and reliability of evidence is sought to be challenged mainly by showing it to be in variance with the statements recorded during investigation and/or the statements made during the previous trial. The reliability of the police record of the statement of witnesses is entirely doubtful in this case, as discussed elsewhere in depth, in this judgement, but that apart, the omission to state that the bakery was closed in the

evening, the omission being confined only to '**in the evening**' is totally insignificant. I can not help observing that even if there would be an omission to state that bakery was closed, without anything more still even that would have been of no significance and not worth bringing on record. Still, I have thought it fit to discuss this at some length, as it serves as an illustration as to the insignificance of several such omissions brought on record, unnecessarily.

194. In an attempt to give added weight to the omissions and contradictions, it was put to Taufel that the facts of the case were more fresh in the mind of Taufel when inquiries were made with him by the police in the hospital, than the time when he gave evidence before this Court, to which Taufel has replied that he had sustained several injuries; and that at that time, he could not state the facts properly. Judging by the injuries sustained by Taufel which are reproduced above, it is not possible to believe that Taufel was absolutely normal and in a condition to narrate all the details to the police. Apart from the injuries, the magnitude of the offence and the length of time during which the incident was spread over, it cannot be doubted that it must have been a terribly frightening experience for Taufel and other victims. Taufel and others were trapped throughout the

night in the midst of a violent mob. Taufel had not only suffered a brutal attack himself, but had witnessed one on his colleagues. Some of the persons had died in the night itself due to burns. This, coupled with nature of serious injuries suffered by Taufel, certainly makes it possible that at that time, he was not in a position to state facts properly to the police. In fact, it is rather impossible to think that he could state the facts properly before the police, at that time.

195. By disliking the above answer given by Taufel, he was asked in further cross-examination whether he stated to the police that 'no inquiries should be made with him at that time as he had sustained serious injuries; and that his statement should be recorded, later on'. Taufel answered that he did not state so. In my opinion, there is no substance in the contention that is sought to be made out by questioning in this manner. It is a fact that Taufel had undergone a terrible experience and undoubtedly he was in a traumatized condition. Additionally, he had sustained very serious injuries on his head. The police were unusually busy and occupied with the law and order problem, apart from the fact, that a large number of cases of offences committed as a part of communal violence, were being recorded during the relevant period. As such, how accurate and how

detailed the statement made by such an injured person, as Taufel was, can be anybody's guess. Thus, not much importance can be given to the alleged omissions in the statement of Taufel recorded during investigation. Certainly, his testimony in the Court can not be discarded or doubted on the trivial matters brought on record by way of 'omissions'.

196. A controversy about the place where Taufel [and others] were sitting at the time when the mob of rioters came, has been raised by the learned Advocates for the accused. There is a challenge in the cross-examination of all the supporting witnesses, as to the place where they were sitting at the material time. This challenge being common to the evidence of all these witnesses, it would be convenient to consider the common attack on the testimony of all of them together. At this stage, it may only be observed that there is no substance whatsoever in the contention that an '*improvement*' has been made by Taufel and all others, as regards the place where they were sitting when the mob of rioters came.

197. In his evidence, Taufel has stated that the mob of rioters was of about 400 to 500 persons. In the cross-examination he was questioned whether he stated before the police that the mob was of 1000 to 1200 persons, to

which Taufel stated that he did not state so. When confronted with a portion in his statement [X-18 for identification], where the figure of the persons in the mob was given as '1000 to 1200', Taufel stated that it might be correct. PI Baria [P.W.72] who recorded statement of Taufel was questioned about it and Taufel's statement that the mob was of about 1000 to 1200 persons has been brought on record by way of a contradiction. No importance can be given to such contradiction particularly because Taufel does not rule out the possibility of the mob being of 1000 or 1200 persons. Secondly, and more importantly it is very difficult to estimate the number of the persons in the mob and even that the mob was of 1000 to 1200 persons is also a guess of the concerned witnesses. Nothing turns on the precise size of the mob and what is relevant is only that it was a large mob.

198. While attempting to bring on record contradictions/omissions - one wonders – whether at times the learned Advocates for the accused have overlooked the relevance and the object of bringing such contradictions and omissions on record. The omissions and contradictions are brought on record so as to discredit the version of the witnesses. It is based on the logic that a person who makes different statements on the same

subject, on different occasions, may not be worthy of any credence. If a witness is making an improvement in his evidence to support the case which he intends to prove and when such statements containing improvements were not made on a previous occasion, the veracity of a witness may be doubted. Here, the contradiction in the number of persons forming the mob [which number is not based on counting, but on a guess made from the size of the mob], is absolutely insignificant to suggest that Taufel is deliberately giving a wrong figure of the persons in the mob as 400 to 500. As such, no importance can be given to the alleged contradiction.

199. An '*omission*' to state before the police that he and others were sitting on a cot put in front of bakery has been brought on record. Really speaking, this has no separate existence from the '*contradiction*' that 'he and others were upstairs', which has been brought on record. Apparently, this is done in an anxiety to increase the number of alleged 'omissions' and 'contradictions' rather than attempting to affect the substance of the version or the story put forth by the witness. In any case, this contradiction and omission which is to be used in support of the contention of the witnesses making improvements regarding their place of sitting, has – as shall be discussed later - no substance, whatsoever.

200. Taufel's version before the Court that the rioters came there holding *mashals* and swords and giving slogans '*maro' 'kato*' was sought to be contradicted by bringing on record that he did not state before the police, that the rioters came there holding *mashals* and swords. It has been brought on record through PI Baria that Taufel did not state so before him. I find that though no specific statement as was put to PI Baria and to Taufel, was made by Taufel during investigation, there is absolutely no value to the failure to make such a statement. It is a matter of regret, that the concept of omissions is apparently not properly comprehended by the learned Advocates for the accused. An omission which amounts to contradiction by reason of it being unable to stand alongwith the version given in the Court is what is relevant and significant. Now, here, Taufel has clearly spoken about the rioters assaulting him with swords. It would be absurd to say - when Taufel speaks of rioters assaulting with swords - that his omission to state that 'they came there with swords' has any value. Obviously, the rioters ***had*** swords with them. When that they had swords is clearly stated by Taufel, pointing out this omission to state that they ***came*** with swords, is rather strange, because there is no challenge to the story of assault by sharp weapons, which even otherwise,

cannot be doubted. As regards the *mashals,* it is true, that there is no mention in Taufel's statement before the police. However, since he has spoken about the rioters setting the Best Bakery building and other places on fire, there is every likelihood that he did not feel it necessary to specifically mention that the rioters were holding *mashals.* There is also every possibility that PI Baria did not find it very important to specifically record that they came with *mashals*. No doubt on the version of the prosecution can be thrown, even if it is held that the failure to state so specifically to the police, is established.

201. An attempt has been made to prove omission on the part of Taufel to state to the police that 'we [he and others] started going upstairs'. Taufel's [P.W.26] general statement that because of the injuries sustained by him, he is not aware as to what was stated by him to the police at that time cannot be ignored in the context of the omissions and contradictions attributed to him. This aspect has already been discussed earlier. However, even without this general aspect and in the context of this particular 'omission', it may be observed that the attempt is not very proper and in any event, is of no use. It is already brought on record that the version advanced by the witness before the police was that he was

'upstairs'. Since the version in the police statement is to the effect as if the witness was already upstairs [which version has been brought on record by way of a contradiction], it is meaningless to bring the omission to state that 'we started going upstairs' on record. A person who stated before the police of his already being upstairs, would have no occasion to state before the police that 'he started going upstairs'. This approach, in my opinion, is indicative of the failure to comprehend the concept of 'omissions' and 'contradictions' and the significance of bringing them on record.

202. Taufel has been cross-examined also as regards what happened to Kausarali and Lulla. It appears to me that what exactly happened to Kausarali and Lulla is not very clear from the evidence. This subject needs to be discussed with reference to the evidence of all the relevant witnesses. Therefore, instead of discussing the evidence of Taufel on this aspect with particular reference to his cross-examination at this stage, it would be appropriate and at any rate, more convenient to discuss the same along with the evidence of all other witnesses on this subject.

203. Taufel [P.W.26] initially stated, when put to him in the cross-examination, that he did not know the names of

the daughters of Habibulla. However, immediately thereafter, he stated that he knew the name of Zahira Shaikh out of Habibulla's daughters. Earlier, he had said that he knew the name of Sabira – who died in the incident. Taufel [P.W.26] then stated that he came to know the name of Zahira Shaikh about 2 to 3 months after the incident – i.e. the riots. He was then questioned as to whether he stated before the police that Zahira had already lodged a complaint with the police regarding the matter. When the witness denied having stated so, he was contradicted with the portion to that effect from his statement [X-18 for identification]. PI Baria [P.W.72] states that Taufel [P.W.26] did state before him accordingly. The relevant portion from Taufel's statement [X-18 for identification] has been marked as Ex.359. However, here again, the object behind bringing this contradiction on record is difficult to comprehend. Whether he stated before the police that Zahiraben had lodged a complaint with the police, was asked to him in the cross- examination and after his answer that he did not state so, he was confronted with the relevant part of his statement to show that he did state so. Thus, a version has been obtained from the witness merely for the purpose of contradicting him. Even otherwise, whether Zahiraben had lodged a complaint with the police, was a matter to be stated by the witness to the police,

requires thinking. That Zahiraben had lodged a complaint was known to the police, and PI Baria [P.W.72] himself had recorded it. It would be, therefore, difficult to understand what would be the occasion for Taufel [P.W.26] to state so specifically to the police when it was a fact known to the police already, to the knowledge of Taufel. In any event, assuming that such contradiction exists, what is the effect of that? That Zahira lodged complaint with the police is not sought to be established by Taufel's evidence. In fact, Taufel, as already observed, did not state this at all, till he was specifically asked about it. Even then, he said that he did not state so. Since Taufel [P.W.26] had neither stated before the Court, nor admitted having stated to the police that Zahira had lodged a complaint with the police, and since it appears to be the case of the accused that Zahira had ***not*** lodged the complaint with the police at all, contradicting Taufel [P.W.26] and bringing on record that he had told the police about Zahiraben having lodged a complaint with the police, is an exercise, the logic behind which is difficult to understand. The learned Advocates for the accused are certainly not interested in trying to show that Taufel [P.W.26] indeed stated so before the police, with the object of making the truth of that, statement of Taufel to be believed, because it is their case that Zahira had ***not*** lodged any complaint at

all. Proving Taufel's statement to the police to that effect, exhibits an aimless attempt to show differences in the record, wherever they appear without understanding their significance and without being desirous of challenging a particular version. Fortunately for the accused, 'proving' the said statement of Taufel does not damage their case. It is because, I do not think it likely that Taufel [P.W.26] would have stated to the police in that condition, that Zahira had already lodged a complaint, a fact known to the police to the knowledge of Taufel. [If he indeed made the statement, the fact that it was known to the police would naturally be known to him.]

204. There is some discrepancy in the evidence of this witness as to whether he knew that the name of one of the daughters of Late Habibulla was Zahira and as to when he came to know this. Though this discrepancy or infirmity in his evidence, is not felt important or relevant by the learned Advocates for the accused, I think it deserves to be given more thought than to the so called 'omissions' and ‘contradictions' emphasized by them, in judging the veracity of Taufel. After a careful consideration of Taufel's evidence in this regard, it appears to me that, that he knew Zahira by name since prior to the date of incident, is correct and his statement that he had come

to know it as he was working in bakery, is to be accepted. The other contradictory statements to the effect of his not knowing name of Zahira appear to be incorrect and resulting from some confusion which the witness apparently had in mind as to the purpose or the object of the questioning. This discrepancy does exist in his evidence, but the same is not very material in my opinion.

205. The omission on the part of Taufel [P.W.26] to state before the police that first, the women got down; and that they were Zahira, her mother and the mother's mother, has been brought on record. However, in my opinion, this omission is insignificant and immaterial. Taufel's statement that the women who got down, included Zahira's mother's mother, is obviously wrong and the same is contradicted clearly by other evidence on record. However, no motive of deliberately making this false statement can be attributed to Taufel [P.W.26], as there is certainly no advantage gained by him or by the prosecution by saying so. This mistake appears to have been caused on the basis of the wrong perception which is inevitable in such cases where a ghastly incident, spreading over a long period and involving a number of victims and a great number of offenders, has taken place.

206. An omission to state before the police that the rioters tied the hands of the women, has also been brought on record. PI Baria [P.W.72] stated that Taufel [P.W.26] did not state so but this is his inference and not what he remembers. PI Baria has inferred this, from the way, in which the statement of Taufel is recorded. PI Baria's evidence shows that what Taufel stated is recorded as '*amara baddhane*' - i.e. 'of we all' - and according to PI Baria, had Taufel stated about women, PI Baria would have written as '*amara baddhane ane striyone*'. It may be observed that the version that hands of the women were tied down, cannot be entirely discarded so as to infer that they were not tied. There is no evidence to infer such a negative. As regards men, Taufel has stated about the rioters tying their ***hands and legs*** and as regards women, he has stated only about tying their ***hands*** and taking them in a room. It would be incorrect to imagine that such happening ***did not*** take place with respect to any woman or women, and disbelieve Taufel. In any event, whether this has indeed happened and not told to the police, or told and not recorded by them in a manner to make it clear, or it had not happened at all; this infirmity in the evidence of Taufel is not material at all.

207. Taufel [P.W.26] has stated that he had sustained

injuries on the backside of his head, on both the sides of his chest, left arm, that his right leg was burnt, that a blow of sword was given on his left leg also. The omission to state before the police that a blow of sword was given on his left leg, is brought on record. This is totally insignificant in my opinion. When Taufel [P.W.26] has described the injuries sustained by him, the omission only with respect to stating that a blow of sword was given on his left leg, has got no significance at all. Taufel has not specifically stated that any particular injury was caused to his leg, except the burn injuries. The fact that indeed he had sustained injuries on vital part of the body, is undisputed. Taufel had no false reason for mentioning that a blow of sword was given on his left leg, particularly when he has not attributed the blow to a particular sword or a particular accused. As such, I am inclined to believe Taufel [P.W.26], when he states that a blow of sword was given on his left leg. That he did not state so to the police, is insignificant.

208. An omission to state that the rioters poured kerosene over the wooden sticks over the bodies of Taufel and others and set them on fire, has been brought on record to the extent that Taufel did not speak about 'kerosene being poured'. The way in which the

omission has been put, indicates that, putting sticks over the bodies and setting Taufel and others on fire, is not what constitutes the omission but failing to mention pouring of kerosene over the wood, is what the omission consists of. This omission is totally insignificant and immaterial, in my opinion. Whether Taufel did not state it to the police, or that he did state and it was not recorded by the police [which possibility also cannot be ruled out], it is immaterial. In the whole happenings, 'pouring of kerosene', by itself, was not very significant at all.

209. Taufel [P.W.26] has been questioned in the cross-examination about the length and width of the terrace, which details he could not give.

210. Taufel has admitted in the cross-examination that he and others were terribly frightened on noticing the rioters coming with '*mashals*' and weapons. He has accepted the suggestion put to him in the cross-examination that he was terribly frightened and was wondering how he would be able to save himself. On this, it is contended that Taufel would not have been in a position to notice the happenings. I am not impressed by this contention. Though a witness may be terribly frightened, he may still be able to observe the

happenings. In the instant case, this is more so because the happenings were spread over throughout the night and even the morning. Moreover, the very basis of the supposition that fear will affect the powers of perception adversely, is not supported by any scientific data. On the contrary, experience shows that powers of perceptions are greatly increased during a fearful incident. As this point is raised with reference to the evidence of all the occurrence witnesses, I think it proper to have a more detailed discussion on the effect of fear on the powers of perception at a later stage while dealing generally with the evidence of identification.

211. Taufel [P.W.26] was then questioned – rather improperly in my opinion – about how many bottles filled with kerosene were thrown by the rioters upstairs towards the victims. He was asked whether he could give the number of such bottles approximately, whether they were 2 to 3, 5 to 10 or 10 to 20. He was asked whether the bottles were in small numbers or in big numbers. Taufel has expressed his inability to say so and thereafter, a suggestion was given to him that it was because he was scared at that time, which suggestion has been accepted as correct by Taufel. Taufel has also admitted that since the bottles were coming from the side of the road,

he and others remained on the other side of the terrace as far as possible so as to, as far as possible, away from the side from where the bottles were coming. Based on this admission, it is contended that therefore, he would not be able to see the rioters. I am not impressed by this contention. When the incident was going on throughout the night and though it is stated that the throwing of bottles was going on continuously throughout the night, it is not possible to hold that during the period of whole night, Taufel and others would have no occasion to see even some of the persons in the mob, even for a short while, or for some period.

212. In the course of cross-examination, Taufel stated that out of the 7 accused identified by him in the Court, 4 were known to him previously – i.e. since prior to the riots. Now, this would mean by implication that he did not know the remaining 3 prior to the riots. This was inconsistent with the claim of Taufel, made in the examination-in-chief, that he knew all the accused identified by him since previously. Taufel has, however, immediately corrected himself and stated that he knew all the 7 persons since previously. Taufel was then cross-examined on the aspect of his previous knowledge of the accused identified by him. Taufel has stated that he knew them as he was working in the bakery and these

accused used to visit that locality. A suggestion was given to Taufel that when these persons came with the mob, he identified them as they were already known to him and this suggestion was accepted by Taufel as correct. Taufel was questioned with regard to whether he stated before the police the fact of some of the persons in the mob of rioters being known to him in an attempt to show that there exists such omission, but in reality, there is no such omission at all. In fact, when Shri Jambaulikar, the learned Advocate for accused nos.2 to 4, wanted to put the question as to whether Taufel did not state before PI Baria that 'some of the persons in the mob of rioters were known to him', the matter was heard and the question was disallowed as no such omission could be spelt out from the statement [X-18 for identification] of Taufel, recorded by PI Baria. The Court note in that regard [pages 2368 and 2369 of the notes of evidence] speaks for itself.

213. Taufel [P.W.26] has admitted in the cross-examination that neither Kausar nor Lulla were assaulted in his presence. Taufel has clarified that he had seen the rioters talking to them, but not actually assaulting them. In my opinion, this shows that the witness is honest. He has avoided making any false claim of having seen the rioters assaulting Kausarali and/or Lulla.

214. It is again confirmed by Taufel in his cross-examination, that 7 accused could be identified by him in the Court, in spite of the time gap of about 2.1/2 years because he knew them since previously. In my opinion, the fact that the accused identified by him in the Court were known to him previously, is satisfactorily established.

215. Taufel has been questioned whether he could describe the features of the accused persons identified by him, by looking at them. Taufel has stated that he could not do so; and that he could not state about their built, height, etc. without looking at them.

216. Taufel was questioned as to whether he had given the description of any of the accused to the police when his statement was recorded and Taufel has admitted that since he could not give the description of those persons, he must not have given the same to the police.

217. On the basis of his inability to give description of the accused persons, it is contended by the Advocates for the accused, that the evidence of identification of the accused by Taufel is not reliable. It is contended that his inability to describe the features of the persons

identified by him without looking at them, makes the value of his evidence doubtful. I am unable to agree with the learned Advocates. In my opinion, the ability to give description is totally different from the ability to recognize. Description of persons without looking at them can be given if there is sufficient power of visualizing it and also of expressing it. The supposition that there exists a conscious and well thought process of recognition to the effect that one first visualizes the features and the relevant details of another; and after visualizing the same in mind, compares the features of one who is sought to be got identified; and after comparing in his mind the similarity of the features that he comes to the conclusion of both the supposed two persons being one and the same, is not correct. A person who lacks the power of visualization and the power of describing, or either of them, would not be able to give description, but, that because of the lack of such power or powers, he would not be able to recognize, is not a scientific or studied conclusion.

218. A man may be unable to give the description of another by the reason of not having power of imaging, but when he would see that person, he would be able to immediately recognize him. ***Wigmore, in his Principles of Judicial Proof*** [***Published by Boston Little, Brown, and***

Company 1913], which is a compilation of authoritative writings on the relevant subject, has referred to a passage from G.F.Arnold's psychology of legal evidence [on pg.467 of Wigmore's book] and has quoted the said learned author, who has advocated the aforesaid proposition. The learned author G.F.Arnold has, while explaining the point, pointed out that the lower animals which have at best only a rudimentary power of imaging, often display a marvelous power of recognizing; and that it is often lost sight of that in memory we only know retention through the fact of revival. The point can be further illustrated by pointing out that a child who may not be able to describe or may even not know the relevant words or their meaning which may be necessary for describing, easily recognizes his own toys or his shoes, etc. Thus, resemblance of the matter is felt by an individual; and that it does not depend on his ability of imaging it before hand or visualizing it without looking at that particular object. Thus, the evidence of Taufel regarding the identity of the accused identified by him as the culprits, can not be discarded or disbelieved on the ground of his inability to give their description to the police or to the Court.

219. Taufel's omission to state before the police specifically that the *wakhar* that was burnt, was

belonging to Lal Mohammad [P.W.36], has been brought on record. According to Taufel, he did state before the police that the *wakhar* in front of the Best Bakery which was belonging to Lal Mohammad was set on fire by the rioters. PI Baria, however, stated that Taufel did not state so before him. Apart from my views about the accuracy in general, of the police record of the statements made by the witnesses during investigation which shall be elaborately discussed later, in the instant case, it may once again, be mentioned that the object of bringing on record omissions and contradictions has been lost sight of. Since there is no dispute on the fact that the *wakhar* in front of Best Bakery was set on fire; and that the said *wakhar* was belonging to Lal Mohammad; and that the accused have nowhere challenged this, whether Taufel stated it to the police or not, is immaterial. It would only show that though true, Taufel did not state it to the police. When the truth of the version of Taufel about the rioters setting fire to the *wakhar* in front of Best Bakery; and that it belonged to one Lal Mohammad is not only not at all doubted, but also not challenged, bringing on record such an 'omission' has been futile.

220. After the cross-examination was over, Taufel volunteered to make a statement before the Court. On

being permitted to do so, he said that he knew the names of four of the seven accused persons identified by him, prior to the incident; and that due to fear, he had not disclosed this fact earlier. He gave the names of the said four accused as Dinesh, Shanabhai, Ravi and Jitu. In view of this statement, the Advocates for the accused were permitted to cross-examine Taufel further. It is contended on behalf of the accused that giving of the names of said accused as has been done by Taufel, is a result of tutoring and an after thought. It is contended that if Taufel was afraid of giving the names of the accused earlier and that too, to the extent of telling a lie to a specific question by the Court about the knowledge of the names of the accused, why did he thereafter, disclose this.

221. I have carefully considered the matter. In my opinion, the evidence of Taufel can not be disbelieved on this ground. The possibility that he was more scared of specifically taking names of any accused, even when he identified them in the Court, can not be ruled out. I am not inclined to give much importance to the answers elicited from Taufel, as to when he developed the fear and when it had gone etc., in as much as, it would be difficult for anyone to understand and/or to explain the precise working of his mind, or the feelings in that

regard. The question would be whether Taufel's reaction, as has been explained by him, can be held to be an impossible reaction on the part of any person, even if he would be frightened. It is possible that by remaining present before the Court on a number of dates, Taufel became familiar with the Court atmosphere and also with the method of recording of evidence. It is possible that thereafter he understood its significance, and ventured to disclose this aspect. It may be recalled, that earlier Taufel had made a claim of knowing all the seven accused identified by him in Court, since previously. Then he had said that he knew four of them previously, and then again, had said that he knew all the seven since, previously. Apparently, when he spoke about the knowing only four since previously, Taufel meant 'knowing since previously, by name'. It appears that after being somewhat accustomed to the Court atmosphere, Taufel thought it necessary to offer clarification, removing the confusion created by his previous answers, regarding which probably he was feeling uncomfortable. It is certainly possible that as the examination of this witness was progressing, he was thinking of the effect of the answers given by him during the earlier part of the examination. It appears that after thinking, he felt the necessity of offering an explanation. I am, therefore, not able to disbelieve the statement of Taufel, that

he knew the names of four of the accused as Dinesh, Shanabhai, Ravi and Jitu since prior to the incident. I am unable to hold that this disclosure which came from Taufel, was a result of tutoring.

222. It may, however, be observed that the learned Spl.P.P. has not asked Taufel to point out the said four accused. The Advocates for the accused have not made any attempt to get it checked whether Taufel was indeed in a position to identify the said four persons by their specific names. Shri Shirodkar, the learned Senior Advocate, contended that after Taufel had disclosed that he knew four accused by names, it was the duty of the learned Spl.P.P. to question him further - as opportunity was given by the Court to the prosecution - to fix the identity of the said four, to which I am inclined to agree. Having failed to do so, the prosecution has deprived itself of the advantage that might have accrued to it, in the matter of fixing the identity of the accused persons more authentically by Taufel's pointing them out by their names, in Court. However, that does not mean that Taufel's earlier evidence gets weakened in any way, on account of the failure of the prosecution to do so. The Advocates for the accused also, for obvious reasons, did not feel the risk worth taking in asking Taufel whether he could point out those accused or not.

In my opinion, in this peculiar position, the evidence of Taufel stands as it is; and though it does not further help the prosecution, it also does not weaken the evidence earlier given by him.

223. Thus, on a consideration of the evidence of Taufel, I find that there is nothing which discredits his testimony. There is nothing to indicate that he is an unreliable witness. It is a different matter that his evidence regarding the identification of the accused persons may require further and deeper discussion in the context of the reliability or acceptability of the identification evidence in general in this case, but what needs to be observed at this stage, is that no inherent improbabilities or infirmities which would make me doubt the veracity of this witness, exist in his evidence.

B] EVIDENCE OF RAEES KHAN [P.W.27]

224. Coming to the evidence of Raees Khan [P.W.27], he has narrated the incident and the details regarding occurrence as given by him, are absolutely consistent with the evidence of Taufel and of other witnesses. He has described how the incident took place; and that how

the riots continued throughout the night, and how he and others were made to get down from the terrace in the morning.

225. After describing the incident, Raees has stated that he could identify the persons who assaulted him and who set on fire. Raees has also stated, he had sustained injuries on his head due to assault by sword. According to Raees, he had suffered 3 blows on his head, first by a wooden stick and then by a sword. Raees has identified the swords marked as Art.R/23 and Art.R/21 as the swords, by which he was assaulted or at any rate, swords similar to Art.R/23 and Art.R/21. The stick marked as Art.R/20, was identified by him as the wooden stick by which he was assaulted.

226. The medical evidence shows that Raees had indeed sustained injuries. According to Dr.Smt.Meena Robin [P.W.46], there were following injuries on his person when he was taken to S.S.G. Hospital and was examined by her.

i) First to second degree burns on right upper limb, left arm and on back.

ii) C.L.W. (on right parieto occipital region, size 10cm X 2cm X scalp deep.

iii) 2 C.L.W.s on occipital region – out

of these, one was 5cm X 0.5cm X 0.5cm and the other was 2cm X 0.5cm X 0.5cm.

227. Interestingly, according to Dr.Dilip Choksi [P.W.62], who treated Raees in the ward, Raees had the following injuries

i) *I.W. of 8cms X 2cms over the right parietal occipital region,*

ii) *4cms X 1cm I.W., over left occipital region,*

iii) *1cm X 1cm I.W., over left occipital region.*

in addition to burn injuries.

228. The injuries noted by Dr.Smt.Meena Robin [P.W.46] are obviously wrong. The evidence of Raees that he was assaulted by a sword is in conformity with the Incised Wounds on his person as noted by Dr.Dilip Choksi. Dr.Choksi having treated him and observed him for a long time. The evidence of Dr.Choksi, as regards the injuries, is certainly more reliable than the evidence of Dr.Meena Robin who had admittedly hurriedly examined him in the emergency treatment department.

229. Raees was asked to identify the culprits from amongst the accused before the Court. The accused were

made to stand in a row *at randum* and not according to serial numbers given to them, in the charge-sheet or in the case. From out of the 17 accused before the Court, Raees has identified accused no.18 - Shailesh Tadvi, accused no.20 - Suresh Vasawa, accused no.15 - Dinesh Rajbhar, accused no.16 - Shanabhai Baria and accused no.4 - Pankaj Gosai. According to Raees, accused no.18 - Shailesh had tied hands and legs during the incident, while the Accused No.20 was having a sword in his hand. As regards accused No.15 - Dinesh, Raees has stated that he too was having a sword and was assaulting. Even accused no.16 - Shanabhai, according to Raees was present with a sword in his hand.

230. A similar request as was made by the learned Advocates for the accused in case of the identification by Taufel, was made by them with respect to Raees also. This was accepted. As such, the names of the accused identified by Raees was not pronounced openly in the Court and the identity of the accused pointed out by him was ascertained not within the hearing of Raees.

231. The evidence regarding actual happening and details of the incident as given by Raees, need not be discussed here, as the same is very much consistent and in consonance with the evidence of other occurrence witnesses, as also the medical evidence and the evidence

of witnesses from the fire brigade and police.

232. It may be recalled that a statement of Raees [Ex.264] was recorded on 02/03/2002, by Abhaysinh [P.W.66]. A contention has been advanced on behalf of the accused, that this statement was actually the First information Report; and that Zahira's statement which is projected as the First Information Report [Ex.136] is actually not the First Information Report, at all. Since this aspect is stretched to such a length, that it needs to be discussed separately, at length. For the time being, I only record the conclusion to which I have arrived at after considering all the relevant aspects – viz. that this contention has no substance whatsoever.

233. Raees was extensively cross-examined. In view of the submission of the learned Advocates for the accused that they did not dispute the occurrence, much of the cross-examination of Raees which deals with the topography, the place where wood used to be stored in the Best Bakery, the items which used to be stored in the bakery etc. has become redundant.

234. Raees was sought to be contradicted with the record of his statements recorded by the police on 02/03/2002

[X-19, later on marked as Ex.264] and his statement recorded by PI Baria [X-20 for identification] on 04/03/2002.

235. Since Raees Khan stated that he peeped outside from the *Jali* and saw that some persons had assembled there with *mashals* and swords in their hands, he was asked whether he told the police about peeping outside from the *Jali* and seeing persons assembled with *mashals* and swords. According to Raees, he did state so to the police, but according to PI Baria, Raees did not state so. This omission is thus brought on record. In my opinion, it is totally immaterial. The question as to *from where* Raees saw the mob of persons assembled was not a crucial aspect of the matter at all, and there is nothing to show that PI Baria had asked Raees about it. What was important was the ability or opportunity to see the mob and not *from where* it was seen. It is not worth even suggesting – though emphatically and vehemently contended by the learned Advocates for the accused – that when the mob had assembled at Hanuman Tekdi and was surrounding the Best Bakery through out the night, the inmates of the Best Bakery had no opportunity to see the mob or to see that persons had assembled. Merely because Raees states that he peeped outside from *Jali* and saw it, it does not mean that there is any special

significance to the 'peeping outside from *Jali'.* The so called 'omission' in the statement of Raees recorded during investigation, is therefore, of no significance at all.

236. In a similar manner, the omission to state that Habibulla's daughters and wife were on the terrace has been brought on record through PI Baria. According to Raees, he did state so, but assuming that he did not state so, since it is a fact which has not been disputed, it is immaterial whether Raees stated so to the police or not. The logic behind bringing on record 'omissions' to state facts to the police – though undoubtedly such facts are true or at least are not challenged at all – is difficult to comprehend. How it would benefit the accused is also difficult to understand. The object of bringing on record '*omissions*' and '*contradictions*' by referring to the record of the statement made by a witness before the police during investigation, is to make his version before the Court doubtful thereby. If a witness states fact ***'A'*** before the Court and has either not stated it to the police, or has stated fact ***'B'*** to the police, whether the fact ***'A'*** as stated by the witness before the Court is true, would be the question that would arise for consideration. Thus, it is to make the Court doubt the truth of the fact ***'A'*** that the

'omissions' and 'contradictions' are brought on record. To bring on record that the witness did not state even the facts, which were true, to the police can lead to two inferences. The first is, that the witness did not state the facts properly to the police in which case, the rigour behind the 'omissions' and 'contradictions' as the case may be, goes away. The other conclusion would be that the police did not record the statements properly; and that the record made by them is unreliable which again would take away, or at least greatly affect, the value to be attached to the 'omissions' and 'contradictions' based on such record.

237. A question was asked to Raees whether he stated before the police about 3 women and 4 children being in the room below. It was made clear that the emphasis of the cross-examiner while putting the question was, on the figures 3 and 4. This omission – viz. to state the figures 3 and 4 while stating that they were in the room below - has been brought on record through PI Baria [P.W.72]. This omission is absolutely insignificant and immaterial. Further, since the fact that 3 women and 4 servants were in the room having already been duly proved and being undisputed, bringing on record such omission, is also meaningless.

238. It was put to Raees that getting down from the terrace was difficult because there was no way of getting down, which suggestion has been accepted as correct by Raees. It was thereafter put to him that had two ladders not been joined together, they [Raees and others] could not have got down from the terrace. It is thereafter that a question was put to Raees as to whether he thought the fact of joining of the ladders to be significant and whether he stated it before the police on 04/03/2002, to which Raees replied in affirmative. Regarding it not being found in his statement dated 04/03/2002, Raees explained that he had stated the facts correctly, but that he did not know what was recorded as the statement was not read over to him. This omission – ***viz. Raees and others being made to get down by a ladder made by joining two ladders*** – has been brought on record through PI Baria, who states that Raees did not state so before him. I am not inclined to give any importance to this omission. It is because Raees and others came down, is what is significant and not that they came ***by a ladder made by joining two ladders***. In fact, that they came down by ladder, cannot be disputed at all and whether or not it was a single ladder or had been made by joining two ladders, is immaterial. It is not the case of the learned Advocates for the accused that Raees is lying about the manner of coming down or that Raees did

not come down by a ladder made by joining two ladders and no such contention is advanced. If there would be a challenge to the evidence of Raees and others on this aspect, then, a claim of the omission to state about joining of ladders being material could be made, and not otherwise.

239. Raees Khan [P.W.27] has been questioned as to whether the facts that the hands and legs of Raees and others were tied; and that the ladies were being taken towards bushes and the rioters started assaulting Raees and others with swords and sticks; and that they put *lakdi* on their person and set them on fire, were stated by him before the police. Raees has stated that he could not say, whether he stated these facts to the police on 02/03/2002, in as much as, he had no proper recollection as to what he stated before the police on that day.

240. Raees has been questioned by Shri Jambaulikar, the learned Advocate for accused nos.2 to 4, during the cross-examination, as to the place where he was residing at Mumbai, as to when did he come to Mumbai, etc. An attempt was made to show that Raees is along with some others who are taking keen interest in the prosecution. It is contended that Raees is lying with respect to certain details about his coming to Mumbai and leaving

Raibareli, etc. It is pointed out that Raees had previously stated that after going to Raibareli from Vadodara after the riots and before coming to Mumbai, he had not left Raibareli at any time, but later on, Raees admitted that he was, during this period, for some time, working at Ulhasnagar in a country liquor bar. Raees has explained that his earlier statement was not correct and that he stated about not leaving Raibareli because he had not paid any particular attention to that aspect. In my opinion, this is of no consequence at all. Even if it is assumed that Raees wanted to suppress the fact of his having worked in a country liquor bar, the same is understandable. What is significant is that Raees made no attempt to deny that, when put to him. I do not think that this post-incident conduct of Raees, or his having worked at Ulhasnagar in a country liquor bar can discredit his testimony about the incident in any manner. Raees has admitted that he came to know of the date on which he had to appear in the Court and give evidence, from Smt.Teesta Setalvad, to whom he referred as 'Teesta Madam'. The cross-examination of Raees in that regard is rather interesting. Raees has stated that he knew Teesta Madam since about 10 to 12 days before his coming to this Court; and the she was introduced to him by one Rahimbhai. Raees stated that Teesta Madam had helped him; and that she helped him for bringing him here

to Mumbai. It was put to him that 'had the help from Teesta Madam not been available, Raees might not have been able to reach the Court', which has been accepted as correct by Raees. Raees has further admitted that he was in contact with Teesta Madam, after he came to know her; and that he used to talk about this case also. After all these admissions, it was suggested to him that as he had forgotten about the incident, Smt.Teesta Setalvad used to explain to him what was the case, what had happened, etc., which suggestion has been denied by this witness as false.

241. I have carefully considered this aspect. In fact, the alleged tutoring done by Smt.Teesta Setalvad to the occurrence witnesses who have supported the prosecution case, has been made a common ground of attack on the evidence of all these witnesses and is being separately discussed. I am unable to accept that the evidence of Raees and the identification of the accused made by him is unreliable on the ground that he had discussion with Smt.Teesta Setalvad. Why and how identifying witnesses cannot be disbelieved merely because they are in touch with Smt.Teesta Setalvad [who is interested in the present prosecution] has, as aforesaid, being discussed separately.

242. When questioned in the cross-examination, Raees has stated that he had no occasion to see any of the accused persons identified by him, ***after the incident and before he saw them in the Court***. **However, Raees has clarified that he used to see them in the locality prior to the incident.** This clarification has been given by way of a voluntary statement made by Raees. That he knew them since prior to the incident, has come from Raees in a natural way, when the topic of the occasions to see the accused was raised in the cross-examination. I do not think that he is tutored in that regard. In other words, the statement of Raees that he used to see them in the locality prior to the incident, cannot be doubted, particularly because the accused, it is clear from the evidence, are indeed from the locality only, as shall be discussed later in the context of reliability of the identification evidence.

243. The statement that the accused were from the locality, is not the result of tutoring, is further apparent from the following.

Raees was questioned about the mob of 1000 to 1200 persons that had assembled and it was suggested to him that he did not know from where those persons had come. Raees, while denying the said suggestion, has stated that they were coming from different directions; and that he

could not say by which road they came. After this, following question was asked to him.

Ques.: Can you say from which locality they arrived ?

Ans.: They were from the locality only.

This answer has been given by Raees when his attention was not on the point of the previous acquaintance between him and the accused persons. The topic that was being touched, was the directions, road or the locality from which the rioters arrived, without touching the point of previous acquaintance between Raees and some of the rioters, but still, the above answer has been given by Raees.

244. A suggestion was put to Raees that since he used to see them [the accused identified by him in the Court], he had become familiar with their faces, which suggestion is accepted as correct by Raees. It has been brought on record that Raees did not give the description of the rioters known to him when his statement was recorded by the police, but as discussed earlier, the inability to give description is totally different from the ability of recognition and the recognition or identification cannot be doubted only on the ground of inability to give description.

245. In the cross-examination, Raees has plainly admitted that he did not know who were the persons who set the bakery on fire. Having stated about the rioters setting the bakery on fire and having stated about the accused being among the rioters, Raees could have easily attributed the act of setting fire to the bakery to some of the accused identified by him. This shows that he is a truthful witness.

246. Raees was asked in the cross-examination that, 'would it be correct if claimed that the rioters poured kerosene and petrol in the room where the ladies and children were sleeping, and put that room on fire'. Raees has replied that he could not say whether it is correct or not. Raees was sought to be contradicted, surprisingly, on this, by confronting him with his statement [X-20 for identification] recorded on 04/03/2002 by PI Baria [P.W.72]. Raees, however, said that he might have said something else and the police might have recorded something else. Now, at this juncture, it will not be out of place to comment on the exercise undertaken by the cross-examining Counsel. **It can easily be observed that the version which was sought to be brought on record by contradicting Raees, is a version which increases the magnitude of the offence**. In spite of this being so, and in spite of the attention

of Raees having been drawn to the fact that the record of his statement made by the police shows so, Raees still did not adopt the statement. This shows that he was particular to ensure that he states only what was really known to him and not what would suit to him or, to the prosecution case.

247. Raees is, at another place, again cross-examined with reference to his association with Smt.Teesta Setalvad, with the object of showing that he has been tutored. After going through the evidence of Raees on this aspect, I think it possible that Raees is not revealing the entire details of his meetings with Smt.Teesta Setalvad. However, on that count, it is not possible to come to the conclusion that the identification of the accused, as made by him, is false or that he had been tutored to do so. In any case, all this shall be dealt with in details at an appropriate place in this Judgement.

248. On a careful consideration of the evidence of Raees, it is not possible to believe that he is an untruthful witness. Rather he appears to be a positively reliable witness. Raees, after the incident, had gone to his native place. It is apparent from his testimony, that he had not kept any track of the matter. He was not in

contact with the local Muslims at Vadodara. Apparently, he had reconciled himself to what had happened to him in the riots and was looking forward to lead a normal life. It is only after the retrial was ordered, and because of the initiative taken by some social organizations, he came in contact with this subject. His evidence fits in properly with the facts which are otherwise sufficiently proved and is in consonance with the other evidence on record. The version of this witness is not at all shaken in the cross-examination and the so called '*contradiction*s' and/or '*omissions*' in his evidence are even otherwise insignificant and immaterial, leaving aside the aspect of unreliability of the police record itself.

[C] *EVIDENCE OF SHEHZAD KHAN PATHAN [P.W.28]*

249. The third occurrence witness who has supported the prosecution is Shehzad Khan Hasan Khan Pathan [P.W.28]. Shehzad Khan, it may be recalled, was working in the Best Bakery and is a victim of the offences. Medical evidence shows that Shezhad Khan had sustained the following injuries :

i) I.W. on left fronto parietal, size 10cm X 2cm X 1cm,

[The certificate (Ex.167) shows the size to be 12cm X 2cm

X 1cm. However, the same is not material.]

ii) I.W. on left post auricular region, size 5cm X 1cm X 0.5cm,

iii) I.W. on behind injury at sr. no.ii) above, size 2cm X 1cm X 0.5cm,

iv) I.W. behind injury at sr.no. iii) above, size 2cm X 0.5cm X 0.5cm,

v) 2 C.L.W.s on right temporal occipital region, size 2cm X 1cm X 0.5cm,

vi) C.L.W. on chin, size 2cm X 0.5cm X 0.5cm.

250. He was brought to the hospital at 12.00 noon and was examined by Dr.Meena Robin. He was admitted in D-4 Ward of the surgical 'F' Unit where he was treated and examined by Dr.Choksi [P.W.62]. He was unconscious when he was admitted in the S.S.G. Hospital. His statement could be recorded by PI Baria only on 6th March, 2002, as, before that, he was not in a condition to make any statement. Shehzad Khan, it is apparent, had sustained very serious injuries which had endangered his life. He was discharged from the hospital on 16/03/2002.

251. I do not think it necessary to discuss his evidence elaborately, as regards the occurrence. It is because the

happenings and the occurrence as per the prosecution case is not in dispute at all. It would be sufficient to observe at this stage that Shehzad's version about the incident is in conformity with the evidence of other occurrence witnesses.

252. Shehzad has stated that he and others were sitting in front of the bakery on a cot in the evening after having food; and that at that time, rioters came with swords and *mashals.*

253. Shehzad's version about Kausarali and Lulla and how they were assaulted etc. shall be dealt with while discussing the entire evidence showing as to what happened to Kausarali and Lulla.

254. Shehzad does speak about the rioters setting on fire vehicles of the bakery. He does speak of rioters throwing on the terrace, bricks, stones, kerosene and petrol etc. He does speak of the presence *inter-alia* of Nafitulla's wife among others.

255. Shehzad has given the details as regards the morning incident. He has described how they got down and how thereafter, the ladies were taken to the jungle by the rioters. According to Shehzad, Sanju [identified by

him as accused no.11 before the Court], tied his hands and took away the amount of Rs.5000/- that was with him. Shehzad has identified the following accused by specifically pointing out to them – i.e. accused no.12 - Bahadursingh @ Jitu, accused no.11 - Sanju, accused no.16 - Shanabhai and accused no.15 – Dinesh. He has pointed out eight others also, but he has not been able to give their names. These accused are accused no.20 - Suresh Vasava, accused no.1 - Rajubhai Baria, accused no.2 - Mahendra Jadhav, accused no.4 - Pankaj Gosai, accused no.14 - Jagdish Rajput, accused no.18 - Shailesh Tadvi, accused no.19 - Kamlesh Tadvi and accused no.21 - Ravi Chauhan. Out of these, Shehzad stated that he knew the name of the accused no.20, but that, at that time, [when he pointed him out in the Court] he was not able to remember it.

256. Thus, Shehzad has identified in all 12 accused, out of which, accused nos. 11, 12, 15, 16 and 20 were known to him by name. [though he could not give name of the accused no.20 at the time of giving evidence] The other 7 accused were not known to him by name. However, he has said that all these accused were having *danda* or sword with them and all were shouting '*musalmanone mari nakho*'.

257. Shehzad has also identified the weapons marked as

Art.R/18, Art.R/19 and Art.R/21 as the weapons which the rioters were carrying.

258. Shehzad was called as a witness in the previous trial held at Vadodara. He was not actually examined there, as he was announced to be of 'unsound mind' by the Public Prosecutor in-charge of the case. Shehzad has stated about this – viz. of he being called for giving evidence, but his being declared as 'of unsound mind', and being driven out of the Court.

259. In the cross-examination, at the initial stage itself, it was put to Shehzad that after his statement was recorded by the police, the police asked him 'whether it was his statement'; and that Shehzad said that 'it was his statement'. Shehzad denied this as incorrect. Shehzad was, then, confronted with a portion in his statement [X-21] to the effect 'these are my facts', when Shehzad said that the police might have wrongly recorded it. This portion, marked as A/142, was shown to PI Baria [P.W.72] when he said that Shehzad did state before him accordingly and then the portion has been marked as Ex.363. As observed in the context of the evidence of other eye witnesses, it is difficult to understand the propriety of contradicting a witness on this aspect. 'These are my facts' is not the version of the witness

about the happenings. In any case, though PI Baria had spoken about Shehzad having said so, I am not inclined to believe him. It is clear from PI Baria's evidence [as shall be discussed later] that it was his practice to write this at the time of concluding the record of a statement, without the witness saying so. It is not a part of the narration of the witness at all.

260. In the cross-examination, Shehzad stated that he was not fully conscious when his statement was recorded. On this, he was asked 'whether he told to the police that he was not fully conscious and therefore, his statement might not be recorded', to which Shehzad replied that he did not state so. In my opinion, the suggestion implicit in putting of the question is absolutely incorrect. By putting the question, the cross-examiner seems to have expected of a person who is not fully conscious, to tell the police when they would come to him for making inquiries that he was not fully conscious and therefore, his statement should not be recorded. This presupposes the existence of a right to refuse to state before the police, and its awareness on the part of a witness. That Shehzad did not tell the police that 'he was not fully conscious and that therefore, his statement should not be recorded' does not indicate that he is lying in that regard; and that he was fully conscious. This argument

has not been advanced; but if this was not the intention behind putting this question, then it ought not to have been put at all.

261. In the context of the evidence of Shehzad that the rioters were shouting *'musalmanone mari nakho'*, the omission to state before the police the word *'musalmanone*' has been brought on record through PI Baria [P.W.72]. In my opinion, this omission is hardly material. It is not in dispute at all, as to what was the object of an unlawful assembly. Whether or not the rioters were shouting *'musalmanone mari nakho',* the object was undoubtedly, *inter-alia,* to attack and kill the Muslims. Whether they said *'musalmanone mari nakho'* or simply *'mari nakho'*, makes no difference. This also does not lead to any conclusion about Shehzad Khan being deliberately lying in this regard. First of all, as discussed, the authenticity of the police record and its reliability itself is doubtful. It therefore, follows that meticulous attention might not have been paid by PI Baria while recording the statement, on what the precise slogans were. It appears from the evidence that a number of slogans were being given by the rioters. It is quite likely that the victims remembered only some of them and all did not remember the same slogans. Secondly, it is possible that on hearing *'mari nakho'*

coupled with the other happenings and the reaction of the mob, the slogan *'mari nakho'* was rightly construed by Shehzad as '*musalmanone mari nakho*' and having so construed, he might have, bonafide, stated that the rioters were shouting '*musalmanone mari nakho*'. It is possible that he gained this impression at that time which came to be reproduced in his evidence. No importance can be given to the alleged omission.

262. Since Shehzad stated that he had sustained injury by sword and also pointed out the portion on his head where he had sustained the said injury, he was asked in the cross-examination as to whether he fell unconscious because he was hit on his head by a stone. Shehzad stated that it would not be correct; and that he was hit on his head by a sword and thereafter, he had fallen unconscious. Shehzad denied having stated to the police about a stone hitting on his head and thereby his falling unconscious. This contradiction [Ex.365] has been brought on record in the cross-examination of PI Baria. I am not inclined to believe that Shehzad indeed stated so before PI Baria. The most important reason for this is that it is factually incorrect. The injuries sustained by Shehzad are clearly caused due to sharp cutting weapon. Dr.Meena Robin [P.W.46] has stated so and has also stated that one of the injuries being 12cms in length, is likely

to have been caused by a weapon of considerable length. No attempt has been made to contradict the evidence about the possible weapon which would cause such injuries and no attempt has been made on behalf of the accused to suggest that the injury as was sustained by Shehzad could be caused by a stone. **In view of my observation about the unreliability of the police record of the statements, it is not possible to accept that Shehzad though actually was injured by sword, stated that he was hit by a stone.** Moreover, the stone throwing was going on in the night and not in the morning when Shehzad got down from the terrace. It is difficult to accept that in the morning incident, he was hit by a stone. The learned Advocates for the accused have also not disputed that the evidence shows that the stone throwing was going on in the night only. As a matter of fact an argument has been advanced, based on this aspect that, that Shehzad was assaulted by stone, had fallen unconscious, in the night itself. I am not at all impressed by this contention. The question arises is, how, in that case, he could get down from the terrace in an unconscious condition. The police and Fire-Brigade have, certainly, not brought down Shehzad and other injured. Though, a faint suggestion to that effect has been given, it has not been pressed and obviously it is contrary to the weight of evidence on record. There is no evidence that

anybody brought him down, which even otherwise, seems to be impossible, because to bring such seriously injured and unconscious person down by a ladder, could not have been undertaken by the victims. Once the police or fire brigade have not brought him down is clear, the only others who could do so, are either the rioters, or the victims.

263. Thus, I am of the opinion that neither was Shehzad hit by a stone on his head, or, at any rate, not instead of being hit by a sword, nor did he state so to the police.

264. After considering the evidence of Shehzad and in spite of meticulously examining it, I am unable to find any such infirmity in his evidence as would discredit his version. The '*contradictions*' and/or '*omissions*' which have been brought on record are insignificant and immaterial, except the omission to state the names of some of the offenders which I shall discuss separately, in the context of the reliability of the identification done by him.

265. Shehzad, on the whole, seems to be a truthful and reliable witness.

266. Apart from the so called '*contradictions*' and '*omissions*' in the record of his statement, made before the police, there is not much other basis on which the evidence of Shehzad has been challenged.

267. As the *contradictions* and *omissions* which are raised in case of all the supporting occurrence witnesses, are, as aforesaid, being dealt with separately, only the *contradictions* and *omissions* peculiar to this witness, are being discussed here.

268. Shehzad was asked as to whether, when he saw the rioters with *mashals* and swords, could he see their faces at that time and Shehzad replied that he could not see their faces at that time. **This shows that the witness is truthful. It does not appear that he is interested in implicating accused, at any cost**. To the next question put, Shehzad has answered that he did see at that time the five accused whose names, he said he knew. Since he had earlier said that he did not see the faces of the rioters at that time he was further questioned specifically as to whether he saw the five accused **at that time,** to which Shehzad has replied as follows:

Ans.:- Yes. At that time also and in the morning also.

It is evident from this answer that by '*at that time*'

Shehzad means, night time and not a particular point of time. This is also relevant in the context of the contention of the learned Advocates for the accused that the witnesses are claiming to have seen the rioters only when they were sitting on *charpaee*. It is clear that such interpretation of what the witnesses stated would be contrary to logic and absolutely incorrect. When Shehzad has said that he saw the five accused **at that time** he is referring to night time and not only the time when the rioters came with *mashals* and swords. Any doubt in that regard is easily removed by the answer, reproduced above.

269. While appreciating Shehzad's evidence the fact that he was severely injured during the incident and was unconscious for a number of days, can not be overlooked. Shehzad and his brother Sailun [P.W.32] were not originally from Vadodara. They had come to Vadodara for a job. There was nobody to take their care after having undergone such a brutal attack and survived only by fortune. There must have been tremendous fear in the mind of Shehzad when his statement was recorded on 06/03/2002. In fact, it is impossible to hold that he was in a fully conscious and composite state of mind and could accurately narrate the happenings to the police. How he perceived the incident at that time and how the police perceived it, is also relevant in the context

of certain omissions particularly with respect to give the names of the accused persons. In the condition in which Shehzad obviously was at the material time, his omission to state certain facts to the police can not be held against him, and his veracity should not be doubted on that count.

270. Shehzad's evidence about the identity of weapons can not be accepted and what can be said is that the weapons identified by him were similar to the weapons which he saw along with rioters. The specific identity of the weapons can not be satisfactorily established by his evidence. In fact, Shehzad clearly admitted that he could only say that the weapons identified by him were of the same appearance as of the weapons seen by him with the rioters; and that he could not say that they were the *very weapons*. This again shows that the witness is not interested in making a false claim and concedes wherever he is confronted with a correct proposition.

271. As regards the identification of the accused Jitu, Sanju, Shana and Dinesh, Shehzad has given the details as to how he knew them. accused no.15 - Dinesh is well known to him, as he is the son of owner of one Mamta Bakery. The evidence of Shehzad shows that Dinesh was well known to Shehzad; and that Dinesh used to come to

the Best Bakery in connection with business.

272. As regards Sanjay Thakkar also, the evidence of Shehzad shows that he knew him since previously, which should be accepted. I see no reason to disbelieve Shehzad on this.

273. Similar is the case as regards the accused No.12 - Jitu.

274. Regarding accused no.16 - Shanabai, Shehzad states that his house is just by the side of the Best Bakery.

275. **There is nothing doubtful in the version of Shehzad as regards his prior knowledge of, or acquaintance with the accused identified by him.** I do not find any substance in the contention that the witnesses including Shehzad have been tutored to identify certain accused. It may be observed that it is not easy to tutor a person to identify another person not previously known to him. It would require the person tutoring, the witness and the accused to be identified to be together for sometime. At a late stage, a suggestion has come from the defence that 'the enlarged photographs of the accused persons were shown to the identifying witnesses', and this suggestion was put to the Investigating Officer – PI Shri

P.P.Kanani [P.W.74]. No such suggestion however, has been put to the witnesses themselves. As such, no importance can be given to such a contention. Identifying a few accused, from out of 17 accused, by giving their correct names, there being no wrong identification in the process is a factor which lends assurance to the identification.

276. The cross-examination on the point that Shezhad is receiving community support is not of any significance, in my opinion. That, therefore, he would falsely depose against the accused can not be accepted, though it can be said that he is certainly an interested witness being an injured person. Being a victim of communal violence, naturally, he has got support of some persons from his community so as to enable him to seek the redressal of his grievance before a Court of Law. Shehzad is also cross-examined on the point of his being introduced to Smt.Teesta Setalvad and her helping him. I do not find anything wrong in anybody helping Shehzad to seek justice by being able to depose before a Court of Law.

277. On overall consideration of the evidence of Shehzad, I find him to be a reliable and truthful witness.

(D) EVIDENCE OF SAILUN KHAN HASAN KHAN PATHAN [P.W.32]

278. The next injured witness is Sailun Hasan Khan Pathan [P.W.32] who was also at the material time working in the Best Bakery. He is the brother of Shehzad Khan [P.W.28]. His presence at the Best Bakery at the material time and the fact that he sustained injuries during the incident is not in dispute, at all. The evidence shows that he had sustained the following injuries.

i] I.W. on Lt. parietal – 10cm x 2cm x scalp deep.

ii] Two C.L.W.'s on Lt. parietal 2cm x 0.5cm, 1cm x 0.5cm x 0.5cm.

iii] C.L.W. on Lt. ear 1cm x 0.5cm. x 0.5cm.

279. He was brought to the hospital at 11.35 a.m. and was examined by Dr.Meena Robin [P.W.46]. At about 3.15 p.m. he was admitted in D-4 Ward of the Surgical 'F' Unit, where he was treated and examined by Dr.Choksi [P.W.62]. By that time, his name had not been ascertained and he was described as '*unknow*n'. Sailun was discharged from the hospital on 02/04/2002. The injuries sustained by him were, admittedly, serious injuries and have been described as '*grievous*' hurt.

280. Sailun has described the incident and has stated how he and others were sitting on a *palang* when the rioters

came with *mashals* and how after Sailun and others had gone to the terrace, the rioters were throwing stones, kerosene etc. on the terrace for burning the bakery. He also speaks about the morning incident and states that after he and others were made to get down, their hands were tied down by the rioters and assault with swords started. He has identified all the accused by pointing out towards them, except the accused no.3 - Haresh Gosai and accused no.5 - Painter @ Yogesh Verma. Out of these, he has identified accused no.11 – Sanju and accused no.15 – Dinesh - by their names as 'Sanju' and 'Dinesh', respectively. He has identified accused no.20 as 'Lala'. He has attributed specific roles to accused no.11 - Sanju, accused no.15 - Dinesh and has stated that they were assaulting by swords after tying the hands [or after the hands were tied.] He also states that accused no.11 – Sanju had taken money of his brother Shehzad.

281. Sailun was unconscious when he was admitted in the hospital. His statement could be recorded only on 06/03/2002.

282. In addition to Sanju, Dinesh and Lala, Sailun has spoken about Jitu. Sailun has stated about Jitu being present with weapon among the rioters, but while pointing him out before the Court, Sailun failed to identify him

by name - i.e. as 'Jitu'.

283. It is submitted by Smt.Manjula Rao, the learned Spl.P.P., that Sailun's evidence is clear, simple and worthy of credence. According to her, it ought to be accepted fully. Shri Shirodkar, the learned Senior Advocate for the accused, on the other hand contended that Sailun does not seem to be mentally fully fit and his evidence can not be accepted. According to him, the evidence of Sailun is, on the face of it, unacceptable and that though it is unfortunate, it seems that Sailun suffers from serious mental defects to such an extent that no reliance can be placed on his evidence. The arguments advanced by Shri Shirodkar are adopted by all the other learned Advocates for the accused.

284. Apart from the challenge to the evidence of Sailun on the ground of the same being unsatisfactory and Sailun being an unreliable witness, it is contended that pointing out the accused persons in the court, as done by Sailun, is of no value. It is contended that 'the accused who have been identified by him **have not been identified as the rioters'**. Shri Mangesh Pawar, the learned Advocate for the accused nos.16, 17, 18, 19 & 21, has pointed out in the memorandum of the written arguments filed by him, the following portion from the

evidence of Sailun which has been recorded in question and answer form.

> Ques:- *When you were made to get down in the morning, who were there ? Do you know any of them ?*
>
> Ans.:- *If I would see them, I would be able to identify them.* [Page-728 Para-11].

285. Sailun has told the Court that he knew the names of two of them and has given the names as Sanju and Dinesh. It is thereafter, that Sailun was asked as follows:

> '*Whether any of those persons are now present in the Court hall ?*

It is thereafter, that the identification of the accused persons by Sailun followed. The argument is that the questioning shows that Sailun was asked to identify the persons '***who were there when he was made to get down in the morning***' and not '***the rioters***'.

286. I have carefully considered this argument. I am not able to accept this contention. It does appear from Sailun's evidence that either because of the impact of the assault or for whatever other reason, Sailun is not fully normal. His understanding seems to be of less than average caliber, and his mental ability below average.

In fact, an attempt was made by the learned Advocates for the accused to show that he was not fit to depose, not being capable of understanding the questions put to him. It is therefore, that a part of his evidence was recorded in question and answer form instead of as a narration. The contention about the incompetency to testify was given up by the learned Advocates for the accused. Among other things, Sailun has admitted that he knew numbers only till 15 and could not count further than that. Sailun also did not know how to use a watch and was unable to understand time from a watch or clock. There was, therefore, undoubtedly some difficulty on the part of the Special Public Prosecutor to get a logical answer to each and every question put to Sailun. However, the contention that he has identified only the persons *who were present in the morning;* and that the evidence of Sailun does not show that those who were identified by him were identified as '*the rioters*' or '*the assailants*,' can not be accepted. The argument noted above which has been advanced by Shri Pawar, with respect to Sailun's evidence [recorded on page 728 of the Notes of Evidence] fails to take into account Sailun's evidence recorded prior to that. Prior to that, Sailun has described the incident that took place after they - i.e. he and others - had come down. This, he has described by saying that this happened in the morning.

The relevant evidence may be reproduced.

> “The rioters were throwing stones and petrol. They troubled all of us throughout the night. On the next day morning, we were made to get down [“*Hum logon ko utare*”].” [pg.726, para 8 of Notes of Evidence].

287. Thereafter, Sailun was asked clarification regarding what he meant by 'we', which he has given. Sailun has then described what happened after they had come down. He has stated that hands and legs were tied. First, the ladies were made to get down. That they were made to get down by using '*double seedhi'* etc. Sailun has further clarified by saying that '*After we were made to get down, our hands were tied and the assault with swords started*'. [pg.727, para 10 of Notes of Evidence].

288. Sailun was then asked as to who were injured, when he said that all were injured by sword. Sailun then described the injuries sustained by him. He then said that he was in the hospital for 15 days. Sailun was then asked by the learned Spl.P.P. as to what he knew about the persons who had come along with the '*mashals'*. Now, this has reference to the evidence given by Sailun earlier while describing the incident. For a better and

proper understanding, it will be useful to reproduce the relevant evidence here. *"After having our meals, we were sitting on a 'Palang'*.

Ques.- *What was the approximate time ?*

Ans.- *It was at about 8.00 to 9.00 p.m. Those persons came with 'Mashals'."* [emphasis supplied] [pg.723, para 6 of Notes of Evidence].

289. Thus, it is in this background, the question as to what Sailun knew about the persons who had come along with the *mashals* was asked. Sailun has replied to that question by saying that they had weapons also; and that they were having swords, sticks and rods with them. It is thereafter that he was asked about who were there when he was made to get down in the morning and pursuant to his answer stating that he would be able to identify them; and that he knew the names of two of them, he was asked whether any of those persons were present in the Court hall. '*Who were there in the morning*,' is a question that has been asked after the morning incident has been described by Sailun. The question and the answer must be understood in the context of the previous questioning. From the manner in which the examination-in-chief has proceeded, it cannot be doubted that the question that was asked was about the presence of the

'rioters' and not of others. The question could not have been understood by Sailun as a question requiring him to point out the persons other than the rioters or assailants. The evidence has to be comprehended not by reading the words out of context. The process of questioning has a continuity, which can not be overlooked. A single question and answer from the evidence cannot be picked up and interpreted, divesting it of the context. There has been no reference in the evidence of Sailun or even of other witnesses as to the presence of any spectators or others who were unconcerned and unconnected with the mob of rioters. His evidence shows that all along, the talk was about the rioters, whether it was in the night, or in the morning. Moreover, it is not anybody's case that the accused identified by Sailun were present there and therefore, he had identified them so as to construe the evidence of identification accordingly as is sought to be suggested. Though in the particular question and answer, it is not reflected that those who were identified as present in the morning when Sailun and others got down, were identified as '*the rioters*' or '*the members of the unlawful assembly*', if the entire evidence adduced before that is seen, no manner of doubt can be felt that the question was in respect of the rioters, that it was understood to be so by Sailun, and has been

accordingly answered. This is further clear from the fact that Sanjay and Dinesh have also been named and identified by name by Sailun as the persons who were 'among the persons who were present in the morning'. Sailun has attributed specific roles to Sanju and Dinesh. Thus, when Sanju and Dinesh have been identified as the offenders and as a part of the mob of the persons who are said to be present in the morning, obviously, the 'persons present in the morning', as referred to, can mean only the persons present in the mob of the rioters. In view of the above discussion, I do not find any substance in the contention that those who have been identified by Sailun as '*being present in the morning*' have not been identified as '*the rioters*' or '*the persons forming the mob of rioters*'.

290. In the view that I am taking of Sailun's evidence, this is not very material, but since this argument has been advanced and since it is not found sound, I have thought it necessary to deal with the same.

291. It is true that many answers given by Sailun while he was questioned, both - in examination in chief as well as in the cross-examination – show his understanding to be a little less then normal. However, certainly he was found capable of understanding the questions put to

him, and was also capable of giving rational answers to them. It is apparent that he has not been able to come out of the impact of the incident fully and perhaps, the serious head injuries suffered by him during the incident together with the horrible experience, which he has undergone, have affected his entire personality. His evidence appears to be somewhat more discrepant, than it really is, because, on many occasions he had replied apparently on the basis of the thought process started by the previous questioning. In such cases, it has resulted in the answer not being exactly with reference to the question put, but with respect to questioning done before. However, it is impossible to hold that he lied or told deliberate falsehood on any aspect of the matter. On the contrary, some of the answers given by him in the examination-in-chief, themselves indicate that he is not dishonest and/or tutored, at all. By way of an example, the question and answer in his examination-in-chief, which has been highlighted by the Advocates for the accused, may be referred to.

> *"**Ques.-**Why have you identified these persons ? ["Inko kyon pahechana hai ?"]*
>
> ***Ans.-*** *3 to 4 persons I knew because they used to come frequently to the Best Bakery."* [pg.729 of Notes of Evidence].

292. This is commented by Shri Mangesh Pawar, the learned Advocate for the accused, as an 'improper attempt' on the part of the prosecution to get a desired answer by a leading question. I do not agree that this question is a leading question, but that is not the point here. What is commented by Shri Pawar is that by this question what the prosecution wanted the witness to say is '*what they had done to him*'. It is contended by Shri Pawar that the prosecution by putting this question, wanted the witness to attribute some incriminating overt acts to the persons identified by him. I do agree with Shri Pawar in this respect and I also agree with him in his further comment that 'the witness has not helped the prosecution by giving the answer expected'; but according to me, that only shows lack or absence of tutoring. The further questions and answers show that the witness was certainly not interested in attributing any specific role even to the persons identified by him. He was specifically asked whether he knew who assaulted *him* with swords, to which, he replied as follows-

> *"There were many persons. All were having swords."* [pg.730, para 11 of Notes of Evidence].

293. Even when the Court put the following question to clear up the necessary point, Sailun, though had spoken

of assault of the rioters being with swords, did not attribute any roles to anyone except Sanju and Dinesh. It was again asked to him whether he wanted to say anything about anybody else who was identified by him, but Sailun replied as that 'the money that was in his bag was taken away, but who had taken it, he did not know'. Thus, in my considered opinion, though Sailun suffers from some lack of understanding, he cannot be branded as a lier or an untruthful witness. On the contrary, in my opinion, he is a truthful witness.

294. Sailun was asked the following question in the cross-examination -

> Ques.- *You could tell this to the Court even after gap of about 2.1/2 years, because you remember all these happenings. Is it correct ?*

to which, he replied as follows :

> Ans.- *“Maar laga hai. Talwar laga hai isiliye jaanta hoon. Poora jism kaat denge to bhi bataoonga”.* [pg.733].

295. In my opinion, this answer - particularly the last part of that - is a clear indication of the fear felt by Sailun about the consequences of disclosing the facts and his determination to do so, in spite of that.

296. Sailun was then asked whether he was angry with the accused to which, he had replied that he was not angry. How badly Sailun was affected by incident and how he could not even recognize his father, has been revealed in the cross-examination. So as to ensure that the word '**knowing'** as has appeared in the Notes of Evidence is not misunderstood or misconstrued, the word used by Sailun '*pahechanta'* [ ] has also been specifically recorded. [It now seems to me that the word '***recognizing***' could have been more appropriately used for the word '***pahechanta'*** [ ] while translating the evidence.]

297. In spite of the weakness of Sailun and the fact that his mental faculties appear to be somewhat affected, the learned Advocates for the accused, have not been able to elicit anything in his cross-examination, so as to discredit his evidence about the involvement of Sanjay and Dinesh and Sailun's prior acquaintance with both of them.

298. In the facts and circumstances of the case, only on the ground that he did not disclose certain facts to the police, I am not inclined to discard the evidence of Sailun. In all probability, no proper elicitation was

done from Sailun at the investigation stage whether because of the lack of desire or lack of feeling necessity of eliciting further facts or because Sailun was not in a proper condition to disclose the facts.

299. It is contended by Shri Shirodkar, the learned Senior Advocate, that it is not possible to believe that Sailun could make a statement before the police on 06/03/2002 as Sailun himself has stated that for one year, he did not state anything to anyone. Thus, Shri Shirodkar contends that the statement of Sailun, as has been recorded purportedly on 06/03/2002, is bogus. I have carefully considered this aspect. Sailun was severely injured. According to Dr.Meena Robin [P.W.46], when he was admitted in hospital, he was unconscious. According to her, he became conscious only on **12/03/2002**, whereas according to Dr.Choksi [P.W.62], who treated him in the ward, he became fully conscious on **24/03/2002.** Admittedly, on 4th, he was unconscious and that is why, his statement could not be recorded when the statements of other injured [except Shehzad] were recorded. Even if it is believed that for a short while, Sailun had regained consciousness when his statement came to be recorded by PI Baria, it is difficult to accept that Sailun was in such a frame of mind so that it could be expected of him to narrate the happenings in detail,

including the names of the assailants or the rioters. In fact, that he was not fit to make the statement is obvious from the medical evidence itself. PI Baria does not state that he took any opinion from any doctor about Sailun being in a fit condition to make a statement. Sailun was asked whether he had told the police about the incident when they had come to him in the hospital. He said that at that time, he did not remember anything. He admits that he did not tell the name of Dinesh to the police and clarifies that he did not disclose anybody's name to the police. He admits not having stated to the police that Sanju had taken money of his brother and also the fact of money of his brother having been taken away. Sailun admits not having stated anything to the police about Jitu. He even admits not having stated to the police about the rioters coming with *mashals*. In fact, Sailun himself states not having said anything to the police, except that he was injured by a sword.

300. Under these circumstances, I am inclined to agree with the learned Senior Advocate that the statement of Sailun stated to have been recorded by PI Baria on 06/03/2002, is possibly a bogus statement. It is significant that Sailun's statement gives the same names of offenders which PI Baria had already gathered from the F.I.R. [Ex.136] and from the statements of other persons

recorded by him before 06/03/2002. The possibility of PI Baria recording a bogus statement purporting to be of Sailun, incorporating the information which he had already gathered from others just to complete the paper work and relieve himself of the responsibility of recording the statements of all the eye witnesses at an early date, cannot be ruled out. In fact, the entire police record in this case and more particularly the statements recorded by PI Baria are of doubtful authenticity and my observations regarding that, have been separately mentioned. However, though I agree with the contention of the learned Senior Advocate about the authenticity of Sailun's statement [X-152 for identification] dated 06/03/2002 recorded by PI Baria, I entirely differ with him with regard to the conclusion or inference which he expects to be drawn therefrom. Sailun's statement has been falsely recorded, cannot discredit Sailun under the circumstances. It discredits the investigation in general and PI Baria in particular. Further, this false record, certainly, has not been created to implicate the accused falsely, in as much as, no new incriminating circumstances or names have been introduced in the statement of Sailun. About the apathy or dishonesty or incompetency of PI Baria, as the Investigating Officer, I intend to make my observations elsewhere in this judgement and by reason of the fact

that Sailun's statement was not recorded properly, or that the record is not accurate, or that no efforts were made to elicit detailed information from him, Sailun cannot be discredited.

301. At the conclusion of the cross-examination, it was put to Sailun that he had not seen any of the accused at the time of the incident, to which, he replied that he had seen them in the morning of the second day. This again shows, in my opinion, the honesty of Sailun. Sailun does not appear to be anxious to implicate the accused falsely by attributing to them various overt acts and also alleging their involvement in the incident that took place in the night. He even does not implicate anyone particularly as the person who assaulted ***him,*** though out of so many accused pointed out by him in the Court, he could have pointed out anyone attributing such a role. It is true that Sailun's evidence suffers from certain weaknesses, but it is impossible to hold that he is a lier or interested in falsely implicating any of the accused.

302. Sailun's evidence regarding the accused other than Dinesh and Sanju, stands on a different footing. It is because he has not attributed any specific role to the others. It would be unsafe to rely on his identification

of those accused whom he neither attributed a particular role, nor has given their names. Even as regards 'Lalo', how far Sailun's evidence can be relied on, can very well be doubted, but, as regards Sanju and Dinesh, certainly it can be relied upon. That Sailun suffers from mental or intellectual weaknesses, is not sufficient to discard his testimony or to hold that he could not have remembered anything of incident. Clearly, the incident has been a life changing experience for Sailun and has left its impact on his entire personality. Much emphasize has been placed by the learned Advocates for the accused in the course of arguments, on the mental weaknesses of Sailun as a ground for not placing any reliance on his memory. In this context, it is worth mentioning what the experts opine on this. Hans Gross in his ***Criminal Psychology*** [1911 translation, Kaller] has observed that, *'It is a matter of experience that the semi-idiotic have an excellent memory and can accurately reproduce events which are really impressive or alarming, and which have left effects upon them.*' When Sailun gave evidence, it was very apparent that he had a deep rooted impression about what was done by Sanju [accused no.11] and Dinesh [accused no.15]. His reaction in mentioning about Sanju and Dinesh was different from his reaction in pointing out towards others. It appears to me that the acts of Sanju and Dinesh have been greatly impressed upon

the mind of Sailun and his memory in that regard, cannot be doubted at all.

303. Sailun has not been able to answer certain questions such as, what was he meant by 'double *seedhi',* though he has used that expression. Sailun stated that he got down from a *bamboo* ladder [*"baas ki seedhi*] and this aspect of his evidence cannot doubted at all. Though, he further used the expression 'double *seedhi*', he said that he did not know what is meant by 'double *seedhi'*. It is, therefore, possible that the expression 'double *seedhi'* has been learnt by him by somebody and though he might not been specifically tutored by somebody, it is possible that discussion has been taken place between him and others about the case. What Sailun must have learnt during such discussion, he might be taking as a matter of fact and as if experienced by him. This may be true with respect to Jitu also. Though he speaks of Jitu performing certain overt acts, he has not been able to identify Jitu as 'Jitu'. He simply pointed out him in the Court, but he did not identify him as 'Jitu'. Thus, the possibility of he having learnt during the discussion with some others about the involvement of 'Jitu', cannot be ruled out.

304. However, in view of the discussion above, and on a

careful consideration of his entire evidence, the evidence of Sailun, in spite of all the criticism of it, made by the learned Advocates for the accused, can safely be accepted, at least with regard to Sanju and Dinesh.

E] EVIDENCE OF YASMIN [P.W.29]

305. The last occurrence witness who has supported the prosecution is Smt.Yasmin Nafitulla Habibulla Shaikh [P.W.29]. It may be recalled that she is the wife of Nafitulla [P.W.31]. She is the only member of the family of Late Shri Habibulla Shaikh who has supported the prosecution case.

306. Yasmin [P.W.29] has, in her evidence, described the incident and has identified 12 accused as the culprits. The 12 accused identified by her have been so identified by her, by pointing out towards them in the Court and also by their names. Though Yasmin had sustained only some minor injuries, for which no medical treatment was required, during the incident, she had gone to the S.S.G. Hospital along with the injured.

307. Yasmin's [P.W.29] evidence has been bitterly and severely attacked by the learned Advocates for the accused. Yasmin's presence during the incident itself

has been severely challenged, though, the rigour of the challenge was almost given up at the stage of arguments. Yasmin has been contradicted, by confronting her with her previous statements. The defence witnesses Shri Kumar Swami [D.W.1], Shri Ramjibhai Pargi [D.W.3], Mrs.Khyati Pandya [D.W.4] and Shri Ajay Patel [D.W.5] have all been examined for the purpose of proving the previous statements made by Yasmin, which are said to be contrary to her version in the Court. Yasmin's evidence is therefore required to be meticulously analyzed in the light of all the contentions that are advanced on behalf of the accused.

308. In her evidence, Yasmin states that she had studied upto 10th standard; and that she can read and write Hindi as well as Gujarati. Yasmin was married to Nafitulla [P.W.31] on 19/11/2000.

309. Yasmin has given the details of Late Shri Habibulla Shaikh's family as it consisted at the material time and has also mentioned about the servants that were employed for running the Best Bakery. Yasmin has mentioned about Taufel, Raees, Shehzad, Sailun, Baliram,
Ramesh and Prakash, and also about Kausarali and one Nasru residing in the Best Bakery building at the material time.

310. Yasmin has then described the incident that took place between at about 9.00 p.m. on 01/03/2002 till about 11.00 a.m. on the next day. Yasmin has stated about noticing a number of persons coming from various directions, carrying with them swords, rods and *mashals*. She states that those persons were shouting and giving slogans to the effect that Muslims should be killed ['*miyako kapo, maro*'].

311. Yasmin has then stated about Kausarali and Lulla talking to the rioters and they being assaulted by the rioters. According to Yasmin, Kausarali and Lulla, who were brought to the first floor, were, later on, dragged away by the rioters. According to her, they were unconscious at that time and their bodies were thrown in the fire by the rioters.

312. Yasmin has categorically stated that she knew some of the persons who were in the mob of rioters in the night and she also knew their names. She has mentioned about Sanjay Thakkar [accused no.11], Jayanti Chaiwala [absconding accused] and one Painter being present among the mob of rioters, leading the mob and telling them to set fire by pointing out different locations such as '*idhar aag lagao, udhar aag lagao*'.

313. Yasmin states that in the morning, they [she and others] pleaded with the rioters that they be allowed to go; and that they apologized to the rioters. Yasmin then describes the incident that followed thereafter. She describes how they got down from the *bamboo* ladder brought by the rioters, how they had been assured before that, that they would be allowed to go after giving a little beating, etc. She then speaks of the rioters tying the hands and legs of the men and dragging the ladies towards the *jhaadi*. She also speaks of the rioters assaulting the men with swords. She states that when the women had been dragged up to some distance, the police came there; and that on noticing the police, the rioters ran away. She claims to have seen the rioters assaulting her husband Nafitulla, Nasibulla, Raju, Taufel, Baliram, Raees, Prakash, Shehzad and Sailun. Yasmin also states that the wives of Firoz and Aslam, 4 children, and her sister-in-law Sabira had been burnt in the night itself while on the first floor.

314. Yasmin has identified Sanjay Thakkar [accused no.11], Pankaj Gosai [accused no.4], Jagdish Rajput [accused no.14], Shanabhai Baria [accused no.16], Shailesh Tadvi [accused no.18], Ravi Chauhan [accused no.21], Rajubhai Baria [accused no.1], Dinesh Rajbhar

[accused no.15], Yasin Khokhar [accused no.13] and Haresh Gosai [accused no.3]. Though she has stated about Painter and Jitu, she was not able to identify any one as Jitu and/or Painter, in the Court. Yasmin has attributed roles to the accused identified by her. According to her, Dinesh [accused no.15] was having a sword with him. Shanabhai [accused no.16] was tying the hands and legs. Jitu [accused no.12] and Jagdish [accused no.14] were threatening to rape the women. Ravi [accused no.21], according to her, had snatched the chain which she was wearing around her neck. Shailesh [accused no.18] and Raju [accused no.1] were involved in the act of catching hands at the time when the men were being assaulted.

315. Yasmin was not examined during the previous trial held at Vadodara. She had not been summoned or called as a witness during that trial. A few days after the incident, she had gone to Chhota Udepur to stay with her parents. About an year prior to the commencement of the present trial, she had gone to Vadodara and had started residing in the Best Bakery premises itself.

316. Yasmin was asked in the examination-in-chief as to whether she would be able to identify the weapons used by the rioters when she said that she would not be able to

do so, but she would be able to say whether the weapons that would be shown to her, were of the type which the rioters were having. Yasmin has stated that the rioters were having swords of the type as the sword at Art.R/23 is, and also the pipe of the type as Art.R/22 is.

317. Yasmin [P.W.29] has been extensively cross-examined on several points. As already observed, the presence of Yasmin during the incident itself is very severely challenged though the rigour of the challenge was tremendously reduced by the stage of the arguments. However, since it is not entirely given up, I shall examine this aspect of the matter first.

318. It is interesting to note that, that Yasmin was not present at the time of incident at all, does not appear to be a contention based on the knowledge of the accused persons or any of them.

319. The stand of the accused, as appearing from their examination under section 313 of the Code, is that they are unaware of the incident, any of the victims [including the members of the family of Late Habibulla Shaikh], the witnesses residing in the locality [except Lal Mohammad (P.W.36), whom accused no.15 admits knowing] and even the Best Bakery itself. The point that is to be

highlighted here is not what the defence of the accused is, or the merits of the defence, but to examine the basis on which the contention that Yasmin was not present at all, has been advanced. It is the case of the prosecution that Yasmin was very much present during the incident and along with the other witnesses, Yasmin's statement was also recorded by PI Baria [P.W.72] on 04/03/2002. A copy of Yasmin's statement is included in the chargesheet and admittedly, copies thereof were given to the accused. In the F.I.R. [Ex.136], however, there is a mention that Yasmin had gone to her parents' place at Chhota Udepur, as supposedly said by Zahira [P.W.41], but the same is supposedly corrected by Zahira in her further statement recorded on 04/03/2002.

320. In this background, it is rather interesting that the thought of challenging Yasmin's presence occurred to the learned Advocates for the accused apparently, at a late stage. It is interesting to note that Raees [P.W.27] and Shehzad [P.W.28] clearly speak of the presence of Yasmin [P.W.29] during the incident, but none of them, in spite of a lengthy cross-examination, has been challenged on this aspect. Raees [P.W.27] has spoken about Guddu's wife being there and there is no suggestion to him that Yasmin was not there at all – let alone a challenge to that evidence. Even Shehzad

[P.W.28] clearly speaks of the presence of Yasmin. Raees and Shehzad, both, have described Yasmin as 'Guddu's wife' and there is no challenge to this aspect – viz. that Guddu's wife refers to Yasmin only and to nobody else. Thus, in spite of elaborate cross-examination of both these witnesses, there was no attempt to question them and to expose the '***falsity***' of their claim of Yasmin's presence during the incident. This, in my opinion, is a clear indication of the fact that the learned Advocates for the accused had not thought this part of the evidence of the witnesses open to challenge.

321. Apparently, the support to the contention that Yasmin was not present at all, is sought to be derived from the evidence of the witnesses from Late Habibulla family, all of whom have been declared as hostile. It is only on being assured of their support on this issue, the challenge to Yasmin's presence appears to have been taken. What is significant, however, that this assurance was felt before the hostile witnesses were examined in Court. None of hostile witnesses were examined before Yasmin was examined. I am not, for a moment, suggesting that the accused persons are not entitled to take any defence which they may think to be convenient and easier, or that the learned Advocates for the accused persons must take up a line of defence only

if specifically instructed in that regard by the accused. However, the persistence with which and the length to which, the claim of Yasmin not being present at all, is pursued by the defence, without it being based on personal knowledge of the accused and without it being supported by any other evidence, is rather strange.

322. The hostile witnesses have denied the presence of Yasmin at the time of the incident. That they have spoken a lie in that regard is however clear.

323. When during cross-examination, it was repeatedly being suggested to Yasmin that she was not present during the incident at all, Yasmin voluntarily made the statement before the Court to the effect that 'video tape in respect of the shooting done at the place of incident was available with Gujarat police; and that the said video tape may be called for by the Court, if desired'. There was vehement opposition by Shri Shirodkar, the Learned Senior Advocate, for even recording this relevant statement. However, as it was thought appropriate, proper and necessary it was recorded by the Court, overruling the objection in that regard. A cassette [Ex.283] later on, came to be produced. It shows, among other things, the presence of Yasmin on the spot when the police along with the Videographer visited

the place.

324. The cassette provides aid in judging the truth or otherwise of the evidence of the occurrence witnesses on a number of points. The visual images and the sounds, conversations and words stored therein provide a valuable insight into the evidence on certain points. It would therefore be appropriate and convenient to discuss at this stage itself whether the video cassette, or rather the contents thereof, are properly proved.

325. I shall, first, briefly consider the admissibility of a video cassette in evidence. A video cassette is a visual and aural record of the events that are recorded therein. It is primarily used for storing visual images but like a tape-recorder, it may also store sounds. If an event or happening is relevant, the *visual* and *aural* record of the same, contained in a video cassette is also relevant. A video cassette can be admitted in evidence under various sections of the Indian Evidence Act, such as Sections 6, 7, 8 and even 9. A video cassette, to a certain extent, is on par with a document, but because of its capacity to store even the visual images apart from the sounds, it can, for certain purposes, be treated as ***real evidence*** and can have more evidentiary value than a mere document. When treated as real evidence, it can be

a strong piece of evidence by viewing which, the Court can form its own opinion on the facts in issue or relevant facts.

326. The video cassette [Art.R/27, and subsequently exhibited and marked as Ex.283] is properly proved. Gautam Chauhan [P.W.69], the Videographer, who had done the shooting in question, has been examined as a witness. The evidence of Gautam Chauhan and PI Baria [P.W.72] shows that at the material time, the work of video shooting was done by Gautam Chauhan on behalf of 'Dimple Video', who had been given a government contract in that regard. That Dimple Video had been given the government contract is proved from the evidence of Parimal Valera [P.W.65]. Gautam Chauhan [P.W.69] states about going to Daboi Road from the police station, along with PI Baria, for the purpose of video shooting and doing the video shooting in respect of what he described as '*Best Bakery Hatyakaand*'. When the cassette was produced, it had a paper slip pasted on it which, according to Gautam Chauhan, was in his handwriting. Gautam Chauhan states that on that date, when he had gone there, the Best Bakery building was burning. He also speaks of some persons, who were injured, lying there. Gautam Chauhan states that he did video shooting of the Best Bakery building from the front side and also from

the rear side, and also in respect of the said injured persons. Shooting in respect of the rescue operation performed by the fire-brigade regarding the injured being taken to the ambulance, bringing down the dead bodies, etc., was also done by him. The video cassette [Ex.283] was played over to him in the Court and he has identified the same as the same cassette in which the video shooting done by him relating to the Best Bakery was recorded. After viewing the cassette, Gautam Chauhan has stated that the said video shooting had been done by him; and that it was done under the instructions of PI Baria [P.W.72]. While it was being played over to him in the Court, Gautam Chauhan was explaining the situation and locations that were appearing on the screen of the television, from time to time.

327. In his cross-examination, nothing which would discredit him on the aspect of his indeed having done the video shooting in question, has been elicited. The cross-examination was directed to establishing that the video cassette did not contain the shooting for the entire period during which the witness and PI Baria were there. It has been brought on record, in the cross-examination, that when the cassette was produced before the Court, its recording tab had not been removed; and that therefore, the cassette could be used for re-shooting, or for

erasing the matter already recorded. PI Baria [P.W.72] and PI Kanani [P.W.74] have also been cross-examined with respect to the custody of the cassette and on collateral aspects. It is not necessary to discuss the evidence in that regard in details, in as much as, there is no challenge to the evidence that what the video cassette contains, is what was shot at the place of incident, immediately after the incident. The evidence is challenged only with respect to the possibility of tampering with the cassette; and that too with reference to the possibility of its copies being taken out and/or that it not containing the full shooting done on that occasion. In other words, there is no claim, or even an attempt to make a claim, that what is seen in the cassette, is fabricated, in the sense that the events were staged, as in case of a shooting of a movie with Yasmin [P.W.29], Zahira [P.W.41] and other witnesses including D.C.P. Piyush Patel [P.W.67] and PI Baria [P.W.72] being made to 'act' their roles; and that the cassette contains the video shooting of such artificially created scenes. In fact, such claim would have been ridiculous looking to the nature of what is seen, - the wide range of persons from the injured to the police and fire brigade and even the hostile witnesses - and has rightly not made. There is also no claim, or challenge to the cassette [Ex.283] on the basis that the cassette

is a combination of two different shootings done on two different occasions and therefore some part of it shows the events or happenings that actually not taken place at all at the material time. There is nothing to indicate – not even a suggestion – that shooting taken on some other occasion has been inserted in the shooting taken at the place of Best Bakery, after the incident. There is also nothing to indicate – not even a suggestion – that the voices, sounds and conversation that are heard, have been recorded separately and inserted in the video cassette containing the shooting done at the Best Bakery premises, immediately after the incident.

328. I have carefully considered the possibility of the cassette having been tampered. This aspect shall be dealt with in details when necessary, with respect to a particular contention or argument. At this stage, it may be observed that though the possibility of some matter having been deleted from the cassette cannot be ruled out, that would not make any difference in the admissibility and relevancy of the cassette [Ex.283], as the evidence of what is seen and heard when it is played. What is seen, if relevant, has to be taken into account and cannot be excluded from consideration on the ground that the ***entire*** recording of the happenings at the place of incident may not be before the Court, either because

the recording of the entire happenings was not done at all, or because, a part of it was, for whatever reason, erased or deleted from the cassette [Ex.283].

329. To facilitate easy reference to the relevant material and to avoid damaging the contents of the cassette by repeated playing, the prosecution was directed to take out copies of the relevant matter in the C.D. Accordingly, the C.D. containing the relevant matter from the cassette [Ex.283] was prepared and tendered in evidence by consent and has been marked as Ex.283/3. Copies of the C.D. also were furnished to the learned Advocates for the accused. An extra copy [Ex.283/2] of the cassette [Ex.283] was also got produced. It was decided, by consent, that the contents of the relevant part of the cassette [Ex.283] and the contents of the C.D. [Ex.283/3] being identical or rather the same, the C.D. [Ex.283/3] would be played, instead of the cassette [Ex.283].

330. Originally the cassette [Ex.283] was produced only to show the visual images recorded in it, and more particularly, to show the presence of Yasmin [P.W.29] on the scene of offence, when the police arrived. It was later on revealed that apart from the visual images, the video cassette [Ex.283] also contained sounds and

conversations recorded therein. When the cassette was initially played in the Court by the learned Spl.P.P., for the reasons best known to her, the sound of the television was kept off and as such, the Court had not noticed that sounds and conversations were recorded in the cassette. When it was noticed, the learned Spl.P.P. was directed to prepare a transcript of what was heard in the relevant portion of the cassette [Ex.283]. Such transcript [Ex.283/A] was prepared and the copies thereof were given to the learned Advocates for the accused. At the conclusion of the arguments, the Court Officer, as per the directions of the Court, on hearing the cassette [Ex.283] and the equivalent C.D. [Ex.283/3], corrected the transcript [Ex.283/AA]. Corrected copies of such transcript were furnished to the prosecution, as well as to the accused and objections/ comments, if any, on corrections carried out were invited. The Advocates for the accused made certain submissions with respect thereto. The cassette [Ex.283] was thereafter heard by the Court in the presence of the learned Spl.P.P. and the learned Advocates for the accused and further corrections were made in the transcript, to finally make it an agreed transcript. The transcript [Ex.283/AA] as corrected, is thus, an 'agreed transcript' of the relevant part of the cassette [Ex.283] and of the C.D. [Ex.283/3].

331. After the cassette was duly proved, the Advocates for the accused have given up the contention of Yasmin not being present at the place of incident when the police, fire-brigade etc. visited the same in the morning on 02/03/2002. What has been thereafter claimed that it shows Yasmin's presence only when the police, Videographer, fire brigade, etc., visited the place, and not before that. However, earlier the stand of the learned Advocates for the accused was that Yasmin was not present at all, when the riots took place; and that even on 04/03/2002 - i.e. the date when her statement was recorded by PI Baria - she was not present in Vadodara, at all. [Page-717 Para 108 of the Notes of Evidence]. I can not help observing that even without the cassette [Ex.283] and independently of it there was sufficient evidence, - apart from Yasmin's own statement – to prove her presence on the spot immediately after the incident, if not, during it. The claim that she was not present was, any way, rather absurd. First of all, had she not been present, PI Baria would not have recorded her statement at all, during investigation. Recording statement of a person who was not present, or was not acquainted with the facts of the incident, would not have been done by PI Baria. Assuming that PI Baria has carried out investigation honestly, he would not have recorded the statement of Yasmin falsely without she

being present not only on 01/03/2002, but also on 04/03/2002, as is suggested by Shri Shirodkar, the learned Senior Advocate, in the cross-examination of Yasmin. Alternately, even if PI Baria has to have acted dishonestly during investigation, he would have had no reason to record the statement of Yasmin, unless she was present. It is not as if, the accused could be implicated and a case could be registered because of Yasmin's statement. No sensible police officer – irrespective of the question of honesty – would record a statement of a person, who would be absent both at the time of the incident and also on the date on which the statement is supposed to have been recorded. There was no dearth of persons who were present. If a dishonest Investigating Officer would be interested in manipulating the statement, he would manipulate the statement of a person whose presence during the offence was established and not of somebody who was not present at all, unless, it is only through such bogus persons, he can bring certain facts on record. Even in such a case, he would show the statement as recorded on a date when such person would be before him. This being rather elementary, need not have been discussed in details, but I feel compelled to discuss it at some length, to show the attitude exhibited by the defence in lengthening the cross-examination of Yasmin, without much basis.

332. There is also record in the nature of entries [portions A/103, A/105 and A/106 in Ex.170, Ex.172 and Ex.174 respectively], made in the medical papers showing that Yasmin was very much present when the injured were taken to hospital on 02/03/2002. Thus, even this would show Yasmin's presence, at least when the injured were taken to the hospital. Once this is so, the burden of establishing that Yasmin was not present during the incident and she appeared on the scene during the period after the incident, and by the time the police arrived and/or by the time the injured were taken to the hospital, would be squarely on the defence, though it need not have been discharged by the standard expected of the prosecution. In any case, all this is rendered meaningless, as the presence of Yasmin is clearly established by the cassette [Ex.283] and at least, that at that point, Yasmin was present, is conceded.

333. The challenge to Yasmin's presence does not appear to be sincere at all, and such a case was attempted to built up falsely with the assistance and connivance of the hostile witnesses. There can be no doubt whatsoever, that Yasmin was indeed present during the incident; and that she has witnessed the incident.

334. It may now be examined what is the criticism levelled on the evidence of Yasmin and what contentions are advanced by the learned Advocates for the accused, to claim that she is an absolutely unreliable witness; and that her evidence is not worthy of credence.

335. Before going deeper into certain aspects of the mater, it may be observed that the basic challenge to her evidence is by bringing on record the '*contradictions*' and '*omissions*' supposed to be existing in her evidence when compared with the police record of her statements.

336. Yasmin's statement was recorded by PI Baria [P.W.72] on 04/03/2002 during the course of investigation. There are two other statements of Yasmin recorded by the Joint Commissioner of Police [D.W.1] and the Assistant Commissioner of Police, Vadodara, [D.W.3] [X-32, X-33/A respectively for identification] in connection with certain allegations made by Zahira and Nafitulla regarding threats allegedly given to them.

337. The first question that was put to Yasmin in the cross-examination was that whether she had told everything that transpired on the material day, to the Court, and Yasmin has replied – rightly in my opinion - that she was not sure about it and has added that it was

not possible to narrate everything about such a big incident.

338. In the cross-examination, Yasmin's evidence about the incident as well as about the identity of the accused is not at all shaken, in my opinion. An attempt was made to challenge the identification made by her, by questioning her specifically with respect to the accused identified by her. In the cross-examination it has been got from Yasmin that the names of the accused persons - whom she had identified in the Court by disclosing their names – were known to her since prior to the incident.

339. Yasmin has also disclosed information and her knowledge about the absconding accused Rinku, Mafat and Munna [original accused nos.7, 8 & 9 respectively].

340. The evidence of Yasmin as regards the details of her knowledge about the accused identified by her and the details of information which she has given about them is not attempted to be challenged. On the contrary, there is enough evidence to support some of the statements made by Yasmin regarding these accused persons. For instance, Haresh and Pankaj are brothers is not in dispute and is admitted by these accused. That accused no.1 – Rajubhai and accused no.16 - Shanabhai are related to each other,

is also not disputed. Similarly, accused no.21 - Ravi is Maharashtriyan - i.e. 'Marathi' - is also not in dispute.

341. Before going deeper into the question of veracity of Yasmin and the reliability of the evidence as regards the involvement of the accused identified by her, in the alleged offence, it may be observed that the fact that Yasmin knows all the accused identified by her, has to be accepted. That she knew them since prior to the incident can not be doubted. In fact, that the accused persons were from the locality, is clearly established and the very fact of identifying them by giving their names indicates prior acquaintance of the witness with the accused.

342. Yasmin has been subjected to gruelling cross-examination. However, except bringing on record the contradictions and omissions in her version before the police, the Advocates for the accused have not been able to establish any other infirmity in her evidence. Yasmin has been questioned as to the circumstances in which she went to Chhota Udepur after the incident, why she went and why she did not come back etc. The replies by Yasmin to these questions appear to be true and convincing.

343. Since Yasmin's first statement was recorded on

04/03/2002, which could have been recorded on 02/03/2002, Yasmin has been questioned in cross-examination at length, on this.

344. It would be proper to reproduce the relevant evidence which has been recorded in question and answer form.

> *Ques.: Did you feel at that time that you should go to the police and inform them about the incident and give your statement ?*
>
> *Ans.: At that time, there was tension about those who were injured. The statement could have been given thereafter also.*
>
> [Page-711, Para-106 of Notes of Evidence]

345. In my opinion, the answer given by Yasmin is proper and has to be accepted. Further, in my opinion, the supposition implicit in the question that a victim of such a serious incident where even the life of her husband was endangered, would be keen on ensuring that her statement is recorded by the police, is not based on reality. It is clearly wrong, in my opinion. It must further be observed, that police had come to the scene of

offence, had rescued the victims, had taken them to the hospital and were aware of the incident. The police were well aware of the incident to the knowledge of Yasmin and there was no question of informing them. It is one thing to question the Investigating Officer as to why he did not record the statement of a particular eye witness immediately, but it is quite another to question the eye witness as to why he or she did not insist on getting his or her statement recorded by the police. The supposition implicit in the question above, is absolutely unjustified where such eye witness was aware that the police were already aware of her being the eye witness to the incident. Argumentative questions were put to Yasmin on the aspect of her not going to the police on 02/03/2002 and telling about the incident and giving her statement. Ultimately, an admission has been elicited from her that if she wanted, she could have given her statement to the police on 02/03/2002. This admission from Yasmin does not help the accused, in any manner, whatsoever. It is clear that PI Baria did not record the statement of Yasmin; and thought that it was not advisable to record the statements of Yasmin and others at that time. PI Baria has been at length questioned on the reasons for not recording the statement of Yasmin and some others on 02/03/2002. He has given reasons for not doing so. Whether the reasons are proper or not, is

not the question here. What needs to be emphasized, is that it is an entirely different matter to seek explanation from a police officer for not recording the statements of eye witness immediately, though available to him; and it is quite another to question the eye witness as to why he or she did not insist on the statement being recorded. It is not as if, the fact of Yasmin being an eye witness to the incident was not disclosed or known to the police or to PI Baria [P.W.72] in particular. In spite of this if PI Baria did not record her statement, no fault can be found with Yasmin on that account. This type of questioning would have had some value, if Yasmin would have thought that the police were not aware of the incident, which was, clearly, not the case.

346. A suggestion was put to Yasmin that she did not go to the police and talk about the incident and '*give her statement*' because she had not witnessed the incident, at all. This suggestion has been denied by Yasmin. This suggestion is devoid of logic, in as much as, in case of Saherunnisa [P.W.40] and Sahera [P.W.35] [regarding whose presence during the incident there is no doubt or challenge] also, no statement was recorded on 02/03/2002. They also did not give their statements to the police by going to the police. Thus, not witnessing the incident,

can not be a cause behind not '*giving the statement*' to the police on 02/03/2002.

347. Coming now to the contradictions and omissions said to be existing in the version of Yasmin when compared with the police record, I find that there is, in reality, only one significant omission and that is the omission to state the names of the accused. The other *omissions* and *contradictions* which have been sought to be highlighted are absolutely inconsequential. The effect of the names of the accused not being found in Yasmin's statement recorded on 04/03/2002, which omission has been brought on record shall be discussed separately, but how insignificant the other omissions are, may be discussed, in brief.

348. Since Yasmin stated about the rioters setting fire to *wakhar* of Lal Mohammad [P.W.36] she was asked whether she stated so to the police. Yasmin replied that she *did* state so. She has been contradicted in that respect by the evidence of PI Baria [P.W.72] who states that Yasmin did not state so. Now, in the instant case, the fact that the rioters had set fire to the *wakhar* of Lal Mohammad is undisputed and in fact, not challenged at all, by the accused. The omission, therefore, does not create a doubt whether Yasmin's statement before the

Court is true or not. On the contrary, her statement that *she* **did** state so, assumes significance, in view of the fact that it had indeed happened that way. This would rather discredit the police record, than the version of the witness.

349. The next contradiction is about naming before the police '*Social Worker Thakkar'* as one of the rioters, instead of '*Sanjay Thakkar*' as stated by Yasmin in the Court. According to Yasmin, before the police also, she stated about Sanjay Thakkar only. She was confronted with a portion marked 'Y' in her statement [X-22 for identification] recorded under Section 161 of the Code, when she stated that it was not correctly recorded. The contradiction, has, however been proved through PI Baria [P.W.72] and the portion marked 'Y' has been duly exhibited [Ex.366]. I am not inclined to give any importance to the so called discrepancy. Social Worker Thakkar had already died in October, 2001 itself, and there is no doubt about this fact which is found in the evidence. The Advocates for the accused themselves have brought on record that in the statements of all the occurrence witnesses the name of '*Social Worker Thakkar*' has been mentioned. Shri Shirodkar, the learned Senior Advocate for the accused, has advanced arguments, with great vehemence, that the very fact that the witnesses

gave a name of dead person as one of the rioters shows that they were telling lies. According to him, this also shows the conspiracy of the witnesses to involve Social Worker Thakkar, falsely in the offences. Motive suggested by him, during the course of arguments, for such false implication was that, '*being a social worker he was the leader of the Hindu community and therefore, the witnesses had conspired to implicate him falsely*'. These arguments are so absurd that they are to be dealt with only because they are vehemently advanced, in all seriousness. **That the statements of different witnesses, recorded even on different dates, speak about the presence of a dead person, does not indicate the witnesses are lying in furtherance of a conspiracy, as suggested, but, on the contrary, this indicates that the record is not correct.** False implication is made with the objective of making that person suffer the consequences of the allegations. A dead person could not have been arrested and prosecuted, which takes away the very motive usually behind false implication. The possibility of Yasmin [and even others] having named 'Thakkar' or 'Sanjay Thakkar' and the police having been aware of a '*Social Worker Thakkar'* being in that locality, but unaware of his death, recording the name as '*Social Worker Thakkar*', bonafide, to have clarity, cannot be ruled out. In fact, that is the only logical

possibility.

350. The usual '*contradiction*' about the place where the servants were sitting, has been brought on record, which as already discussed, is totally insignificant and immaterial.

351. Since Yasmin stated in her evidence that they [she and others] noticed a number of persons [meaning there by rioters] coming from various directions, the omission to state 'various directions' has been brought on record. In my opinion, this omission is totally insignificant.

352. Another omission on the part of Yasmin to state to the police about the rioters coming with swords, rods and *mashals* was attempted to be established, but according to PI Baria [P.W.72], the omission consists only in not mentioning about '*mashals*'. PI Baria has pointed out from a portion in Yasmin's statement [X-22 for identification] that it speaks of rioters having swords, rods, etc., with them. The omission has to be with respect to the substance or essence of the statement and not such as is arising because of a particular construction of a statement. Thus, the omission which relates only to '*mashals'* is not significant in my opinion, even if the fact that in this case, the accuracy

of the police record of the statements recorded under Section 161 of the Code is doubtful, is ignored.

353. Yasmin's evidence is challenged on the ground that she omitted to state before the police that the rioters were shouting and giving slogans '*miyako maro', 'kapo*'. The omission is not with respect to rioters shouting and giving slogans, but only confined to what were the shouts. This '*omission*' is totally immaterial, in my opinion. The shouts may be relevant only for gathering the object of the unlawful assembly, which in this case, is already established. Since the object has been clearly understood by the police also, it might not have felt necessary at all, by PI Baria to record precisely the slogans that were being given by the rioters.

354. An omission to state that the '*rioters were coming from different lanes*' that has been brought on record. The dispute is not about Yasmin's stating of the rioters coming, but her stating that 'they came from different directions'. The omission to state this – when there is no contradictory version on record to the effect that the rioters came from a single and/or a particular direction - is absolutely insignificant.

355. The only omission which is worth taking into

consideration is the failure of Yasmin to state before the police about the threat of rape given to her and others by some of the accused.

356. In the cross-examination, Yasmin [P.W.29] was asked whether threatening of rape is a serious wrong, which has been accepted by Yasmin. It was further asked to her that if the woman would be married, it would be more insulting and humiliating for her, to which also Yasmin has agreed. The correctness of the belief of the cross-examiner that threat of rape would be **more insulting and humiliating** for a married woman is difficult to accept, but since Yasmin has accepted this proposition, I do not wish to go into that. Yasmin was questioned on whether she felt surprised on the threat of Jagdish and Jitu to rape them i.e. Yasmin and others one by one, to which Yasmin has replied that 'she did'. According to Yasmin, she did state to the police when her statement was recorded on 04/03/2002, that she was threatened of being raped. According to PI Baria, Yasmin did not state before him about she being threatened to be raped by Jitu, Jagdish, Mafat and Munno. Yasmin is seriously criticized during the arguments and remarks about her character are passed on the ground that she has allegedly given a false story of threats to commit rape. The question is whether this story has been falsely invented

by Yasmin. I have carefully considered this.

357. Three contentions are put forth in support of the claim that the story of being threatened of rape is false, by Shri Shirodkar, the learned Senior Advocate for the accused. The first one is that the other eye witness who have supported the prosecution case viz: Taufel, Raees, Shehzad and Sailun have not deposed about the story of rape. I am not impressed by this contention. It is in evidence and stated by these 4 witnesses also, that the women were separated from the men and were dragged elsewhere. The evidence shows that they were being dragged towards '*jhaadi*' or '*jungle*'. It can not be spelt out from Yasmin's statement that the threats to commit rape on the women, were given in the presence of the men. Such threats, if given, were likely to be given after the women are separated from the men and were being dragged elsewhere and not at the same place and where the men being assaulted. No attempt was made to elicit in the cross-examination of Yasmin as to when exactly the threats were given. There is nothing to suggest that the threats were given in the presence of the men. Even if one takes a liberal view of the matter and says that it was not necessary on the part of the defence to establish *when* the threats were given, the fact remains that failure to do so would certainly not mean that they were

necessarily given in the presence of men. Since there is no claim, or evidence that the threats to commit rape were given in front of the said 4 witnesses, their omission to state this does not make the version of Yasmin doubtful.

358. The next contention is that no suggestion or case was put by the prosecution to the hostile witnesses about the story of rape. Though this is true, no importance can be given to this aspect. So far Nafitulla and Nasibulla are concerned, there is nothing to indicate that the threats of rape to the women were given in the presence of the menfolk. So far as the women hostile witnesses Zahira [P.W.41], Sahera [P.W.35] and Saherunnisa [P.W.40] are concerned, they could have been certainly asked about it, which has not been done. Considering the extent of hostility of these witnesses, however, who made attempts even to deny the facts leading towards the incident, it may not have been felt necessary by the Special Public Prosecutor, to put to them specifically about threats to commit rape on them. The question is not whether the Special Public Prosecutor was right in doing so or not, but the question is whether the failure to put this suggestion or case to the hostile witnesses affects the evidence of Yasmin on this aspect. In my opinion, it does not.

359. The next contention is that in Ex.136 which is the F.I.R lodged by Zahira who was not hostile then, there is no mention about the threat to rape. I am not impressed by this contention also. There is a reference in the F.I.R. about the women being dragged towards the bushes. There is evidence of the other eye witnesses that the women being dragged towards the *bushes* or *jungle.* Taufel [P.W.26] has stated about the women being dragged towards a room, or about being taken in a room. As there were 4 women, it is possible that both the versions are correct. **What is significant is that the fact of dragging women away from the place where the men were, is consistently mentioned by all the witnesses**. Separating women from the men and dragging them away towards the *bushes* or *jungle,* obviously was being done with an evil intention only. This conduct of the rioters undoubtedly lends support to Yasmin's testimony about threats of rape having been given to them.

360. There can be no doubt that the women were dragged towards '*jhaadi*' or '*jungle*' or 'bushes'. In the cassette [Ex.283] and the transcript thereof Ex.283/A, the statement to that effect – viz. that they were being dragged towards '*jungle'* is heard. [***isse baandh ke rakha phir woh jungle mein le ja rahe the.***]

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]. It has already been observed that the cassette has been properly and satisfactorily proved. The various contentions about its unreliability as 'evidence' shall be discussed separately, but it may be observed here that I have found them to be without merit.

361. B.U.Rathod [P.W.63] has also stated that at the time when D.C.P. Piyush Patel [P.W.67], PI Baria [P.W.72], fire brigade and ambulance arrived there, 3 *Muslim* women came from the bushes and met D.C.P. Piyush Patel and PI Baria. That they came '*from the bushes*' is significant. This evidence of B.U.Rathod – which is unshaken in the cross examination – establishes that the women had been to the bushes. The women obviously could not have gone to the bushes on their own leaving the men lying on the ground in an injured condition.

362. Once the fact that the women had been dragged towards the jungle/*jhaadi* or bushes by separating them from the men is established – as it's clearly the case –, it lends support to the evidence of Yasmin [P.W.29] that the women were being threatened of rape.

363. For a woman it causes much embarrassment to speak of rape or threats of rape being given to them. This is so even under otherwise ordinary circumstances. In the

instant case, when Yasmin had undergone through such a terrible incident, it is possible that she did not state about the fact of having been threatened with rape, to the police. It is made clear by her that she was not actually raped. The omission to state specifically that she was threatened of being raped is not sufficient to discredit this version of Yasmin, in my opinion particularly when that 'she was dragged towards the jungle' is mentioned.

364. Undoubtedly, Yasmin does claim that she told to PI Baria about the threats to rape, but on this aspect - viz. of stating it to PI Baria - I am not fully satisfied that it is true. It is because it is my opinion that PI Baria has not attempted at all to elicit information. It would have been extremely embarrassing for Yasmin to specifically utter the word as 'rape' and mention about the specific threats in the condition, she was at that time. However, though she may not be telling the truth when she says that she *did* state about the threats of rape to PI Baria for fear of being disbelieved on this aspect, I see no reason to disbelieve her evidence on this aspect. I am of the opinion that Yasmin's evidence that she was threatened of being raped can be safely accepted. At any rate, the failure to specifically state so to the police, if any, can not result in discrediting

her testimony not even on that aspect, leave alone, on other aspects.

365. Yasmin has been contradicted with her statement recorded on 27/09/2003, by Shri Kumar Swami [D.W.1], the Joint Commissioner of Police, Vadodara,. An omission to state the names of the accused on the part of Yasmin in the said statement, has been highlighted. Certain portions in the said statements have been brought on record by way of contradictions. It must be noted that this statement has ***not*** been recorded during the course of investigation of this case. In fact, the statement has been recorded ***after*** the trial in the Sessions Court at Vadodara was over and the accused were acquitted.

366. As Kumar Swami's evidence shows, Yasmin's said statement [X-32 for identification] was recorded in an inquiry that was conducted by him, pursuant to certain proceedings pending in the Hon'ble Supreme Court of India. Zahira, her sister and two others had filed an affidavit in the Hon'ble Supreme Court of India, mentioning about the threats given to Zahira by the Local M.L.A. Shri Madhu Srivastava. In connection with an inquiry into the said allegations, the said statement of Yasmin was recorded by Kumar Swami.

367. Thus, the said statement [X-32 for identification] was recorded in an inquiry into the allegations made by Zahira before the Supreme Court of India about not being able to state the truth during the trial due to the threats received by her and her family members. Yasmin's failure to give the names of the accused in the 'Best Bakery Case' to Kumar Swami during in that statement is absolutely irrelevant. It is rather surprising that such an '*omission*' is sought to be highlighted. I have no doubt that it would have been totally irrelevant for Yasmin to state about the names of the accused in the 'Best Bakery Case'. This is because, in his evidence, Kumar Swami states that he was not concerned with that aspect at all; and that he was merely concerned with an inquiry in connection with the alleged threats received by Zahira and others.

368. It is true that Yasmin has claimed that she mentioned the names of the accused in the 'Best Bakery Case' when her statement was recorded by Kumar Swami, but this is highly unlikely , in view of the scope and purpose of the inquiry in which the statement was recorded. Moreover, nobody was interested in knowing who the accused were, as the trial was already over and accused had been acquitted. It appears to me that Yasmin was rather misled into believing that the

statement recorded by the Joint Commissioner of Police was also regarding the 'Best Bakery Case', because in the cross-examination, the statement recorded by PI Baria on 04/03/2002 was referred to as the '*first statement*' and the statement recorded by the Joint Commissioner of Police was referred to as the '*second statement*'. In fact, after asking Yasmin as to what she stated before the police when her statement was recorded on 04/03/2002, she was asked about her statement recorded by the Joint Commissioner of Police and at that time, Yasmin stated that she had given the names of the some of the accused to the Joint Commissioner of Police. Yasmin may not be telling the truth when she says that she ***did*** give the names of the accused to the Joint Commissioner of Police, Vadodara, but that must be by reason of an apprehension of the involvement of the accused being disbelieved, if the names would not be given.

369. I find that the failure to give names of the accused persons to the Joint Commissioner of Police is absolutely immaterial. In fact, there would be no occasion to give such names. I cannot avoid the temptation of observing here that on the contrary, keeping in mind the object of the inquiry thereof, the scope thereof and the fact that no investigation into the present offence was pending as regards the accused - who had been acquitted -, if Yasmin

would have given the names of the accused and if the Joint Commissioner of Police would have recorded the names, it would have been suspicious.

370. Yasmin was asked whether in the statement [X-32/A for identification], she stated that at that time, her mother-in-law and sister-in-law Zahira and others were staying with Shabana Azmi and Javed Akhtar in Mumbai; and that they had received a lot of money and therefore they had given interviews to the channels and newspapers; and that whatever facts they have stated, were false and baseless. Yasmin denied having said that initially, but when confronted with the statement [X-32/A for identification], admitted having said about their having received lots of money and their giving interviews to the channels and newspapers. Yasmin stated that she might have stated that the information given by her mother-in-law and sister-in-law Zahira in those interviews was false and baseless. However, I am not inclined to give any importance to this aspect. What is really significant is that the Joint Commissioner of Police requires a word from Yasmin about the information given by Saherunnisa [P.W.40] and Zahira [P.W.41] to various news channels and newspapers being false, without pointing out any specific interviews or newspapers. Thus, this shows an improper attempt to get something on

record without a real desire to know the facts of the case. Kumar Swami [D.W.1], apparently, was not interested in telling Yasmin what exactly Saherunnisa and Zahira had stated and seeking facts from Yasmin on those matters. Instead, the general denial of all statements made by them and all interviews given by them has been sought to be recorded in the statement without bringing on record what those statements are. This shows an undue anxiety to somehow discredit Saherunnisa [P.W.40] and Zahira [P.W.41] who were, at that time, making allegations against authorities in State of Gujarat and the local M.L.A. Moreover, if the statement [X-32 for identification] is read, it is clear that the portion which has been brought on record as Ex.508, refers not to the information given regarding the Best Bakery incident, but regarding the allegations which have been made against the police, as well as Chandrakant Battu Shrivastav, Madhu Shrivastav, local leaders, and some others, including the Advocates. The interviews apparently were given by Saherunnisa and Zahira making allegations about the threats, improper conduct of the trial and it is that information, which according to Yasmin, was false, even if Yasmin indeed made such a statement before the Joint Commissioner of Police. Yasmin was asked as follows,

Ques.- Will it be correct to say that in

the interview taken by the T.V. channels, facts given by you, about the 'Best Bakery incident', were true and correct ?

Yasmin answered as follows,

Ans.- I did not state facts relating to the 'Best Bakery incident'. The channels had come to me in connection with the case made by my husband in connection with the threats given by Madhu Shrivastav.

371. Yasmin was then asked whether she stated before the Joint Commissioner of Police that on 19/09/2003, that the personnel of local T.N.N. channel had taken her interview in which whatever the facts given by her about the 'Best Bakery incident', were true and correct. When Yasmin denied, she was confronted with a portion in statement [X-32 for identification] and on Kumar Swami [D.W.1] having said that Yasmin did state so, the said portion has been brought on record as Ex.509. Now, what facts Yasmin stated in the interview taken by T.N.N. channel, which are referred to in this portion, has been brought on record and forms part of Ex.517(colly). If this portion is seen, there is absolutely nothing about the 'Best Bakery incident'. The entire interview

concerns itself about there being no fear for Yasmin and Nafitulla for residing in the same locality; and that the people in the locality telling them to live happily; and 'that they would not harm them', [-Ÿ¸ ˆÅ ›¸-ú ˆÅ£Š¸] [this is significant], etc. The interview states that what Saherunnisa and Zahira were talking about the threats received by them, was all false. It is clear that the interview speaks about the allegations of threats having been received as made by Saherunnisa and Zahira at the material time and does not deal at all with the 'Best Bakery incident'. As a matter of fact, when Kumar Swami [D.W.1] himself says that the statement that he recorded had nothing to do with the 'Best Bakery incident'; and that he was merely conducting an inquiry for a limited purpose, that he should record Yasmin's statement which says that 'the facts stated by her, in her interview to T.N.N. channel, regarding the 'Best Bakery incident' were true', is surprising. Kumar Swami ought to have realized that the facts were not about the 'Best Bakery incident' at all.

372. In any case, if the defence wants to be benefited by such admission that whatever facts Yasmin stated in her interview taken by '*T.N.N. channel*' were true and expects Court to draw an inference that they were about the 'Best Bakery incident', then to make the contradiction

meaningful, what were the facts, ought to have been brought on record. The same has not been done.

373. As can be seen, barring the exception of Shri Deepak Swaroop [D.W.2], Commissioner of Police, Vadodara City, who was called for establishing the existence of certain documents [allegedly favourable to the accused] all other defence witnesses have been examined only with the object of proving previous statements made by Yasmin. The defence witnesses have not been examined with respect to the facts touching the offences, but for a collateral purpose – viz. for proving that Yasmin had made some statements previously, which are contrary to what she has stated before the Court.

374. It would therefore, be appropriate at this stage, to examine the reliability of the defence witnesses themselves and the defence evidence itself.

375. Shri Kumar Swami [D.W.1], though a Senior Police Officer working as Joint Commissioner of Police, Vadodara, at the material time is proved to be an unreliable witness. Undoubtedly, he has spoken about his having recorded the statement [X-32 for identification] of Yasmin and certain statements made by Yasmin before him, have been - as already observed -

brought on record. The value to be attached to those statements and how far they are contradictory or inconsistent with the version of Yasmin, as advanced by her in the Court, is a matter that is being dealt with separately, but what must be recorded here is that the evidence of this witness is highly unsatisfactory. In fact, it appears extremely doubtful to me, that he indeed recorded the statement of Yasmin, as and in the manner stated by him; and at any rate, it is extremely doubtful whether the statement [X-32 for identification] is an accurate record of what Yasmin stated.

376. The purpose of the inquiry in which Yasmin's statement came to be recorded is clear from the reply given by him to a specific question to that effect put to him by the learned Spl.P.P. It would be appropriate to reproduce the answer given by this witness :

> *Ans.: In the 4 affidavits [of Zahira and others] that had been filed, there were allegations of threats given by Madhu Shrivastav. Supreme Court had directed the Director General of Police to hold an inquiry in the matter. The Director General directed the Commissioner of Police, and the Commissioner of Police*

> *directed me to hold the inquiry.* ***The purpose was to find out whether the allegations of threat were true***. [Emphasis supplied] [pg.3606 of the Notes of Evidence]

377. If this was the scope of the inquiry, many of the matters appearing in the Yasmin's statement [X-32 for identification] are immaterial and need not have been recorded at all. In fact, due to the weaknesses in the evidence of Kumar Swami, the Court thought it necessary to put certain questions to him. Among these questions, a question was asked to him as to what made him think that Yasmin's statement should be recorded in connection with an inquiry which he was conducting. This question was asked, because, taking a *prima-facie* view of the matter and just to come to a *prima-facie* conclusion about the allegations of threat, Yasmin, who was not residing in Vadodara at the time when the alleged threats were given, need not have been questioned, at all. The answer which is reproduced below is totally unconvincing,

> ***Ans.:*** *Because she was also part of that. She was the relative of the witnesses who had filed the affidavit.*

378. Naturally, he was required to be questioned further.

It would be appropriate to reproduce the relevant questions and answers:

Ques.: Were you not aware, or had you not the information at the material time - i.e. when you recorded the statement of Yasmin - that she was not residing with Nafitulla since a few days after the incident ?

Ans.: I had such information.

Ques: Did you think from the material that was made available to you and the information that was available to you that when threats were allegedly given to Zahira and her family members, including Nafitulla, Yasmin was not residing with that family ?

Ans.: During this period - i.e. from the time I started making inquiry and till her statement was recorded-, I came to know that she had given some interview to a local T.V. Channel.

Ques.: But the question to you is whether you thought, or not, that when the alleged threats were given, Yasmin was not residing with the family, or with the persons who had allegedly

received threats ?

Ans.: I thought it fit to record her statement. [Page 3625 to 3626 of Notes of Evidence]

379. It is easy to note that the witness has attempted to avoid answering the questions, obviously, on realizing that it was not at all necessary to record Yasmin's statement for the purpose of the inquiry which he was conducting. The question and answer last reproduced above, indicate that the witness had not replied it at all and the answer given by him actually reveals that he was aware of the weakness of the stand that he was taking. It is only when the Court repeated the question, he answered as follows:

Ans.: Yes. I did realize that Yasmin was not residing with them at that time.

The Court thereafter, questioned him directly on the point as follows:

Ques.: Did you therefore not think that no light could be thrown by Yasmin on the actual giving of the threats, as were alleged by the said persons ?

The witness has answered as follows:

Ans.: I have already explained that during this period, I came to know that

> *Yasmin had given an interview to a local T.V. Channel and therefore, I thought it fit to record her statement.* [Page-3627 of Notes of evidence].

380. This makes it clear, that it is on learning about an interview given by Yasmin to a local T.V. Channel [later on, revealed to be '*T.N.N. Channel*'] that Kumar Swami thought it fit to record Yasmin's statement. Though he does not bind himself in saying that otherwise he would not have recorded Yasmin's statement in the said inquiry, as that would have depended on the progress of the inquiry; the fact remains what caused him to record the statement [X-32 for identification] of Yasmin is his knowledge that Yasmin had given an interview to a local T.V. Channel. According to Kumar Swami, he learnt about such interview given by Yasmin from his police sources - i.e. the staff who produced a copy of the C.D. of the programme of the channel before Kumar Swami. Now, the transcript [forming part of Ex.517] of the said interview has been brought on record. It shows that Yasmin had termed the story of threats having been received by Zahira and others as 'false'. It is after knowing this, that the statement of Yasmin was recorded by Kumar Swami. What is significant is that somebody from the police staff should be so prompt to bring to the

notice of Kumar Swami a statement of Yasmin that was tending to refute the allegations of threats as made by Zahira and others. The transcript which Kumar Swami got prepared from the C.D. of the said interview is also interesting. It consists of an English translation of the answers given by Yasmin in Hindi. The transcript is only of the answers and not of the questions put. This clearly shows that Kumar Swami was not interested in actually finding out the truth, but only in giving an official sanction to the statements made by Yasmin during an interview given to T.N.N. Channel. It can not be doubted that anybody having a sincere desire to know what actually Yasmin stated, would not have been satisfied only by reading the transcript of the *answers given*, without feeling the necessity of knowing the *questions*, as well.

381. What is further interesting is that Kumar Swami is unable to state the manner in which he recorded the statement of Yasmin. He was asked whether this statement was recorded pursuant to questioning, or was only a record of narration made by Yasmin herself on her own. Kumar Swami replied that it was recorded 'by a combination of both these'. He claimed to have put question to Yasmin. To the question, '*in which language*', he replied as '*Gujarati*'; and immediately

after giving this answer, added '*and Hindi*'. When it was asked to him in which language Yasmin was answering, he said that she was answering in a 'mixture of Gujarati and Hindi language'. The 'mixture' is qualified by him, on further questioning, as some answers would be given in Gujarati and some answers would be given in Hindi. Kumar Swami was asked as to how the answer would come on the paper and he answered as follows :-

'We have to reduce it to Gujarati language'.

What followed thereafter, is rather interesting and is worth reproducing.

Ques: *Who reduced it to Gujarati language?*

Ans.: *Myself and the one who wrote ..... myself.*

Ques.: *Which language you know better, Hindi or Gujarati ?*

Ans.: *Both equally.*

Ques.: *Did you have any occasion to study any of these two languages – i.e. Hindi or Gujarati - in your school education, or in your college education, or any further education?*

Ans.: *I have not studied either of these languages either in school or in college.*

Ques.: *Which language Yasmin used to speak, according to you ?*

Ans.: *I have no idea.* [Page 3630-3631 of Notes of Evidence]

382. The last answer is indeed shocking. It shows that before embarking upon recording the statement of Yasmin, Kumar Swami did not even bother to know which language Yasmin used to speak. Undoubtedly, later on, he has attempted to give some justification by saying that the 'conversation was going on' and 'there was no problem of communication' which can not be accepted, in as much as, it was necessary for Kumar Swami to ascertain this aspect before commencing the recording of statement. Whether there was a problem of communication or not could not have been decided by him, without knowing that and without ensuring whether the communication was proper.

383. Kumar Swami claimed that the transcript [forming part of Ex.517(colly)] which is in respect of the answers given by Yasmin in the interview taken by '*T.N.N. Channel*' was prepared immediately after recording Yasmin's statement. He has further confirmed it by saying that when the C.D. was given to him by his staff, there was no transcript submitted along with that. However, later on, on referring to the transcript and on

referring to statement [X-32 for identification] of Yasmin, he admitted that the transcript was already available to him before Yasmin's statement was recorded and this he says, on the basis of the date which the transcript bears – i.e. '19-09-2003'.

384. Kumar Swami [D.W.1], admittedly, did not contact interviewer from the '*T.N.N. Channel*' and did not even ascertain who he was.

The following questions and answers are further interesting and are worth reproducing :

Ques.: You have said in the earlier evidence that some answers were given by Yasmin in Gujarati and some answers were given by her in Hindi..?

[Court Note: At this stage, the witness answers as follows.]

Ans.: I am not now sure that Yasmin was giving some answers in Gujarati and some answers were given by her in Hindi.

Ques.: Do we take it that you are neither sure that Yasmin answered in any one language only, nor are you sure that she used both the languages for

giving answers ?

Ans.: Yes. I am not sure. [Witness volunteers, "I now say that she used both the languages, as far as I remember"].

Ques.: In which language, the questions were being asked to her ?

Ans.: In both the languages.

Ques: Does it mean that all the questions were asked in both the languages ?

Ans : Yes.

Ques: May I know the necessity or propriety of doing so ?

Ans : To make understand as to what she would say.

Ques: We are unable to follow this answer. Can you kindly explain?

Ans: What she knows about that – i.e. the inquiry I was conducting.

Ques: In which language you used to ask the questions first and in which language subsequently;

or whether there was no fixed order as regards the languages in which the questions were to be put ?

Ans : I don't remember exactly.

385. A further ridiculous answer is given by Kumar Swami as, that 'first question used to be asked in Gujarati and then in Hindi'. When questioned about the propriety of following such a procedure, Kumar Swami gave an interesting answer, which is worth reproducing:

> *Ans.: She was staying in Gujarat. So, I first asked in Gujarati. Since she did not follow Gujarati fully, questions were asked in Hindi.*

386. Kumar Swami was asked as to *when* he realized that Yasmin did not follow Gujarati fully - i.e. after asking her how many questions. Perhaps, then, by realizing the unacceptability of the above answer given by him, he tried to be evasive and stated as:

> '*In Gujarat, we have to record the statements in Gujarati. The questions were put to her in Gujarati, then explained to her in Hindi. and then the statement was recorded.*'

387. Questions were put to her in Gujarati, then explained to Yasmin in Hindi then the statement was recorded. He added that 'both the languages are having some similarity also', which statement is entirely out of place and shows that the witness was nervous. Kumar Swami further stated that Yasmin would answer only after

the question being explained to her in Hindi and she would answer in Hindi only. It was being translated by him and his Jamadar Ahmed, in Gujarati. The questions and answers reproduced above, thus indicate how ridiculous the version of the witness is, and needs no special comments.

388. What seems to have happened, if Kumar Swami is right and is telling the truth, is as follows. Kumar Swami would put a question in Gujarati. As Yasmin would not follow it, the same question would be put after translating it in Hindi. Then he would explain it to Yasmin who would answer in Hindi. Then the answer would be translated in Gujarati by Kumar Swami with the help of His Jamadar and then recorded. The next question again would be put in Gujarati [though it was clear that Yasmin did not follow Gujarati fully], then again the same question would be put in Hindi, then it would be explained to Yasmin and the same procedure would be followed. That things would happen in this manner is not possible; and obviously Kumar Swami cannot be believed in that regard. This evidence is so ridiculous, that when considered in the light of other inconsistencies and infirmities in the evidence of Kumar Swami more particularly the manner in which he has been giving replies, creates a doubt – to say the least – in my mind,

that Kumar Swami himself has not recorded the statement of Yasmin, at all.

389. It appears that the C.D. of the interview given by Yasmin to '*T.N.N. Channel'* which was available, was sought to be made use of because the statements of Yasmin recorded therein exonerated those against whom allegations of having given threats had been levelled; and as the inquiry was required to be conducted by high ranking officers, only his signature has been put on the statement. It is possible that he has taken some part in the recording of the statement, but certainly he has not recorded the entire statement. He has, certainly not taken efforts to probe into the matter.

390. In any event, the omission to state the names of the offenders in the 'Best Bakery Case' to the Joint Commissioner of Police, as is sought to be highlighted, is absolutely immaterial. Further, the contradictory portion [Ex.507 in X-32] does not show that Yasmin actually gave any false names of the persons from their locality, falsely as the offenders. In fact, the explanation of Yasmin in that regard that her mother-in-law and sister-in-law Zahira were insisting on giving the names of some additional persons falsely, has to be accepted. Thus, this portion [Ex.507] does not discredit

Yasmin, in any manner.

391. As regards the evidence of Ramjibhai Pargi [D.W.3], Assistant Commissioner of Police, Vadodara City, through whom the contradiction to the effect that 'on the next day of the Best Bakery incident, Yasmin went to the Chhota Udepur at her *Mama's* place', as supposed to have been said by Yasmin to this Officer, and as recorded by him in Yasmin's statement [X-33 for identification] dated 23/10/2003, has been brought on record. I am not impressed by this '*contradiction*', and I am not inclined to attach any weight to it. First of all, it is clearly and factually wrong. On the next day of the Best Bakery incident would mean 03/03/2002. Admittedly, Yasmin's statement was recorded by PI Baria on '04/03/2002'. As such, the story of Yasmin having been gone to Chhota Udepur on the next day after the incident, can not be accepted. Why Yasmin would make such a statement is not clear, and when Yasmin denies having said so, I am inclined to believe her, rather than Pargi. It is not that the Court has to mechanically accept what a police officer recording the statement states by disbelieving what the person concerned suggests in that regard. Yasmin had not said this when her statement was recorded by Kumar Swami [D.W.1].

392. The other contradiction on the part of Yasmin as has been brought on record [as Ex.500] through Shri Pargi to the effect that 'on her opposing her mother-in-law and sister-in-law Zahira got her beaten through her husband', is absolutely of no consequence. Whether a particular fact was stated or not by the witness to the police is not '*per se*' relevant. This is relevant only for contradicting the version of the witness as given by him or her in Court. Here, there is no version of Yasmin '*that her mother-in-law and sister-in-law had not got her beaten'*.

393. Like Kumar Swami, this officer – Shri Pargi [D.W.3] - also seems to be interested in getting some matter on record, which is extraneous to the investigation which he was doing. The question of recording of the statement of Yasmin by Shri Pargi arose in the course of investigation into an offence which was registered on the basis of the report lodged by Nafitulla which was duly inquired into by Kumar Swami [D.W.1] and who advised registration of an offence. C.R.No.41/2003 in respect of offences punishable under section 506 Part-II and 507 of the I.P.C. r/w section 34 of the I.P.C., came to be registered in this manner. Surprisingly, Shri Pargi has admitted that though the names of the accused persons were disclosed in the F.I.R. itself, he had not

taken any action against the said person. The reason given by him, for not taking any action is that the investigation was still going on; and that till then no material against those accused persons had been gathered. **The F.I.R. was registered on 06/10/2003, and investigation was still incomplete when Shri Pargi gave evidence in this Court - i.e. on 30/8/2005**. Except highlighting this, I do not wish to comment further. It is apparent that what Saherunnisa had told Yasmin, whether she asked Yasmin to falsely give the names of persons from the '*faliya*' as the culprits in respect of the Best Bakery incident, was not something on which Shri Pargi was required to concentrate. In fact, that appears to be rather irrelevant, unless, there is a belief that 'if the accused had been falsely named by Zahira and others, then threatening Zahira and others, as alleged, would be justified'. The possibility of Yasmin's statement [X-33 for identification] having been recorded only to elicit some matter which was thought as might be useful to the accused in the 'Best Bakery Case', when a possibility of retrial was made to appear, can not be ruled out.

394. Yasmin has been sought to be discredited further by proving that she made statement exonerating the accused in the 'Best Bakery Case', in an interview given by her

to the '*News Plus Channel*' from Vadodara. Smt.Khyati Pandya [D.W.4] and Shri Ajay Patel [D.W.5] have been examined for showing that. Interestingly, Yasmin was earlier questioned about having made certain statements in her interview taken by '*T.N.N. Channe*l', but later on, such statements are said to have been made in the interview taken by '*News Plus Channel*'.

395. The evidence of Smt.Khyati Pandya and Ajay Patel needs to be examined in that regard. Smt.Khyati Pandya is working as the Chief Executive Officer in '*News Plus Channel*' which is a local channel, in Vadodara City. The channel is owned by her father. Khyati Pandya has stated that the channel has its own reporters, and when it is felt that there is anything which ought to be covered, the cameramen attached to the said channel are sent to the relevant place for doing video shooting. After doing the shooting, cameraman comes back to the studio and gives the '*capture*' - i.e. the entire video shooting done by them. Thereafter, the necessary editing is done. The news is generally written by reporter bringing it, but sometimes, somebody else including Smt. Khyati Pandya would write the news. That this is called the script. She has explained some technical details as to how a programme is ultimately telecast. She has explained that first of all a master C.D. is prepared and then from the

master C.D., about 10 to 12 C.D.'s are prepared, which are sent to various cable operators in Vadodara City for telecast.

396. Khyati Pandya [D.W.4] appears to be a highly interested witness, and much can be observed on that aspect. However, in the view that I am taking it is not necessary to discuss the same in details. The evidence of Khyati Pandya has been adduced only to bring on record a C.D. which is supposed to contain a record of Yasmin's interview, and therefore the discussion on the interestedness of Smt.Khyati Pandya can be kept to the minimum.

397. It is an admitted position that the C.D. [Art.R/38] produced by the witness is certainly not an original record, or even a copy of the original record of Yasmin's interview. Yasmin has not made the statements in question to Khyati Pandya. Khyati Pandya was neither the interviewer in respect of the said interview of Yasmin, nor was she present during any such interview. The interviewer - one Ketul Pothiwala - has not been examined. The C.D. that has been produced by Smt.Khyati Pandya was taken out and preserved by her on the request of Advocate Rajendra Trivedi, who appeared for the accused persons during the first trial of this

case, held at Vadodara. The story is that after the programme containing Yasmin's interview was telecast by the '*News Plus Channel*', Advocate Rajendra Trivedi requested Khyati Pandya to give to him a record of the same and also to keep a C.D. in safe custody.

398. The genuineness and authenticity of the record of interview as is found in the C.D. [Art.R/38], is extremely doubtful.

399. If the evidence of Ajay Patel [D.W.5] is taken into consideration, it becomes clear that some matter regarding bomb blast at Kothiyad Nagar, that had *not* taken place on the day on which Yasmin's interview is supposed to have been taken, has been incorporated in the C.D. Further, it is not clear how Kailash @ Heena is seen in the C.D. According to Ajay Patel, who has done the shooting on that day, he had not done any shooting in respect of Kailash @ Heena; and that he had not done any shooting in respect of Kailash @ Heena at any time, whatsoever. However, in the C.D., Kailash @ Heena is seen. Regarding this, Khyati Pandya stated that this video shooting in respect of Kailash @ Heena was taken at the same time. However, later on, she hastened to correct herself by saying that she had got the 'capture' at the same time and when and where the shooting was

done by Ajay Patel, had not been asked to him, by her. Khyati Pandya was questioned as to whether first the entire shooting in respect of Yasmin's interview was done and thereafter the shooting in respect of the scene in which Kailash and her child are seen was done; or whether shooting of Yasmin's interview was partly done and thereafter, shooting in respect of the scenes of Kailash and her child was done and thereafter, again the shooting of Yasmin's interview was done. She stated that she had no personal knowledge regarding that. Thus, apparently, the C.D. is not a record of any particular incident or happening or of shooting done at a particular point of time. It is an edited programme. When questions were raised about the genuineness of the said C.D. during the course of arguments by Smt.Manjula Rao, the Special Public Prosecutor, no attempt was made to reply to those contentions on behalf of the accused. What was stated was that the object was to confront Yasmin with the record of the previous statements made by her and since she has agreed having made the statements, it was immaterial whether the same was proved or not. There is substance in this contention and therefore, what Yasmin says in that regard is important.

400. Since the whole basis of the defence is on the admission of Yasmin of having made the statements, what

are those statements and what are those admissions needs to be seen. The statements of Yasmin, which she admitted having been made, are reproduced below, one by one.

> *“Woh is liye ki main sab sachhai batana chahti thi ! Is liye meri saas ne* aur *meri nanand ne mera naam F.I.R. mein nahi likhaya”* [Ex.514/1].

401. It may at once be observed that question preceding the answer which has been marked as Ex.514/1, is not, at all proved. The above statement of Yasmin at Ex.514/1 does not help the defence in any manner. How Yasmin can be discredited or Yasmin's evidence is rendered unreliable by reason of having made the statement, is difficult to understand. Yasmin has categorically stated that the questioning which has preceded the answer represented by the portion in Ex.514/1 is not correct. On this, the learned Advocates for the accused have not sought to challenge Yasmin. Since neither the evidence of Khyati Pandya nor the evidence of Ajay Patel establishes what the question was and since the C.D. is admittedly an edited version and combination of shooting taken on different places and different times, even though Yasmin has admitted to have been made the statement in question, in reply to what question the statement was made, has not been brought on record. It

is therefore, of no consequence, at all. In fact, its meaning cannot be comprehended at all.

402. Another statement of Yasmin, which she admitted as having made, is as follows:

> *"Sachhai to yeh hai ke jo Kailash hai, Kailash ke baare main sab kuchh ye ho raha tha! jis waqt woh hamala karane aye the, jab Kailash ka hi naam lekarke woh hamala karate the! Bole ke "yeh momedian hoke Hindu jaat ke upe haath lagaya aur ye apani bibi banake rakhha!" usko jab ladka hua to sab saare mohalleme hahakaar mach gaya tha! Bole "ladka hua hai" aur is tarahse bolne lage aur woh hi baat Kailash ka hi naam lekar sab gents ko maarte the woh log."* [Ex.514/2]

403. Here, Yasmin has denied having said so, out of a free will and according to her, her husband had made to say all this, but even if this is ignored, the fact remains that these statements of Yasmin are worthless unless the context in which they are made is also established. Knowing the questions in response to which they were given would be absolutely necessary. However, the learned Advocates for the accused seem to be satisfied with proving only the answers; and that too

only on the basis of the admission of Yasmin. No attempt to prove the entire transcript or to examine the interviewer has been made. Significantly, an application was made to examine the interviewer Ketul Pothiwala as a witness for defence, and though summons was issued to him, he has not been examined. The fact, therefore, remains that the record of the interview is not at all, properly proved. In fact, the Advocates for the accused have made it clear that they are not even interested in proving the same, and it is their contention that what they wanted to prove is the statements made by Yasmin, which have been proved by her own admission. The learned Advocates for the accused are right in this, but then, they can not bring the question preceding the statements in to play, to suggest that the answers are given to those questions, when those questions, have not been proved at all.

404. The next statement of Yasmin, which has been brought on record [marked as Ex.514/4], reads as under :

> *“Main Supreme Court mein jaane ke liye bolti hoon ke mein supreme court kya, kahin bhi mujhe le jaayenge ye jo sawaal ke liye, to mera ek hi sawaal rahega ki ye log nirdosh hai aur ye haadse mein the hi nahin ye log. Jo the, woh baaharki*

public thi. Agar koi bhi mere ko bulana chahta to bula sakta hain."

405. As regards this also, unless the context in which the statement is made, is brought on record more particularly by bringing the questions to which the said reply was given on record, no importance can be given to the said statement. In fact, it can not be properly comprehended at all in the absence of the question. For instance, '***ye log nirdosh hai aur ye hadse mei the hi nahi ye log ! Jo the woh bahar ki public thi***'! etc. is rendered meaningless, unless it is shown to have uttered with reference to the accused in the 'Best Bakery Case'. That has not been done.

406. The next statement of Yasmin which has been brought on record is '***Chandrakant Battu to waise hamari jaan bachai unnhone***' [Ex.514/5]. Yasmin states that she said it as Nafitulla had asked her to say so. Whether this is true or false is absolutely irrelevant, so far as this case is concerned, and why it has been brought on record is difficult to understand. Yasmin had not made any statement making any allegations against Chandrakant Battu during the evidence and therefore, her version [supposed to be contradictory] showing that Chandrakant Battu had saved their lives, is absolutely irrelevant.

407. It is only in the portion marked Ex.514/3 that the question asked by the interviewer is reflected. Curiously, the question is '***to jin logonko pakda hai, woh log the humla karnewale*** ?' The present tense represented by the verb '***pakda hai***' indicates that some accused had been arrested and were actually in custody at the time when the question was put, but the date of the interview is given as '19/9/2003' which is after the accused had been acquitted and before retrial had been ordered. This shows that there is something wrong with the record of the interview and therefore, when Yasmin says that the questions that had preceded her answers are not properly reproduced/reflected in the C.D., she should be believed. Not only there is sufficient reason to doubt the genuineness or authenticity of the C.D. as a true record of some event or events, but there is evidence to positively suggest that the C.D. is a tampered and fabricated document. When such is the position, the statements of Yasmin by themselves, can have no relevance. In fact, without knowing the context in which the statement has been made, its significance cannot be comprehended at all, and when this is the position, it cannot be understood to be a '*contradiction*'.

408. What is significant in my opinion, is however, different.

409. It appears to me, that the interviews of Yasmin both by '*T.N.N. Channel*' and by '*News Plus Channel*' were taken somehow to create some evidence to show that the allegations that were being made by Zahira at that time, against the State of Gujarat and the Police Machinery in the State, were false. Zahira was, at that time, making allegations against the entire State Machinery, saying that the rioters were being protected by the State machinery that investigation had not been carried out properly; and that due to fear she and other witnesses could not depose against the accused, during the trial. Zahira was demanding retrial and was being helped by the N.G.O. - Citizens for Justice and Peace. It is quite apparent that to counter Zahira, aid of Yasmin was taken by persons, who were very much upset with the allegations of the State, not having been diligent in getting the matter investigated and ensuring a fair trial. The interview taken by '*T.N.N. Channel*' may not be that objectionable, but certainly the attempt of '*News Plus Channel*' is an heinous attempt to make Yasmin speak something which could be used to counter the allegations made by Zahira. Interestingly, a number of local channels rushed for taking Yasmin's interview at the

material time, though Yasmin was not examined at all during the first trial. The script [of the news item] written by Khyati Pandya shows her anxiety to contradict Zahira and her mother. Yasmin is made use of to get certain things, said in a somewhat different context. Things said by Yasmin are then highlighted from a totally different context.

410. Thus, it is my opinion that though Yasmin appears to have made some statements, at some point of time, which are contradictory to what she has stated in the Court, exactly under what circumstances, and in reply to what questions, she made those statements is not clear. This ***could have*** been established by the defence who brought those statements on record, but it has been avoided. No importance to such statement, can therefore, be given, even if the person to whom it is attributed admits having made it. It does not necessarily follow that those statements are made in the context in which the accused suggest. The statements, as aforesaid, are not such so as to indicate the context thereof without any other aid. At any rate, the explanation of the person concerned as to the context in which it was made, has to be accepted when the context has not been brought on record, or rather bringing it on record has been avoided.

411. Ajay Patel [D.W.5] was asked whether he remembered any answer, or answers, given by Yasmin in reply to the questions that were asked to her during the interview. Ajay Patel stated that he remembered the interviewer having asked her as to why she had come there and started renovation work; and that why it was being done. Ajay Patel also stated that he also remembered that Yasmin was asked whether the persons who had been involved in the 'Best Bakery Case' were really involved therein; and that Yasmin had, thereupon, said that the persons who had been accused in the 'Best Bakery Case', were not the assailants; and that the assailants were from outside [ ]; and that the accused had been falsely implicated. It is contended by Shri Shirodkar that this evidence of Ajay Patel has not been challenged; and that this proves that Yasmin had made the statements which Ajay Patel has attributed to her.

412. I have considered the matter. In the cross-examination, when asked that if there would be no record of the interviewer asking the question to Yasmin as to why she had come there and started renovation work, etc., then the C.D. in question would not be his shooting, Ajay Patel replied that he did not remember properly as there has been a time gap. Interestingly, he claimed that even if such recording, or shooting, would not be

seen in the C.D., still, the shooting would be his only. In my opinion, apart from the fact that this indicates his determination to support the evidence of Smt.Khyati Pandya at any cost, it also indicates that his evidence of his remembering the statements made by Yasmin, is not reliable. Moreover, according to Ajay Patel, he did the recording of all the questions that were put by the interviewer to Yasmin. When a visual and aural record in the form of the cassette, or in the form of C.D. prepared therefrom, was available and when that has not been established or proved, it is not possible to accept the oral evidence of Ajay Patel regarding the statements allegedly made by Yasmin given by him from his memory and of which he is not sure. It is one of the cardinal rules of law of evidence that the best evidence – such as the nature of the case would permit - must be given in all cases. Such oral evidence which he gave, cannot be safely accepted. This is particularly so, because the interestedness of this witness in the defence of the accused is too obvious. Even otherwise, the exact words of Yasmin cannot be expected to be remembered by him. What he would remember would be the impressions formed by him in that regard, which can be a result of many factors, and might be gathered subsequently. That Yasmin indeed made such statements, therefore, cannot be proved by the oral evidence of Ajay Patel particularly

when Yasmin is not specifically confronted with this aspect, or that Ajay Patel having recorded her interview.

413. At this juncture, it may be observed as to in which peculiar position Yasmin was placed at the material time and how her position was sought to be exploited by the interested parties for achieving their object. Zahira's making allegations against State of Gujarat had, apparently, caused concern in a certain section of the society; and that section wanted to refute such allegations vehemently. When Yasmin had come to reside there, she was without any support and apparently, her relations with the members of Habibulla family were also not good. She could not very much depend on her husband, as he had already kept a mistress. The accused who were the residents of the locality had already been acquitted. Yasmin had to reside in the same locality. The object of the persons coming to take her interview was obvious. Certainly, they were not interested in getting from Yasmin that threats had indeed been received by Zahira and Nafitulla. Significantly, when Yasmin was away from Vadodara and when the accused were being prosecuted, nobody had thought of what Yasmin had to say in the matter. That Yasmin came to stay in the locality, where the accused were also residing, made it quite obvious to the interested persons that Yasmin would not – rather

dare not - speak against those persons at that time. It is under these circumstances, that interview of Yasmin was taken. Obviously, Yasmin who wanted to stay there, could not have said anything about the threats allegedly given to Zahira and others. Here, the question is not whether threats had really been given or not, but what must be appreciated that there was no occasion to question Yasmin as regards the innocence or guilt of the accused in the 'Best Bakery Case', which had already been over.

414. Under the pressure, - which must be tremendous - Yasmin might have told something to media, which is inconsistent with what she has stated in the Court, but that hardly discredits her. It is quite easy to understand that Yasmin would not have been able to stay in the locality, had she spoken against the accused who had already been acquitted. Rather, it must be only after she decided not to speak against the accused, that a decision to go there and reside must have been taken by her.

415. Can the false statements made by a person before media, be given the same importance as the statements made by a person before a public servant who has lawful authority to inquire or investigate into the matter ?

For instance, when the police are investigating a case, it is the duty of a person to tell the facts truly. In a Court of law, certainly, witnesses are bound to tell the truth. When a police officer questions a person, it is in order to achieve some lawful object, or in order to do something, which it is the duty of police to do. Speaking of media, the media is neither under any obligation to inquire into any facts, nor is media entitled to compel a person to give an answer. Media also can not take any steps or bring the offenders to book or exonerate on the basis of any answer that may be given by the persons interviewed. Making a false statement before media is nothing more than telling an ordinary lie; and how damaging this would be to the character of the persons doing so, depends on the circumstances in which the lie is spoken. Given the situation in which Yasmin was placed, I do not think that it was possible for her to condemn the accused openly when they had been acquitted and had been residing by her side. The false statements if any, made by her were clearly under pressure and no importance – certainly not to the extent of branding her as a wholly unreliable witness – can be given to the same.

416. In the facts and circumstances of the case, I am of

the opinion that Yasmin's evidence that she did not want to tell the truth before the media is acceptable. It appears to have been the strategy of Yasmin which enabled her to remain in the locality without any problem. Merely because of the inconsistent statements made by Yasmin, which anyway do not go to the root of the matter, I am not inclined to disbelieve the testimony of Yasmin as given by her in the Court. Moreover, the statements are not exactly as are sought to be interpreted.

417. To sum up, the evidence of these witnesses who have supported the prosecution case does not suffer from any weaknesses, so as to reject it as unreliable. On the contrary, the evidence of all these witnesses is consistent and fits in properly with the other evidence in this case, and/or with the facts which are undisputed. It is corroborated by the Cassette [Ex.283]. In fact, when it is conceded that the occurrence or the happening of the incident is not disputed at all, a large part of the evidence of these witnesses is already established as true.

418. The whole basis of the attack on the evidence of these witnesses is with respect to the omissions and contradictions in their evidence when compared with the record of statements made by them, before the police

during investigation. As elaborately dealt with while discussing the evidence of these witnesses, the concept of contradictions and/or omissions is not properly understood by the learned Advocates for the accused, as is clear not only from the cross-examination of these witnesses, but also from the express arguments advanced. Though, in the written arguments [Ex.521/A] filed by Shri Shirodkar, the legal position as regards the omissions and contradictions is quite properly stated [particularly in clauses (a), (b), (c) and (e) of para 9A of page 2 thereof], the arguments actually advanced orally are not in consonance therewith and all the time, the number of omissions and contradictions found in the evidence of each of these witnesses was being counted and emphasized. It was also argued as if they are to be subtracted from the evidence. Repeated arguments have been advanced, and even in the written arguments it is emphasized that '*if the contradictions and omissions are taken out, nothing remains in the evidence*'. It therefore, becomes necessary to briefly mention the correct legal concept in this regard and to indicate what is the proper approach in such matters.

419. Appreciation of evidence is not a question of law. Whether the evidence of a witness is to be believed or not to be believed is not a matter of law. The belief or

disbelief of a statement made by a witness before the Court depends on so many circumstances, that it is impossible to lay down any hard and fast rules in that regard. Contradicting a witness by referring to his previous statement, is only one of the modes by which a witness may be discredited. Section 162 of the Code, which, despite a general prohibition, permits a limited use of statements recorded by the police during investigation, for the purpose of contradicting a prosecution witness, does not lay down any rule of law or procedure to the effect that the evidence which has been contradicted in this manner is to be excluded from consideration. It does not say that the statements in the evidence which were not made before the police, shall cease to be the part of evidence before the Court. The belief or disbelief in any witness or in any particular statement or statement made by him is influenced by various factors. The contradictory statements, or the omissions to mention the relevant facts at the earliest possible opportunity, are important to assess the truth or otherwise of a particular version by a simple rule of logic and prudence. Prudence indeed requires that a man who makes two different statements on the same subject on two different occasions may not be thought reliable and since he advances two versions of the same incident, which of them is true, or whether none

of them is true, may, very well be doubted. Similarly, if anything material and significant is not stated at the earliest opportunity, whether the facts later stated are an afterthought, would be a question that would arise for consideration. Thus, the effect of previous contradictory statements or the omissions to state earlier are such infirmities that would require a closer examination of the statements made before the Court; and while assessing the truth or otherwise of the versions advanced before the Court, the fact that earlier a contradictory statement was made or that something important was not earlier stated, will not be lost sight of by the Court. There is however, no question of mechanical rejection of the relevant evidence. There is no '*subtraction*' of the relevant portion from the evidence, as has not only been suggested, but emphatically put forth by Shri Shirodkar and Shri Jambaulikar, the learned Advocates for the accused, [despite mentioning the correct position in the written arguments (Ex.521/A)]. The very notion appears to be erroneous and since in this case, the basic challenge to the evidence of all the supporting witnesses is only by showing it to be contradictory with the police record, this may need some further discussion.

420. Section 161 of the Code, does not make it obligatory for a police officer to make a written record of the

statements of the persons who are interrogated by him during the course of investigation. The very option given to the police officer in the matter of reducing the statements of persons examined in the Course of investigation, into writing, shows that the record is meant for the benefit of the investigating officer, and as it may be necessary from the point of investigation. The record is not to be signed by the persons making the statements. Though the accused can legitimately make use of it for contradicting the prosecution witnesses, the object of making the record is not to make available, a previous statement of a witness to the accused. Moreover, though many of the prosecutions are launched after police investigation, prosecutions can be launched on the basis of complaints made by private persons, which are not preceded by recording of a prior statement of the witnesses. Only the previous version of the complainant - in the nature of the complaint itself - would be available in private prosecutions, and no previous statements of the witnesses named in the complaint is likely to be available to the accused in such prosecutions. Therefore, the very concept that the record of a previous statement *is made for the purpose of later on ascertaining whether the evidence adduced before the Court is in conformity with it*, is erroneous.

421. A crime is committed. Investigation starts. If the culprits are found, they are prosecuted. Witnesses are examined before the Courts of law. The Courts are required to adjudicate whether the persons prosecuted are guilty or not. This conclusion about the guilt or otherwise of an accused before it is to be reached, mainly, upon considering the evidence - i.e. statements made before it by the witnesses and the documents produced before it. Thus, basically the matter is to be decided on what the witnesses said before the Court; and that they did not state certain matters before the police and/or stated something differently, is only a factor which would influence the Court's assessment of their evidence. It is only one out of several aspects which may make the Court doubt the truth of the version of a witness or his veracity in general.

422. The aforesaid discussion on the evidence of the supporting witnesses indicates that immaterial variations between the evidence recorded in Court and in the statement under section 161, were projected as '*contradictions*' and '*omissions*'.

423. Much reliance has been placed by the learned Advocates for the accused on a decision of the Supreme Court of India in ***Tahsildar Singh and another Versus***

State of U.P. 1959 Cri.L.J. 1231. This Judgement of the Supreme Court of India is well known, but it does not even remotely suggest that whatever is contradictory with the version recorded by the police out of the evidence given by a witness, it should be excluded from consideration. In fact, in Tahsildar Singh's case the question before the Supreme Court of India was as to the effect of omissions in the police statements. The Judgement deals with several important aspects, but is of no assistance to the accused.

424. Reliance is also placed on another decision of Supreme Court of India in ***Yudhishtir Versus The State of M.P. 1971 (3) Supreme Court Cases 436.*** It is clear from the reported Judgement that no proposition of law has been laid down in the said decision and the effect of omissions was considered with respect to the facts of that particular case. The Advocates for the accused have placed reliance on the Head Note (ii) in the reported Judgement to give an impression that a proposition of law has been laid down by the Supreme Court of India. A perusal of the Judgement makes it clear that Their Lordships were dealing with the facts of that case and did not, even remotely suggest a rule of general application in the matter of appreciation of evidence. As a matter of fact, it has been, time and again, made

clear by the Supreme Court of India itself, that on facts there can be no precedent; and that appreciation of evidence is a question of fact and not of law.

425. Moreover, in this case, as shall be discussed later, the police record of the statements under section 161 of the Code itself is unreliable. In fact, the Advocates for the accused have advanced several arguments contending that it is got up, manufactured and concocted. This shall be discussed later, but for the time being it may be observed that when this is the criticism of the record, it would be rather unreasonable to discredit the testimony of a witness on the basis that it is in conflict with such record.

426. In any case, there are no omissions or contradictions in the evidence of these witnesses which can be called as 'significant' or 'material', except on one point. It is regarding the failure to name the accused who were known to these witnesses by name. Except this omission, all other omissions are insignificant and immaterial. None of the contradictions or omissions which have been brought on record, affect the basic structure of the prosecution case. In fact, there is rather a remarkable consistency as to the manner in which the incident has happened. The effect of the

omission with respect to disclose information about the culprits, either by their names, or by their descriptions, or by making a specific claim of prior acquaintance, however, needs to be considered in appreciating the evidence of these witnesses as against the concerned accused, with respect to their identity.

427. The evidence of the aforesaid five witnesses is fully corroborated by the evidence of several witnesses. Thus, the evidence of Dayaram Pal [P.W.9], Kiritbhai Patel [P.W.10] and Ishwarbhai Sutar [P.W.11], who are all the fire brigade personnel, shows that when they reached the spot, Best Bakery building was burning. The evidence establishes that seven dead bodies were brought down from the first floor by the fire brigade personnel. The evidence also shows that an old woman who had been trapped on the terrace of the Best Bakery building was brought down by the fire brigade personnel. There has been no challenge to the evidence of these witnesses which confirms the fact of 9 injured being found on the spot and being sent to the S.S.G. Hospital and an old woman being brought down. In fact, in the cross-examination of Ishwarbhai Sutar [P.W.11] it is got confirmed from him that he noticed 9 injured persons and they were removed to S.S.G. Hospital in an ambulance. The evidence of Dr. Meena Robin [P.W.46] shows that the

injured were brought to the S.S.G. Hospital by the fire brigade ambulance driver. The injuries suffered by Taufel [P.W.26] Raees [P.W.27], Shehzad [P.W.28] and Sailun [P.W.32] have already been mentioned earlier. The evidence of Dr.Meena Robin, which is supported by the evidence of Rameshbhai Rathwa [P.W.16] and Gordhanbhai Makwana [P.W.17], which, in turn, is supported by the relevant entries made in the official record, shows that the nine injured persons that were removed to S.S.G. Hospital were Raees [P.W.27], Sailun [P.W.32], Ramesh Vaijnath Sharma @ Raju, Shehzad [P.W.28], Nasibulla [P.W.30], Nafitulla [P.W.31], Taufel [P.W.26], Prakash and Baliram. It may be appropriate at this stage to record the injuries found on the person of Prakash, Baliram and Ramesh also. The injuries show how brutal and merciless the assault was. The injuries are also to be noted in the context of the evidence of the hostile witnesses - which shall be discussed later - claiming that those who were injured during the incident, were so injured while on the terrace only. Prakash, Baliram and Ramesh have died, as per the medical opinion, due to these injuries, which were antemortem. It would not be out of place to note the injuries here itself.

I] Prakash :

i) S.S.W. on Rt. forehead, from midline to Rt. eyebrow – 8cm oblique,

ii) S.S.W. on Rt. frontal region, from anterior hairline to obliquely downwards 3cms above injury no.(1), size 6cms,

iii) Incised Wound of size 3cms X 1cm, bone deep on Left eyebrow,

iv) Incised wound on Left frontal region, 5cms away from midline size 3cms X 1cm,

v) Incised Wound on Right parietal region, size 3cms X 1cm, in midline 3cms front of Right parietal dome,

vi) Contusion on Right parietal region 2 cms down and to Right parietal dome, size 6cms X 3cms, reddish,

vii) S.S.W. on nape of neck, horizontal, size 15 cms,

viii) Multiple contusions in midline occipital region in area 4cms X 4 cms, red in colour,

ix) Surgical tracheostomy wound – in front of neck.

II] Baliram :-

i) Incised Wound on the back of the

occipital region below occipital protuberance, size 3cms X 2cms X bone deep,

ii) Contusion on Right scapular region back, size 5cms X 2cms.

III] Ramesh :-

i) Chop wound over right side of chin, size 6cms X 2cms X mandible bone deep,

ii) Incised wound Right alae of nose and Rt. cheek – 5cms X 1cm X muscle deep.

iii) Chop Wound over Left forehead on the outer aspect of Left eyebrow, size 4cms X 2cms X cranial cavity deep.

iv) Abrasion on the tip of Left shoulder, size 3cms X 1.5cms, red in colour.

v) Tracheostomy in the midline.

vi) 4 chop wounds back of head on Left side occipital region length varying from 4cms to 6cms, width 1cm to 4cms X bone deep

vii) Punctured wound – 2 in nos. left cheek, size 0.6cm in oral cavity deep

viii) Contusion over Left hypochondrium over area covering 4cms X 1cm

That Prakash, Baliram and Ramesh had sustained the injuries as recorded above, is proved by the evidence of Dr.Beejaysinh G. Rathod [P.W.48], Dr.Kishore P. Desai [P.W.49] and Dr.Smt.Sutapa Basu [P.W.47], which is duly corroborated by the memorandum of the post-mortem examination [Ex.201, Ex.208, Ex.194 respectively].

428. Thus, the evidence of the fire brigade personnel, coupled with the evidence of Dr.Meena Robin [P.W.46], Rameshbhai Vajubhai Rathwa [P.W.16] and Gordhanbhai Mithabhai Makwana [P.W.17], together with the relevant record, duly proved, lends support to the version of the supporting eye witnesses, on several aspects.

Evidence of Police Officers who had gone to the spot.

A] SHRI B.U.RATHOD [P.W.63]

429. The evidence of the police witnesses - viz. PSI Shri B.U.Rathod [P.W.63], D.C.P. Shri Piyush Patel [P.W.67] and PI Shri H.G.Baria [P.W.72] - also corroborates the version of the supporting occurrence witnesses, particularly with respect to the happenings of the morning incident. These are the officers who reached on the spot immediately after the incident. In fact, it is when PSI Rathod, who was the first of them to reach the

spot went there, that the rioters ran away. It is he and his staff who noticed the nine injured persons whose hands and legs were tied and who had injuries inflicted by sharp weapons, as also burn injuries on their bodies, lying on the rear side of the Best Bakery building. The evidence shows that these nine persons were Taufel [P.W.26], Raees [P.W.27], Shehzad [P.W.28], Nasibulla [P.W.30], Nafitulla [P.W.31], Sailun [P.W.32], Baliram, Prakash and Ramesh, though PSI Rathod has not named them.

430. The evidence of PSI B.U.Rathod and D.C.P. Piyush Patel not only corroborates the evidence of the supporting occurrence witnesses, but it is of independent weight and value in itself. It therefore requires to be discussed in some depth. It would be convenient to discuss the evidence of PI Baria [P.W.72] also, so far as it relates to the facts deposed by these two witnesses, along with their evidence.

431. PSI B.U.Rathod [P.W.63] states that on 02/03/2002, while patrolling within the area of his Police Station by wireless mobile van-I, he received a message and went to the spot. He categorically states that on seeing the police mobile van, the mob ran away. The mobile van was parked near the Hanuman Temple. He noticed the Best Bakery building burning and on hearing voice of some

persons crying, he and his staff went to the rear side of the said house. PSI Rathod categorically states that he and his staff noticed 9 persons whose hands and legs were tied and who had sustained injuries on their bodies, as aforesaid. PSI Rathod immediately gave a message to police control and to PI Baria informing about the 9 persons being there in burnt and injured condition and also gave a message calling for Fire-Brigade and ambulance. PSI Rathod states that he and his staff then started untying hands and legs of said 9 persons. It is at that time, that Shri Piyush Patel [P.W.67], D.C.P. [South] and PI Baria [P.W.72], the fire brigade and the ambulance arrived there. PSI Rathod then states about 3 Muslim women coming from the bushes and meeting D.C.P. Patel and PI Baria. He then states about extinguishing of the fire on the first floor of the building, 7 dead bodies being brought down from the first floor, the injured being put in the ambulance, and being sent to S.S.G. Hospital and one old woman being brought

down by the Fire-Brigade from the terrace. Rathod also states that the D.C.P. and the police staff started searching for the accused in the surrounding area.

432. There are five important aspects that emerge from the evidence of Rathod – viz.

i] The mob was there till the police came.

ii] The police noticed 9 persons whose hands and legs were tied and who had injuries inflicted by sharp weapons, as also burn injuries, lying on the rear side of the 'Best Bakery' building.

iii] The police untied the hands and legs of the said 9 persons and sent them to S.S.G. Hospital.

iv] After Shri Piyush Patel, PI Baria and other policemen arrived there, 3 *Muslim* women came from the bushes and met D.C.P. Piyush Patel and PI Baria.

v] D.C.P. Piyush Patel, PI Baria and the police staff started searching for the accused in the surrounding area.

433. The evidence of PSI Rathod is fully corroborated by the evidence of PI Baria and D.C.P. Patel. In fact, except the incident of the 3 women coming and meeting D.C.P. Piyush Patel and PI Baria, there is not much challenge to the evidence of this witness. His statement was recorded during investigation.

434. In the cross-examination, a point is sought to be made out that his statement was recorded only on 14/03/2002; and that he was not on leave during the intervening period. The suggestion is that there has been

a delay in recording of his statement. I am not impressed by this suggestion. If there would be delay in recording the statement of a witness, the possibility of concoction can not be overlooked and one may doubt the version of such witness. However, in the instant case the version of PSI Rathod is well supported by other evidence and there is no question of doubting his presence on the spot or his version of the incident. Moreover, what is significant is that the delay in recording the statement can properly be understood. How tense the law and order problem was, has been said by PI Baria [P.W.72] and also PI Kanani [P.W.74]. In the background of the number of cases that were being registered, the number of law and order problems created by the communal riots, it can not be said that the delay in recording the statement of PSI Rathod is unreasonable or suspicious. 'Delay' is a relative and subjective aspect. It cannot be considered without looking into the needs of the investigation at a particular stage. For instance, if an eye witness's statement is to be recorded, without which further investigation cannot proceed, it would be difficult to accept the explanation for delay, but where the statement is not expected to give a new direction to the investigation, or where further investigation is progressing without making it essential to record the statement forthwith, the explanation for the delay may be

easy to accept. It may be observed, further, that the investigation carried out by PI Baria was rather unsatisfactory as shall be discussed at an appropriate places, but Rathod's statement came to be recorded soon after the investigation was entrusted to PI Kanani.

435. In the cross-examination it has been brought on record that PSI Rathod had not made any entry anywhere regarding coming of D.C.P. Patel and PI Baria on the spot. Since D.C.P. Patel's presence and also of PI Baria's presence on the spot is not disputed and no argument has been advanced even remotely suggesting that they had not come to the spot, whether he made any entry anywhere regarding it, is immaterial. Again, why and where **he** was supposed to make an entry is not clear.

436. A question was asked to PSI Rathod [P.W.63] in the cross-examination as to who told him that D.C.P. Patel [P.W.67] and PI Baria [P.W.72] and staff started searching for the accused in surrounding area, to which PSI Rathod has replied that it was not told to him by anyone. The attempt which was, perhaps, to show that PSI Rathod had no knowledge of this aspect, has thus failed. It is thereafter, that the omission of PSI Rathod to state so in his previous deposition [Ex.251] before the Court at Vadodara is brought on record. I do not think

this omission to be significant. I do not think that since he did not state it before the Court at Vadodara, what he stated here did not happen at all. This aspect is supported by the evidence of D.C.P. Piyush Patel and PI Baria and in the course of their evidence it will be discussed. A general observation regarding the effect of telling before this Court the facts not stated before the Court at Vadodara, shall be made while discussing the evidence of PI Kanani because this aspect has been much highlighted by the defence during the cross-examination of PI Kanani.

437. There is no challenge to the evidence of this witness to the effect that he reached the spot in question, about the time at which he reached there, that the building was burning, that he saw nine persons lying injured on the rear side of the building, etc.

438. Omission to state in his statement recorded during investigation about the three Muslim women coming to D.C.P. Piyush Patel and PI Baria, was attempted to be brought on record. However, from the evidence of PI Kanani, it is clear that the omission is not about the happening of the incident, but with regard to the details of the place from *where* the Muslim women came and about specifically mentioning about the names of D.C.P. Piyush

Patel and PI Baria as the persons to whom they came. PI Kanani's evidence [on pages 3228, 3229 of notes of evidence] is clear in this regard. The incident can not be doubted at all. This will be further dealt with while considering the evidence of D.C.P. Piyush Patel and PI Baria in that regard.

439. An attempt was made to bring on record omission on the part of PSI Rathod to state in his statement recorded during investigation that D.C.P. Patel and the police staff started searching for the accused in the surrounding area. However, PI Kanani who recorded the statement has made it clear that there is no such omission; and that PSI Rathod did state accordingly. The contention of the learned Advocates for the accused, on the basis of some variation arising due to the manner of recording, that there exists an omission to state a material fact, can not be accepted.

440. Interestingly, it was asked to PSI Rathod [P.W.63] at the conclusion of the cross-examination as follows:

> *Ques.- Did it happen that 3 Muslim women came running towards you in a very frightened condition from the East side. Those women told you that a mob of Hindus have ransacked their*

residential building and bakery, and looted the same, and set the same on fire, and there were other persons also on the first floor in that building ?

Ans.- It did happen. It happened when the Mobile staff were in the process of untying the injured persons.

441. The contention of the defence with respect to this question and answer is that the story of the women giving names of certain persons as the culprits is falsified; and that all that they told was about a **mob of Hindus**. I am not impressed by this contention, because this is said to have happened before the arrival of D.C.P. Piyush Patel and PI Baria. Therefore, this evidence can not be used to challenge and falsify the evidence of PI Baria and D.C.P. Piyush Patel about the three women giving some names to them, as the names of the culprits or offenders. Moreover, there is a more fundamental and basic question as to whether the description of the offenders as '**mob of Hindus**' is inconsistent with the mob consisting of any known persons. The answer has to be a 'No'. Therefore, because a person earlier spoke of a 'Hindu mob', he or she cannot be disbelieved, because he or she immediately

thereafter mentioned names of some as persons present in the mob. This will be discussed further, while dealing with the contention raised in the context of the history of the incident, as given by the victims or injured, to the Medical Officer at the time of the admission in the hospital.

442. In my opinion, the evidence of PSI Rathod [P.W.63] is satisfactory, unshaken, and can be safely relied upon.

[B] EVIDENCE OF D.C.P. PIYUSH PATEL [P.W.67]

443. In his evidence D.C.P. Piyush Patel [P.W.67] states that at about 10.45 a.m. while he was patrolling on 02/03/2002, he heard a message from Panigate Mobile-I to the Control Room, saying that on Daboi Road, Hanuman Tekdi, 4 to 5 houses had been set on fire; and that persons were burning; and that, ambulance and fire brigade be sent immediately. That on hearing this message, he went to the Gajrawadi Fire Station, took the fire-brigade and the ambulance personal with him and went to the spot. The message was heard by him at about 10.45 a.m. and according to him, he reached the spot within about 6 to 7 minutes therefrom. This part of his evidence is in conformity with the evidence of PSI Rathod [P.W.63] and PI Baria [P.W.72]. D.C.P. Patel also states about the building being burning when he reached there;

and that on the rear side of the building, he saw 9 persons lying injured. D.C.P. Patel states that PSI Rathod came to him and informed him that those 9 persons had been tied by wires; and that they were attacked on their heads and were also burnt. This corroborates the evidence given by PSI Rathod and also confirms his evidence regarding having reported the same to D.C.P. Patel. D.C.P. Patel then speaks of a lady - wife of the owner of the building – along with two girls coming to him and the ladies telling them about the incident. D.C.P. Patel has narrated what they told him. According to him, they said that a mob of about 1000 to 1200 persons of Hindu community had *'gheraoed'* the said building throughout the night; and that the persons – viz. Jayanti *cha ni lariwala*, Jayanti's son, Mahesh, Kiran, Munno, Pratap, Jitu, Lalo and Painter - and a mob of persons from Hanuman Tekdi and surrounding area had pelted stones, set the building on fire and had cut the telephone wires. That they also told D.C.P. Patel that the victims – i.e. the ladies and others – had hidden themselves on the terrace of the building; and that in the morning, the mob had assured them that they - the mob - would not do any harm to them and so they had come down. That the mob had, thereafter, tied the hands and legs of the victims and started assaulting them. According to D.C.P. Patel, the ladies also told him that

they had gone to the *bhaiyya's* place; and that the mob had tried to drag them towards the bushes. D.C.P. Patel was also told about there being other persons trapped inside the building. D.C.P. Patel then speaks of one old lady, who was on the terrace of the said building, being brought down by the fire brigade personnel and also about bringing down 7 dead bodies from the first floor of the said building.

444. D.C.P. Piyush Patel [P.W.67] has stated about the injured being sent for medical treatment and his going to the hospital. Before that, according to him, ***combing*** in the area was done, but all the houses were closed and police did not get anyone.

445. The statement of D.C.P. Patel was recorded by PI Kanani [P.W.74] on 24/03/2002.

446. In the cross-examination, nothing which would discredit D.C.P. Patel, has been brought on record. D.C.P. Patel was asked questions inviting discussion on various legal topics and principles of evidence. He was asked about whether knowing the names of victims in the investigation of any offence is important, why it is important, whether he agreed that knowing the names of the accused or the offenders at the earliest is

important, etc. etc. Nothing turns on such questioning and the answers given pursuant thereto. It was thereafter sought to be ascertained from him, whether he was supervising and guiding investigation, when he said that though he was supervising and guiding, it was not fully, as he was busy in controlling the riots. It was asked to him as to whether in the next three weeks from 02/03/2002, he was kept informed about the progress of case such as, arrests made, etc. to which, he has replied that the investigation was not with him after 10/03/2002.

447. D.C.P. Piyush Patel [P.W.67] has been questioned on the aspect as to whether he ***directed*** PI Kanani to record his statement or whether he ***requested*** him to record his statement. He is also questioned as to whether PI Kanani called him or he called PI Kanani. According to me, there is no point in such cross-examination. An attempt has been made to create a feeling – that there exist certain discrepancies – not on the basis of there being different and discrepant versions, but by playing with the words. In my opinion, whether D.C.P. Patel ***directed*** PI Kanani, or whether he ***requested*** him are not two different matters at all. D.C.P. Patel is a superior officer of PI Kanani. At the same time, when PI Kanani acts as an Investigating Officer and records the statement of D.C.P. Patel, D.C.P. Patel is only a person

acquainted with the facts of the case. Whether D.C.P. Patel ***directed*** or ***requested*** is a question of perception of the concerned persons – i.e. D.C.P. Patel and PI Kanani. It also depends on how they or any of them, would like to put it, which may depend on where they are narrating it. In any case, D.C.P. Patel has explained that there had been a talk between him and PI Kanani on the point of requirement of recording the statement of D.C.P. Patel during the investigation; and that, actually, the had been called by PI Kanani for recording his statement and when it was decided, PI Kanani was called by him. There is no suggestion that they did not meet at all; or that no statement was recorded at all and therefore, nothing turns on who called whom.

448. D.C.P. Piyush Patel [P.W.67] has been asked the ***cause*** as to why he remembered that he called the Investigating Officer at a particular time and place. D.C.P. Patel has rightly replied that he could not say ***why*** he remembered it. According to me, he is right. The causes as to ***why*** certain incidents are retained in memory cannot be explained by a person – at least not always - though he would retain the memory thereof.

449. Attempt has been made in the cross-examination, to show that the evidence of D.C.P. Patel, as given by

him in the Court at Vadodara, is inconsistent and/or contradictory to what he has stated here. I do not think that there are any variations or contradictions in the evidence of D.C.P. Patel as deposed by him in this Court and between the record of his deposition in the Court at Vadodara. In my opinion, the attempt that has been made in the cross-examination is only to play with the words, without trying to bring out any variations or discrepancies in the happening as stated by him. The inconsistency between the versions about the time of recording his statement is of no consequence unless the recording of the statement itself is an issue that is under challenge.

450. D.C.P. Patel [P.W.67] has admitted that he did not note down the names given by the said 3 women as the names of offenders or accused on any paper, at any time, till his statement was recorded. On this aspect, PI Baria [P.W.72] has stated that D.C.P. Patel did note down the names given by the said 3 women. Undoubtedly, there is conflict between the evidence of D.C.P. Patel and PI Baria on this aspect. No paper containing any names supposed to have been noted by D.C.P. Patel at that time, has been produced before the Court. It is contended that this conduct of D.C.P. Patel in not recording the names of the accused or not directing PI Baria to record the

names is unacceptable and D.C.P. Patel cannot, therefore, be believed on this aspect. I do not agree with this contention. D.C.P. Patel has been asked as to why he did not instruct PI Baria to record the names of the said 3 women and to record their statements on the spot and D.C.P. Patel has replied, rightly in my opinion, that PI Baria was there itself; and that there was no question of telling him. D.C.P. Patel had no reason to believe that the needful would not be done by the Inspector in-charge of the concerned area and there was hardly any reason for him to give any direction to him at that time itself, as to how and what steps should be taken by him. D.C.P. Patel was further questioned on this aspect and it would be appropriate to reproduce the relevant question and answer.

> *Ques.-Did **you** tell him; because they had come to you ?* [Emphasis is on 'you'].
>
> *Ans.- They had come to 'us'. We were together.* [page 2116 of Notes of Evidence].

Because D.C.P. Patel used the expression 'us', he was sought to be contradicted by his statement in the examination-in-chief to the effect that they had come to him by emphasizing the expression 'me' used by him. D.C.P. Patel could not challenge what was recorded and since the record shows the expression 'me', he admitted

having said it. In my opinion, there is no discrepancy at all and there is no distinction in the narration of the events whether the expression used was 'us' or whether it was 'me'. Though in the portion marked as **'A/134'** the expression 'me' has been used, further evidence of D.C.P. Patel refers about the ladies telling ***them*** and uses the expression 'us' [The ladies told ***us*** about the incident. page 2097, para 6]. This again is a matter of using a particular expression and not of there being any actually different situation or happenings. There is a consistent version that D.C.P. Patel [P.W.67], PI Baria [P.W.72] and other officers were together. It is not that what was stated by the women could not be heard by others, who were very much there, or was not intended to be a disclosure to anybody else, except D.C.P. Patel. Since it is not that D.C.P. Patel *alone* was there, the variations resulting from the use of expression 'me' and 'us' etc, are immaterial.

451. In the cross-examination of D.C.P. Piyush Patel [P.W.67], he has been questioned at length, as to why he did not ask PI Baria [P.W.72] to record the names of the said women and to record their statements on the spot, to which, D.C.P. Patel has replied that the injured were required to reach the hospital; and that he had other steps to take. Even disregarding the explanation given

by D.C.P. Patel, in my opinion, the basic assumption that *he ought to have instructed* PI Baria accordingly, is not very sound. The names are to be noted for the sake of record and those women, obviously, were not going to run away. The situation at the scene of offence when extinguishing the fire and the rescue operation was going on, can well be imagined; and if cannot be imagined properly, the aid of the cassette [Ex.283] can be taken for visualizing the situation. Moreover, one fails to understand what conceivable difference it would make, if the names would be recorded on the spot or a little later. It is suggested to D.C.P. Patel that actually no names of the offenders or the culprits were disclosed on 02/03/2002 at the spot; and that, that is why, he did not and could not instruct PI Baria or any officer to record their statements or register a case. This suggestion has been denied by D.C.P. Patel. The suggestion itself is absurd. It presupposes that unless the names of the offenders would be disclosed, no case of any offence would be registered. This is absolutely incorrect. If at all it was necessary to register a case at that place itself, it could have been done irrespective of the fact whether the names of the offenders were disclosed at that time or not. If no anxiety was felt of recording the statements of the said 3 women because of the belief that the said women would become available for inquiry or

for the purpose of recording their statements, then, there is nothing wrong in it. In fact, considering the situation on the spot at that time, under the circumstances, it would not ordinarily be thought by anyone of making such record at that stage itself.

452. D.C.P. Piyush Patel [P.W.67] has stated about 3 ladies having been seen by him, talking to PI Baria [P.W.72] in the hospital and PI Baria writing down what one of them was narrating. D.C.P. Patel was asked whether that was important and he has answered in the affirmative. In this background, an ***omission*** to state this in his statement [X-89 for identification] recorded by PI Kanani [P.W.74], is sought to be brought out. According to me, this ***omission*** is insignificant and immaterial. D.C.P. Patel's admission that it was '*important*', is of no consequences, in my opinion. It is clear that this incident is not important at all by itself. I fail to see as to what turns on whether D.C.P. Patel saw these ladies, talking to PI Baria and narrating. D.C.P. Patel's admission that it was '*important*' as made by him in the Court, is based on the fact that Zahira [P.W.41], whose statement was recorded by PI Baria in the hospital, has, later on, denied having made the statement. It is the denial of Zahira which made this aspect 'important'. It could not have been

thought of, or imagined either by D.C.P. Patel, or by PI Kanani that the lady whose statement was recorded by PI Baria is not going to admit it and say that she never made any statement. Since when the evidence was given by D.C.P. Patel in the Court, Zahira [P.W.41] had turned hostile and had disowned her statement recorded by PI Baria in the hospital, this fact might have been thought of as '*important*'. It could not have been thought of as 'important' on 24/03/2002 and therefore, non-mention of this, in his statement, recorded by PI Kanani, is absolutely insignificant. In fact, in my opinion, even after Zahira has denied having made a statement which was recorded by PI Baria in the hospital, this evidence of D.C.P. Patel is not important at all. It is contrary to reason to accept that no inquiries were made with Zahira by PI Baria in the circumstances, though both – PI Baria and Zahira – were together and PI Baria was aware of the happenings of the incident, having taken Zahira with him from the spot itself. I see no reason to disbelieve D.C.P. Patel on this aspect only on the ground that this was not stated by him before PI Kanani. No material was being collected by PI Kanani to show that First Information Report had been indeed and in fact, lodged; and he could not have even imagined collecting of material to support such a claim. As a matter of fact, it would have been rather curious and would have given

rise to suspicion, had, at that time, collection of material showing that the F.I.R. *had been indeed lodged* would have been attempted to. There is, therefore, no substance in this contention. Since the fact that D.C.P. Patel indeed went to the hospital, that PI Baria and Zahira both went to the hospital, are not in dispute at all, there is nothing unbelievable in the version that D.C.P. Patel saw one of the 3 ladies, talking to PI Baria in the hospital and Baria recording what she was telling. When a fact has indeed happened, as is proved from the evidence on record, why and how a contention that D.C.P. Patel had not seen this happening at all, has been advanced, is difficult to comprehend.

453. With respect to D.C.P. Patel's evidence in examination-in-chief that he inquired about the condition of the injured; and that he was told that most of them were not conscious enough to speak, he was questioned that this was 'important' as had they been conscious, their statements could have been recorded. When he answered in affirmative, he was questioned as to whether he stated before PI Kanani regarding this. This is apparently done to bring out a so called ***omission***. I am not at all impressed by this effort. First of all, what was important was the condition of the injured, and not making a record of that. This type of questioning

and the arguments based on that, exhibit an unawareness of the requirements of the investigation. I see no reason for PI Kanani to have inquired with D.C.P. Patel as to whether he had inquired about the condition of the injured and what he was told, etc. I also do not see any reason for D.C.P. Patel to state this, on his own, to PI Kanani as if he was anticipating that a dispute on their condition was likely to crop up and would hasten to make a record of this fact immediately. Incidently, no dispute about the condition of the injured, which anyway can be gathered from the medical evidence, has been actually raised.

454. D.C.P. Patel was confronted with his statement, made by him before the Court at Vadodara that he had gone to the S.S.G. Hospital before 12.00 noon. The relevant portion has been duly marked as '**A/135**' and it shows that D.C.P. Patel indeed said so. However, this is obviously a wrong statement even if he said it, in as much as, it is clear that the process of admission of the injured in the hospital was still going on by 12.00 noon. PI Baria had gone to the S.S.G. Hospital after 12.35 noon. The record of the E.P.R. and the entries made in the police diary, regarding information received from the hospital, clearly make it impossible that D.C.P. Patel had visited the S.S.G. Hospital before 12.00 noon and had made

inquiries with regard to the injured. Though D.C.P. Patel was made to admit having made the statement, he was not asked whether it was factually correct or not. As such, it cannot constitute substantive evidence to establish the time of his going to S.S.G. Hospital.

455. D.C.P. Piyush Patel [P.W.67] has denied the suggestion put to him that no names at any time were disclosed to him; and that he had come to know certain names by 24/03/2002; and that he inserted those names in his statement as if they were told to him on the spot.

456. The contention that this evidence of D.C.P. Patel is false; and that this statement has been made 'to make Zahira the first informant', is without any substance. The motive suggested for making such false statement is contrary to the reason and logic. The motive suggested for making a false claim of having learnt about the names of the accused, is that D.C.P. Patel – or the investigating agency – 'wanted to make Zahira the first informant'. Apparently, what is contended is that '***it was intended to make a false claim later on, that Zahira had lodged the F.I.R. and by anticipating that this evidence of D.C.P. Patel would be useful when a dispute in that regard would arise, Piyush Patel made a false statement before PI Kanani'***. How this is absolutely

contrary to logic and reason shall be demonstrating by considering various possibilities. This shows that the investigating agency already knew that Zahira would disown her statement. The question is, if all that the investigating agency wanted was to frame some persons falsely, why they would select a person who would not support them in making such allegation. I am not considering here whether the investigating agency was acting honestly; but even assuming that the investigating agency was acting dishonestly and wanted to implicate certain persons falsely, why would they rely on a false statement of a person who was not going to support them, cannot be comprehended. If at all there was dishonesty and false implication, it could be only at the instance of or in collusion with Zahira, and not otherwise. If Zahira was a party to such collusion, naturally, D.C.P. Patel would not expect her to be hostile and would not be arming the Investigating Officer with material to prove that she had lodged the F.I.R. Hardly, in any case, anyone, and more particularly any officer from the investigating agency, would think of collecting material for proving that the F.I.R. had been indeed lodged by a person named as the first informant in the police record. Secondly, if the desire to falsely implicate would be so much prominent, a chit of paper could have been easily created containing the names of some of the accused

persons which are reflected in the F.I.R. [Ex.136] and a claim would have been made that on the spot, this information was recorded. If the investigating agency has indeed gone to the extent of fabricating the record, with the object of falsely implicating the accused, why would they not be consistent in that regard and achieve their objective, remains unanswered. Lastly, for falsely implicating persons, why was it necessary to make Zahira the first informant ? It has been contended emphatically that statement of Raees [P.W.27] had been the real F.I.R. and the manipulation to involve the accused persons could have been done, even by showing him as the first informant and recording all the names in his statement. Thus, even before coming to the conclusion about the evidence in respect of names having been given to D.C.P. Patel on the spot to be true, *it can at once and easily be observed that the motive for such false evidence, as suggested, is ridiculous and unacceptable*.

457. I have carefully considered the evidence of D.C.P. Patel generally and more carefully with respect to this aspect. I find that D.C.P. Patel is a truthful witness and his evidence cannot be doubted. His presence on the scene of offence cannot be doubted and has not been disputed. While appreciating his evidence, it ought

to be kept in mind that there is always some motive behind giving false evidence. In this case, it is not that the accused persons could not have been implicated without this statement of D.C.P. Patel. In fact, they have been named in the F.I.R.. It is only because Zahira had turned hostile, the fact that she had given certain names on the spot itself, has assumed importance. Further, being the D.C.P., Piyush Patel was not under any personal obligation or responsibility to collect material supporting the charge, when PI Baria was present on the scene of offence and was actually taking steps in investigation. Therefore, there is no motive to avoid a possible blame of negligence that would be given to him, if he would not state about names of some persons as culprits being given to him. I have no manner of doubt that D.C.P. Patel's evidence in that regard can be safely accepted and I hold that on the spot itself, the names of certain persons as mentioned by D.C.P. Patel in his evidence, were given by one of the 3 women. What is the value to be attached to the facts which are said to have been stated by one of the said 3 ladies is a matter that would require separate discussion.

458. The evidence of PI Baria [P.W.72] on this aspect, corroborates the version of PSI Rathod [P.W.63] and D.C.P. Piyush Patel [P.W.67]. PI Baria also states about

his going to the scene of offence, PSI Rathod already being there, D.C.P. Patel coming there, his noticing 9 persons lying in a serious condition, etc. He also speaks of 3 ladies coming with PSI Rathod and one of the 3 women stating that the assailants were from Hanuman Tekdi locality and giving information about the incident. PI Baria has also stated about the women giving the names of certain persons as the assailants and has given those names in the Court. PI Baria's evidence fully corroborates the version of PSI Rathod and D.C.P. Patel on this and there has been nothing in the cross-examination, which makes me doubt this version.

459. I have no hesitation to conclude that the incident of 3 women coming to D.C.P. Patel and other police officers and one of them narrating about incident and also giving the names of some persons as the culprits has indeed taken place.

460. In my opinion, the statements about the happenings of the incident and also the naming of some persons as the culprits given by one of the three women to D.C.P. Patel and PI Baria are substantive evidence. These statements mention about the incident immediately and as soon as it ended. The maker of the statements obviously, had not come out of the shock of the incident. The

statements made by one of the said three women about the mob of Hindus having '*gheraoed'* the building and also the persons named by her as being in the mob of rioters, about how the incident happened, how the victims were assaulted, how the ladies were dragged towards the *bushes,* etc., are so intricately connected with the actual happenings of the incident, that they form a part of the same transaction. It is immaterial for the admissibility of these statements as substantive evidence whether the maker of those statements has been ascertained to be a specific or identified person. It is the obvious corollary of the fact that the statements are admissible in evidence without examining the maker. This is also clear from the illustration (a) to section 6 of the Evidence Act which refers to 'by-standers'. The very reference as 'by-standers' indicates that the persons whose statements are admitted under the section are unascertained and unidentified persons. The only requirement is that the 'by-standers' must have knowledge of the event regarding which the statement is made. If the by-standers are required to be examined as witnesses, the illustration (a) would be redundant. These statements are clearly admissible as substantive evidence of the facts which they state under the provisions of Section 6 of the Evidence Act. They can, therefore, be taken into consideration as evidence of the

facts stated therein.

461. To leave no manner of doubt regarding the type of statements that can be admissible under Section 6 of the Evidence Act and the use they can be put to on being admitted, reference can be made to two reported decisions of the Apex Court.

462. In ***Ratan Singh V/s. State of H.P., AIR 1997 Supreme Court 768,*** on which reliance has been placed by the Special Public Prosecutor, the Supreme Court of India had occasion to discuss the scope of Section 6 of the Evidence Act. The relevant facts of that case as found from the reported Judgement are that in the night on a particular date, the mother-in-law of Kanta Devi woke up and heard cries of Kanta Devi, that the appellant was standing there with a gun. This was followed by the sound of a gun shot. Kanta Devi died, Prakram Chand – brother-in-law of Kanta Devi - lodged F.I.R. One of the questions that arose before the Supreme Court of India was the admissibility of the statement uttered by deceased immediately before she was fired at. The Hon'ble Supreme Court of India, held that apart from Section 32 (1) of the Evidence Act, the statement of Kanta Devi to the effect that the appellant was standing nearby with a gun, was admissible under Section 6 of the

Evidence Act, on account of its proximity of time to the act of murder. The Hon'ble Supreme Court also held that whether admissible under section 32 (1) or under section 6 of the Evidence Act, such statement is substantive evidence which can be acted upon with or without corroboration.

463. ***In Sukhar Versus State of Uttar Pradesh, AIR 1999 S.C. 3883,*** the facts of the case as appearing from the reported Judgement were that one Nakkal who had lodged the F.I.R. implicating Sukhar – the accused – [appellant before the Supreme Court] alleging that, that Sukhar had caught hold of his back and fired pistol shots to him causing injury to Nakkal, Nakkal died and could not be examined as a witness. No attempt was made to show how he died and there was no claim that his death was in any way, connected with the injury sustained by him. There was a witness who deposed that Nakkal had told him that Sukhar had fired upon him. It was contended that the evidence of the said witness about Nakkal's statement was not admissible under section 6 of the Evidence Act; and that it can not be said to have formed part of the same transaction. The Supreme Court of India after considering the aspect in depth and after referring, *inter-alia,* to its previous decisions, including the decision in ***Ratan Singh's*** Case [*Supra*] held that 'the

statement of the witness indicating that Nakkal had told him that Sukhar had fired at him was admissible in evidence Under Section 6 of the Evidence Act'. This statement was admitted as evidence of the fact which it stated.

464. Thus, the statements made by one of the three women about the incident including the names of some of the persons as culprits given by her, are an independent piece of substantive evidence, fully corroborating the version of the supporting witnesses.

Video Cassette [Ex.283] and the objection to consider it in evidence

465. Before proceeding further, I shall consider the evidence in the form of the cassette [Ex.283]. It has already been seen earlier that it very much shows Yasmin present on the scene of the offence. The video cassette [Ex.283] shows what was the scene of the offence and what were the reactions of the victims and witnesses immediately after the incident. The cassette gives an accurate idea as to what was happening on the scene of offence, after the police had arrived. It shows some of the injured lying on the ground having serious injuries on their respective person and groaning. It shows the presence of policemen including Piyush Patel and Baria.

It shows Zahira and Saherunnisa speaking to policemen. It also shows Yasmin weeping by the side of one injured. It shows the fire brigade personnel extinguishing the fire, the dead bodies being brought down, the old woman being brought down by a ladder. It also shows what the women were speaking at that time. Certain sentences uttered by them which can be heard when the cassette is played, are significant. They are:

'Yeh sab idhar hi ke the !

[i¸ ¬¸•¸ fŠ¸£¹- ^Å ~¸]

Iss se bandh ke rakha phir woh jangal mein le jaa rahe the!

[f¬¸ ¬¸ •¸¸Š¸ ^Å £‰¸¸ ¹ÛÅ£ ¨¸¸ •¸Š¸¥¸ Ÿ¸ ¥¸ •¸¸ £- ~¸

]

Bandh bandh ke jalaye !

[•¸¸Š¸ •¸¸Š¸ ^Å •¸¥¸¸i¸]

Inko pahle kya bahot maara...inhone!

[f›¸^Å¸ œ¸-¥¸ ^i¸¸ •¸-¸÷¸ Ÿ¸¸£¸ f›-¸›¸]

Sab ko bandh ke rakha tha !

[[¬¸•¸ ^Å¸ •¸¸Š¸ ^Å £‰¸¸ ~¸¸]

Aur koi nahi baki sab jal gaye!

*[*और *^Å¸f ›¸-ú •¸¸^Åú ¬¸•¸ •¸¥¸ Š¸i¸]*

466. The utterances which were made by the persons present on the scene of offence at that time, as have

been recorded in the said cassette, some of which have been reproduced above, are clearly admissible under Section 6 of the Evidence Act. The provisions of Section 6 of the Evidence Act, have already been discussed earlier in the light of the pronouncements of the Supreme Court of India. The utterances reproduced above, lend corroboration to the version of the prosecution witnesses. The utterances: *'Yeh sab idhar hi ke the ! [¡¸¬¸•¸ ƒš¸£¹- ˆÅ ˜¸], Iss se bandh ke rakha phir wo jangal mein le jaa rahe the, [ƒ¬¸ ¬¸ •¸¸Š¸ ˆÅ £‰¸¸ ¹ÛÅ£ ¨¸¸ •¸Š¸¥¸ Ÿ¸ ¥¸ •¸¸ £- ˜¸] , Bandh bandh ke jalaye ,[•¸¸Š¸ •¸¸Š¸ ˆÅ •¸¥¸¸¡¸], Inko pahle kya bahot maara...inhone,[ƒ›¸ˆÅ¸ ¢¸-¥¸ ˆ¡¸¸ •¸-¸÷¸ Ÿ¸¸£¸ ƒ›-¸›¸], Sab ko bandh ke rakha tha, [¬¸•¸ ˆÅ¸ •¸¸Š¸ ˆÅ £‰¸¸ ˜¸¸], Aur koi nahi baki sab jal gaye, [--£ ˆÅ¸ƒ ›¸-ú •¸¸ˆÅÚ ¬¸•¸ •¸¥¸ Š¸¡¸],* etc., speak for themselves. Thus, not only the cassette establishes the presence of Yasmin, it also corroborates various aspects of the prosecution case, as spoken about by the witnesses. The utterances reproduced above are substantive evidence of the facts which can be gathered from them. These utterances and sentences, by themselves and independently, may not prove anything, but when considered in the context of the evidence of the occurrence witnesses, at once create an assurance and lend support to their testimony.

467. I shall now deal with the contentions challenging the consideration of the cassette [Ex.283] in evidence. Shri Shirodkar, the learned Senior Advocate, has pointed out the evidence as to where and in what manner the video cassette [Ex.283] had been kept before it came to be tendered in evidence. PI Kanani's [P.W.74] evidence to the effect that the video cassette [Ex.283] was not seized under any panchanama, that it was lying in unsealed condition, etc., was pointed out and the submissions that are advanced in that regard are to the effect that the claim of the prosecution as to when it learnt about existence of the cassette, is false. The contention is that on the basis of the false claim, the prosecution succeeded in examining the videographer without providing the video cassette [Ex.283] to the defence. It is also contended that PI Kanani's evidence that he forgot about the cassette till the last, cannot be believed; and that the prosecution was well aware about the existence of the video cassette [Ex.283]; but as it did not support the prosecution case on several aspects, it was not produced at all. In the view that I am taking, it is not necessary to go deeper into these contentions and I look at the matter by assuming that ***the prosecution*** was aware of the existence of the video cassette [Ex.283] before it was produced in the Court,

or before a mention of it was made by Yasmin [P.W.29]. Still, when exactly the learned Spl.P.P. in-charge of the matter learnt about it, is not clear. The substance of the contentions advanced by Shri Shirodkar is that in spite of being aware of it, the cassette was not included in the charge-sheet; and that its production before the Court, at a later stage, has prejudiced the accused.

468. I have carefully considered this aspect. On a careful thinking, it is clear that the video cassette [Ex.283] does not contain any facts regarding which prosecution had not made a claim earlier and had not adduced, or was not intending to adduce, evidence. For instance, the video cassette [Ex.283] shows the Best Bakery building burning, the injured lying, the fire brigade attempting to extinguish the fire, the dead bodies being brought down by the fire brigade staff, an old woman trapped on the terrace of the building, etc., etc. However, the prosecution had witnesses to speak about each and every of the above facts. The importance of cassette, therefore, might not have been felt by the prosecution earlier. It depicts only the happenings after the incident and does not connect the accused persons with the alleged offences. It is when the defence took some specific contentions, that the relevancy of the video cassette [Ex.283] might have

occurred to the prosecution and it is thereafter that it might have been seen carefully by somebody connected with the prosecution and/or the learned Spl.P.P. For instance, a point not within the knowledge of the accused persons – viz. that Yasmin was not present at all on the scene of offence, which also could not be gathered from the chargesheet or other record – was not only taken up, but was being blown out of proportion and therefore the fact that Yasmin is seen in the video cassette [Ex.283], became important. Similarly, that Zahira's [P.W.41] *Nani* was not present at all during the incident, was a contention taken up by the learned Advocates for the accused, which was not borne out by anything on record and regarding which the accused claimed to have had no knowledge. It is not as if the video cassette [Ex.283] shows something new which is not a part of the prosecution case regarding which the accused had been forewarned. It is not that the accused were required to meet a new case on account of the cassette [Ex.283] being tendered in evidence. The purpose of supplying of copies of the documents on which prosecution relies, is to give an opportunity to the accused to know what case they are required to meet. It is not that Yasmin's presence, that injured had suffered serious injuries, that the police and fire-brigade came and rescued the victims, are factors not spelt out from the chargesheet.

469. The principles of Criminal Jurisprudence require that the accused should not be taken by surprise; and that they should be aware well in advance of the case which they are required to meet. No new fact, not initially forming part of the prosecution case, has been introduced by the cassette [Ex.283]. Since the accused had information from the police report that Yasmin was present during the incident, there was no question of they being 'taken by surprise' only because Yasmin's presence is established by a visual record in the cassette. Moreover, the copies of the cassette [Ex.283] in the form of compact discs were given to the learned Advocates for the accused before it was taken on record, marked and exhibited. The statement of the videographer Gautam Chauhan [P.W.69] was also recorded by the Investigating Officer and a copy thereof was furnished to the learned Advocates for the accused before he was examined as a witness. Thus, the accused had been given full opportunity to know the contents of the video cassette [Ex.283] and the version of the person who did the recording in question, before the relevant evidence was introduced, and had been given an opportunity to cross-examine the material witnesses in that regard. No prejudice has been caused to the accused by introduction of the said video cassette [Ex.283].

470. It is contended that the delay in producing the video cassette [Ex.283] was due to the fact that the prosecution wanted to '*doctor*' the video cassette [Ex.283] suitably. There is no basis for this contention. It could have been meaningfully advanced, only if Gautam Chauhan [P.W.69] had been cross-examined on the relevant aspects, for establishing that all that was shot, is not seen in the video cassette [Ex.283], or is not in the same order, etc., or that it has something more than what he shot. Gautam Chauhan [P.W.69] who has, in his evidence, clearly stated that he had done the shooting contained in the video cassette [Ex.283], has been asked a number of questions, but asking him whether all that he shot was not seen or available in the video cassette [Ex.283] when it was played over to him in the Court, is avoided. Not even a suggestion that the video cassette [Ex.283] does not contain the entire shooting that was done by him with respect to the Best Bakery incident and with respect to the scene of offence, has been given to Gautam Chauhan [P.W.69]. In any case, in the view that I am taking, it is not necessary to discuss this aspect further. It is nobody's case that an amalgamation of different shootings done at different time and place exists in the video cassette [Ex.283], or that any figures or objects are superimposed on the film

which was shot. Thus, what remains is only the possibility of certain part from it having been removed. But this possibility, even if real and genuine, would hardly be a ground to refuse to look into it and ascertain what it contains. What it contains would be relevant and material, irrespective of the fact that it is not a full cassette or a full record of the shooting done by Gautam Chauhan [P.W.69] on that day, at that place. To illustrate this point, an example can be given as follows. Suppose a photographer takes, say about 4 or 5 photographs of the scene of offence one after the other but after keeping some time gap. Suppose some - say 2 to 3 - out of the said photographs are either got destroyed or deliberately not produced, can the remaining photographs be refused to be looked into, or from being considered as evidence of what they would show ? Suppose a photograph shows 'A' hitting 'B' with a stick, can the photograph be refused to be admitted in evidence, though relevant, on the ground that a photograph taken prior to that showed 'B' in a posture suggesting of his intention to assault 'A', is not produced ? The answer has to be a 'No'. To illustrate the point further, another example can be given. Suppose a witness – X - on reaching a particular place, notices 'A' assaulting 'B', can his evidence be contended to be inadmissible on the ground that 'before he came on the

scene, 'B' had given filthy abuses to 'A' and had provoked him; and that 'X' will not be able to disclose what had happened before he came on the scene? Even if it is held that the cassette is not a full record of the shooting done on the occasion or that certain parts of it have been removed, still, it is good evidence of what it shows. If at all anything has been removed from the original cassette or from out of the shooting done at that place at that time, then what it was, is to be decided on the basis of evidence and probabilities. That the possibility of something having been deleted exists, will not be lost sight of by the Court while appreciating the cassette as a piece of evidence, but because of such possibility, if the Court is called upon or expected to just ignore what is seen, then that would be, clearly, impermissible.

471. It is contended that the time line indicates that the minutes change even before a count of 60 seconds; and that this can be one more example of doctoring of the video cassette [Ex.283]. I am not able to give any importance to this. First of all, no such specific instances have been brought on record by putting the same to Gautam Chauhan [P.W.69], or any other witness. Secondly, it is in the evidence itself that even if the shooting would be stopped, the time line would continue

to run and therefore, the change of minutes can occur before a shooting of 60 seconds. Thus, that change of minutes occurs before a shooting of 60 seconds, does not, by itself, indicate *'doctoring'*. In the absence of any questioning in this regard to Gautam Chauhan, PI Baria and PI Kanani, this contention is untenable.

472. In their attempt to discredit the evidence of the cassette, a question is posed by the learned Advocates for the accused as to '*why the footage of Best Bakery episode is only of 12 to 13 minutes when there were no restrictions on what to videograph and how long the footage should be'*. An answer to this question is provided by them as that 'the rest of the footage which falsified the case of the prosecution, had to be eliminated by '*doctoring*' the cassette. There is no substance in this contention. 'Why is the footage of the Best Bakery episode only of 12 to 13 minutes' has been asked neither to Gautam Chauhan [P.W.69], nor to PI Baria [P.W.72]. The argument which presupposes that actually there was more footage, fails as not only this fact itself is not established, but questioning any witness on that, has also been scrupulously avoided by the learned Advocates for the accused.

473. It is next contended that the ***inability*** of PI Baria

[P.W.72] or PI Kanani [P.W.74] to prove how, with whom and where the video cassette [Ex.283] was kept, is not in fact an 'inability', but a deliberate suppression 'to prevent the defence from establishing the *doctoring* and to establish that the claim of the prosecution that Zahira [P.W.41] and others disclosed names to the police, is not concoction of evidence'. [Page 51 of the written submissions of defence filed by Shri Shirodkar]. This is without any substance. There is no case put to anyone - much less there exists any evidence - that shooting in respect of the names disclosed by Zahira [P.W.41] and/or others or in respect of Zahira saying that she did not know any of the rioters was done; and that the original [undoctored] cassette contained such a recording.

474. It is next contended that the defence had suggested that Yasmin was not present when the incident took place; and that examining the videographer Gautam Chauhan [P.W.69] belatedly and by permitting it to be done, grave prejudice and irreparable damage has been caused to the defence. There is no substance in this contention. That Yasmin was not present, is a contention invented by the learned Advocates for the accused themselves and obviously, not from what was within the knowledge of the accused. This is clear from the fact that none of the accused, in their examination under Section 313 of the

Code, has even claimed to have known Yasmin, or nobody else of the victims, and for that matter, even the Best Bakery itself. Merely because an unfounded contention is demonstrated to be false in a more effective and obvious manner, no grievance of prejudice having been caused, can be made.

475. Though Shri Shirodkar, the learned Senior Advocate, had filed a written arguments on behalf of the entire defence, Shri Bichu, Advocate, on behalf of accused nos.13, 14, 15 and 20, and Shri Pawar, Advocate, on behalf of accused nos.16 to 19 and 21, have also chosen to file separate written arguments. This has been done, apparently to cover the points which though initially not thought of, but the significance of which was realized as the arguments progressed. It appears that the significance of certain points or the necessity to address to them was thought of by the learned Advocates for the accused in view of the queries of the Court and the discussion that took place pursuant to the queries, during the lengthy arguments advanced by Shri Shirodkar. Shri Pawar has, in his written arguments, referred to the video cassette [Ex.283] as '*a key to many truth*'. Much reliance has been placed on the video cassette [Ex.283] to contend that it proves the prosecution case to be false. It cannot be helped

observing that the various arguments advanced by the learned Advocates for the accused contradict one another.

476. It is contended by Shri Mangesh Pawar, the learned Advocate for accused nos.16 to 19 and 21, in support of the contention that the video cassette [Ex.283] had been seen by somebody who had tutored Yasmin about she being seen in the video cassette [Ex.283], and that 'how else would Yasmin know that she was filmed?' This argument, which is absolutely without any merit, is rather surprising. It presupposes that a person who is being filmed, will not know about it unless he or she would be told about it by someone who has seen the film. No opinion is being expressed on whether Yasmin was told by someone who had seen the video cassette [Ex.283] about her presence being seen in the video cassette [Ex.283], but that she knew that she was filmed, is not indicative of that.

477. Based on the evidence that PI Kanani [P.W.74] claims to have not seen the video cassette [Ex.283], that it not being kept in a sealed condition, etc., an interesting contention is put forth. An elaborate explanation as to how this might have happened and what is the possible truth behind it, is advanced. It is found in the written arguments [Ex.523/A] filed by Shri Pawar [Clauses E & F

on pages 63 and 64 of the written arguments] and is best understood by reading the same. These contentions are mere flights of imagination and without any basis. No attempt has been made in the cross-examination of various witnesses to obtain any evidence supporting at least parts of this theory. It is not suggested to PSI Rathod [P.W.63] that the witnesses told him that they did not know the offenders, that they were outsiders or that the witnesses could not see them, etc. In fact, the suggestion given to PSI Rathod [P.W.63] is with respect to the ladies telling that a mob of Hindu persons had done it, without trying to bring on record that the mob was of persons unknown to those ladies. 'Mob of Hindu persons' does not mean 'mob of unknown persons'. Further, no suggestion has been given to PI Baria [P.W.72] or to PI Kanani [P.W.74] or to anybody else that the duplicate video cassette was got prepared deleting the portion favourable to the accused.

478. There is no substance at all in all these contentions which are based on certain assumptions, then further assumptions on the assumed facts, and then further assumptions on those facts also; but apart therefrom, what is most significant is that no attempt, by cross- examining the relevant witnesses to support this version in any manner, has been made.

479. It was open for the accused to make an attempt to show that something was, in all probability, deleted; and that, what was deleted was in relation to the happening of a particular event favourable to the accused. Without questioning the videographer Gautam Chauhan [P.W.69], PI Baria [P.W.72], Zahira [P.W.41] and Saherunnisa [P.W.40], Yasmin [P.W.29] and/or others who figured in the cassette, about the record not being genuine, and not of the entire shooting done on that occasion, no inference as desired by the learned Advocates for the accused can be drawn.

480. As regards the contentions that the prosecution was aware of the cassette prior to its being produced in the Court on the ground that a C.D. from the cassette had been prepared already on 19/09/2004; and that Zahira had been questioned with respect to the happenings recorded in the cassette even before it was produced, I do not find it very significant. Here, when one speaks of '***prosecution***' it is not clear that it refers to a particular person or group of persons. It is possible that the learned Spl.P.P. had an idea about the existence of the cassette or the contents thereof also, but unless and until the cassette would be received by her through some official and authentic sources together with the

relevant information as to the person doing the shooting, etc. it would not be possible for her to make a claim of the existence of the cassette, before the Court or seek its production in evidence.

481. It is pointed out that the C.D. shows 19/09/2004 as the date on which it came in existence. That it was prepared on 19/09/2004 was not pointed out before the concluding arguments and no explanation was sought from the learned Spl.P.P. This contention/argument was kept reserved, apparently in the belief that it could provide a fatal blow to the prosecution's claim about the cassette and/or C.D. It is contended by Shri Pawar, the learned Advocate for accused nos.16 to 19 and 21, that Section 4 of the Information Technology Act, 2000, proves that the C.D. [Ex.283/3] was prepared on 19/09/2004 in the absence of any evidence to prove the contrary. I find that Section 4 of the Information Technology Act, 2000, has no relevance to this aspect. It deals with meeting of a legal requirement to be in writing, typewritten or in print with respect to any information or any other matter, and provides that such requirement shall be deemed to have been satisfied if such information or matter is rendered or made available in an electronic form and is accessible so as to be useful for a subsequent reference. Thus, the Section is

intended to bring information or matter rendered or available in an electronic form on par with a matter required to be in writing or printed form, etc. The contention that the date seen in a C.D. as the date on which it was created, should be concluded as correct, without any evidence, cannot in any case, be advanced on the basis of the said section.

482. According to Smt.Manjula Rao, the learned Spl.P.P., she had got prepared the C.D. [Ex.283/3] on a computer which was not in use for a long time; and when and by whom, the date and time setting was done, is not known to her. I do not find it proper to come to a conclusion in this regard - viz. when the C.D. was prepared, or got prepared, without any evidence as to the computer on which the said C.D. was got prepared, and without there being any evidence as to whether and in what circumstances, it is possible to have a date of creation of the C.D., which is wrong. I do not think that the date and time setting cannot manually be changed at any time. However, even if it is held that the C.D. is actually prepared from the cassette on 19/09/2004, still, that would not affect the genuineness or the evidentiary value of the cassette. It would only show that the statement of the learned Spl.P.P., as to when it was prepared, is wrong. Though this would be relevant in

considering the possibility of the C.D. being available to some persons earlier, it would not go, in any way, towards affecting the genuineness, authenticity and evidentiary value of the cassette itself. The possibility of the C.D. being available to a witness, prior to his giving evidence may affect the weight to be attached to the evidence of such witness, on certain aspects, and his evidence may not be weighed more by reason of it 'being corroborated by the cassette [Ex.283]'; but to claim or hold that this affects the genuineness or value of the cassette would be incorrect.

483. It is contended by the learned Advocates for the accused that the cassette has been useful to the prosecution for a very limited purpose; and that it is proved to be to the benefit of the defence and the truth. In fact, it is repeatedly asserted in the written arguments filed by Shri Mangesh Pawar, the Advocate for the accused, where the cassette is not only described '***a key to many truths***' [Page 61 of the written arguments], but how it advances the version of the defence is also elaborately mentioned [Pages-68-90]. Without going into the soundness of those contentions, it may be observed that if this is indeed the belief of the accused, then it is not possible for them to complain prejudice on account of its production.

484. A contention that the cassette contained shooting done simultaneously on the rear side of the Best Bakery Building as well as the front side of the Best Bakery building by two different camera is combined into it by editing, has been taken up. [Para Nos. e & f on Pages 68 & 69 of written arguments Ex.523/A]. This is also without any substance. First and foremost, the possible explanations of any facts are always so many and therefore to make any reasonable claim of this nature, it was a must to specifically question and confront videographer Gautam Chauhan on this. This is the least, but, in fact even PI Baria who claimed the responsibility of the shooting, also ought to have been questioned on this aspect. Without doing so, such fanciful claims can not be advanced and at any rate, can not be seriously accepted. Moreover, there is also a simple explanation of what is claimed to be an indicator of tampering and editing. It is in evidence that even if the shooting is stopped, the time would keep on running and when the shooting restarts, it may show the time when it commences. Thus, if after doing shooting, for sometime – say for 20 seconds – the shooting is stopped and then, after some time – say 30 seconds – within which time, the videographer has moved to a different location, the shooting restarts, it would be not from 21 seconds

onwards, but from 51 onwards. The change of minute which has been referred in this specimen by Shri Pawar, occurs not after 60 seconds and therefore there is nothing to indicate that the shooting had not been stopped during that period. In other words, where after showing the rear side premises and doing the shooting, the shooting is stopped and videographer then comes to the front side and starts shooting there, such an eventuality can take place and this was pointed out to Shri Pawar when the C.D. [Ex.283/3] prepared from the cassette [Ex.283] was played in the Court at the instance of Shri Pawar. This highlights the necessity of requiring the party interested in making a particular point, to question the witness appropriately on those aspects, without which no inference on a mere suggestion of party can be drawn by a Court of Law. As already observed, this only indicates how the possibilities are rather too many. Perhaps, realizing that Gautam Chauhan could have given a satisfactory explanation destroying this claim of the defence, how this has happened, has not been asked to him, in the cross-examination.

485. Again, a similar contention is advanced which is worth rejecting outright and has to be taken a note, only because it is put fourth in the written arguments [Clause (g) Page 69]. It is contended that though the

prosecution case was that hands and legs of 9 persons were tied down by the culprits, the material used for tying the limbs of 9 persons is not seen in the cassette, which creates serious doubt about the story of tying the limbs. This is ridiculous. Everything that was available on the scene of offence was recorded is nobody's case. That the entire ground surrounding the Best Bakery was seen in the frame or that shooting showing the entire ground was done, is also nobody's case.

486. The cassette is not merely a document, but it is more akin to 'real evidence'. The Court can take cognizance of what is seen and heard when it is played, by its own senses.

487. Thus, the cassette [Ex.283] is properly admitted in evidence. It supports the evidence of the occurrence witnesses. The objections raised against its admission in evidence are without any merit. The contention that part favourable to the accused has been removed from the cassette, has also no substance. In the absence of any attempt to question Gautam Chauhan and other material witnesses in the cross-examination and elicit material to suggest such an inference, no conclusion about any part having been removed from the cassette, can be drawn.

Moreover, the removed part, if any, could be either favourable to the accused, or to the prosecution, or partly favourable and/or unfavourable to both the parties, or altogether irrelevant. In the absence of any material to indicate by whom, when and under what circumstances a part of the cassette was removed or got deleted, no conclusion about whether it could be favourable to the accused or to the prosecution can be drawn. The avoidance of questioning Gautam Chauhan on what else was shot, or that something that was shot was missing, can also lead to an inference that the cross-examiner thought it too risky. It may be observed in this context that PI Baria categorically stated that shooting in respect of the three women coming to him and giving names of some of the offenders to Piyush Patel was available in the cassette. After viewing the cassette, he admitted that it did not contain such shooting. The matter has been left at that by the parties and therefore, may not be discussed any further; but the point which I intend to make is different. The point is simply that no inference can be drawn that anything that was favourable to the accused had been shot and was removed. That the learned Spl.P.P. disclosed the availability of the cassette much later; and that this was done deliberately, even if true, cannot affect value to be attached to the cassette as a piece of evidence.

No prejudice has been caused to the accused by introducing the cassette [Ex.283] in evidence late.

Medical Evidence

488. I shall now refer to the medical evidence, as has been adduced in this case, which fully corroborates the version of the occurrence witnesses who have supported the prosecution case. The medical evidence however disproves the version of Nafitulla [P.W.31] and Nasibulla [P.W.30], who are hostile, as regards the manner in which they sustained the injuries in question. The injuries sustained by Taufel, Raees, Shehzad and Sailun have already been mentioned earlier. The injuries sustained by Nafitulla and Nasibulla will be mentioned later. Since the medical evidence is not in dispute, it is not necessary to examine the same in depth. The evidence of Dr.Smt. Sutapa Basu [P.W.47] clearly establishes that the cause of death of Ramesh is 'shock and haemorrhage following multiple chop wounds'. The evidence of Dr.Beejaysinh G.Rathod [P.W.48] clearly establishes that the cause of death of Prakash is - 'craniocerebral trauma following multiple injuries over head'. The evidence of Dr.Kishor P.Desai [P.W.49] clearly establishes that the cause of death of Baliram is -'craneocerebral trauma after assaulted head injury'.

This is supported by the entries made in notes of post-mortem examinations in respect of the dead bodies, which are duly proved [Ex.194, Ex.201 and Ex.208 respectively]. There is no dispute on this.

489. Firoz and Nasru had sustained the following injuries as revealed by the evidence of Dr.Beejaysinh G. Rathod and from the notes of post-mortem examination [Ex.202 and Ex.204 respectively] carried out on their dead bodies.

Injuries on the body of Firoz :-

i) A stab wound of size 1.5cm X 1cm X muscle deep on right cheek, 2cms below right eye. It was horizontal,

ii) A stab wound of size 2.5cms X 1cm X muscle deep, horizontally placed on the right sub mandibular region, 3cms below angle of mouth,

iii) A stab wound of size 3cms X 1cm on right and left upper lip through and through,

iv) A stab wound of size 3cms X 1cm X cavity deep on left axilla posterior fold,

v) A perforated wound of size 0.5cm X 0.5cm X cavity deep in the midline epigastric region, horizontally

placed,

vi) A perforated wound, size 0.5cm X 0.5cm X muscle deep on the front of the chest, midline, at the level of 4th intercostal space.

All these injuries were ante-mortem.

Injuries on the body of Nasru :-

i) A stab wound of size 2.5cms X 1cm X cavity deep on left axilla, posterior fold, horizontally placed,

ii) A stab wound of size 2.5cms X 1cm X cavity deep, obliquely placed in the 9th intercostal space at the anterior axillary line with a tailing of 4cms, lowered down,

iii) Incised Wound of size 3cms X 1cm X muscle deep on left forearm, postero laterally 6cms below elbow,

iv) Incised wound of size 6cms X 1cm X muscle deep on the left shoulder top,

v) Incised wound of size 2cms X 1cm on right index finger, which is cut,

vi) Contusion of size 6cms X 2cms on the left side of the front of the chest,

brown in colour,

vii) Incised wound of size 6cms X 1cm X bone deep on the left nape of the neck behind left ear,

viii) Incised wound of size 3cms X 1cm X muscle deep, obliquely placed on the left parieto occipital region, 3cms away from midline,

ix) Incised wound of size 3cms X 1cm X muscle deep on the left frontal region, 2cms lateral to midline.

All these injuries were ante-mortem.

Though there is not much to be discussed about the medical evidence, in as much as, it is unchallenged, some inconsistencies therein may be noticed. It has been already observed that the injuries on Raees Khan were described as C.L.W.s by Dr. Meena Robin [P.W.46], while they were described as incised wounds by Dr. Dilip Choksi[P.W.62]. Further, the injuries noted by Dr. Meena Robin on the person of Baliram are totally different from the injuries noted by Dr. K.P. Desai [P.W.49] in the notes of post-mortem examination [Ex.208] on his dead body. The injuries on the body of Nafitulla [P.W.31] also have been differently mentioned by Dr. Meena Robin and Dr.Dilip Choksi. All this may not be very material. Since the doctors have not been questioned specifically

about such variations, it is not possible to form any opinion as to the exact cause of such difference, but an inference, which seems reasonable, is that due to mass casualty, the records were perhaps not properly made.

490. The evidence of Dr. Meena Robin and Dr. Dilip Choksi needs discussion in a particular context. It may be observed that the evidence of these two doctors as regards their assessment of the seriousness of the injuries suffered by the victims, and more particularly Raees and Nafitulla, seems to be unsatisfactory.

491. According to Dr.Meena Robin [P.W.46], the injuries sustained by Raees were 'simple if no complications'. According to her, injuries sustained by Nafitulla were also 'simple' According to Dr.Dilip Choksi [P.W.62] also, the injuries suffered by Raees were 'simple'. As regards the injuries suffered by Shehzad [P.W.28], initially, Dr.Choksi said that the injuries suffered by him were 'simple', but later on, corrected himself and said that they were 'grievous'. As regards the injuries suffered by Nafitulla [P.W.31], interestingly, Dr.Choksi says that they were 'grievous' at the time when he was admitted, but turned out to be 'simple' after the conclusion of the treatment. I have got a definite

feeling that both these doctors have tried to project the injuries as less serious than they actually were. I have been quite slow in coming to this conclusion but after carefully considering their evidence, I do conclude that way.

492. It may be observed that in law the terms 'simple' and 'grievous' are used not in relation to injuries, but in relation to 'hurt'. 'Grievous hurt' is defined by Section 320 of the I.P.C. which provides 8 kinds of hurt that are designated as 'grievous'. Clause '*Eighthly*' of Section 320 of the I.P.C. however consists of a class of hurts which can not be distinguished by a broad and obvious line, from slight hurts, as in the case of hurts contemplated by 7 previous Clauses. Emasculation, fracture or dislocation of a bone, etc., would be obvious and visible, but every injury which endangers life may not have any visible or obvious line separating it from the category of 'simple hurt'. Such injuries, though not falling within any of the first 7 Clauses of Section 320 of the I.P.C., may, nevertheless, be very serious and may cause intense pain and a lasting injury to the body constitution. It appears to me that since the injuries sustained by Raees and Nafitulla did not have any obvious quality making it at once clear to be in the category of 'grievous hurt', the doctors have attempted to describe

it as 'simple'. For instance, if a fracture would be noticed, the doctors would not able to claim it to be 'simple hurt', though it may be a small fracture not even remotely posing any threat to life.

493. In my opinion, the doctors are clearly wrong in terming the injuries suffered by Raees and Nafitulla as 'simple'. It is an admitted position that the injuries sustained by Raees and Nafitulla also like in case of others were on vital parts of the body. Raees was required to be hospitalized till 16/03/2002. The injuries on such vital part of the body could not be termed as 'simple' in my opinion. The very fact that a qualification as 'if no complications' is noted before terming them as 'simple' itself indicates that they are not 'simple' to the knowledge of the Doctor, who at that time itself saw a possibility of complications. According to Dr.Choksi, Nafitulla had sustained following injuries:

i) I.W. from left side occipital to the mandibular region, size 15cm X 2cm X 1cm,

ii) I.W. on occipital region, size 4cm X 2cm X 0.5cm,

iii) I.W. on right leg, size 3cm X 1cm X 0.5cm.

The injuries were on the occipital region. X-rays of skull and mandible were required to be taken. It appears that the doctors have chosen to describe the injuries as 'simple' where there was no fracture. This is also clear from the evidence of Dr.Choksi, who initially described the injuries sustained by Shehzad as 'simple', but later on, after noticing that he had a fracture, stated that the injury was 'grievous'. It is after noting that there was a multiple linear fracture, he changed his opinion about the seriousness or category of injuries. The approach of the doctors is incorrect. Whether they are ignorant or attempted to take advantage of the absence of a broad defining line bringing the injuries suffered by Raees and Nafitulla in other more obvious categories provided by Section 320 of the I.P.C., is difficult to understand. The concept that the injuries being 'serious when admitted' and 'turning out to be simple later', as introduced by Dr.Choksi, is unheard of. The voluntary statement made by him when his evidence was being recorded to the effect 'there was no fracture' shows his concept, which is obviously erroneous. Because of such wrong conception, he admits that since in the ultimate result, the patient survived, he terms the injuries in question as 'simple'. Regarding Raees, he says that at the end of the treatment, there were no complications and as such, the injuries were 'simple'. Interestingly, he

admits that if the injuries would lead to death, he would call the very same injuries as 'grievous'.

494. It is apparent that the injuries suffered by all these six persons were very dangerous, on vital parts of the body and are necessarily required to be termed as 'grievous hurts'. That they were dangerous, have been admitted by both these doctors. The only justification for calling them 'simple' is given as absence of fracture and that 'no complications arose at the end of the treatment'. It is not possible to accept the theory of 'grievous hurt subsequently turning into simple hurt'. Why this is elaborately mentioned is a doubt is felt whether this is bonafide ignorance, or an attempt to reduce the gravity of the injuries. This is particularly so because Dr.Choksi was rather reluctant to admit that head is a vital part of the body. He qualified it by saying that it is so because brain is located in head. Nobody had asked him ***why*** head was a vital part of the body, but still, just in order to stick to his claim of injuries sustained by Raees being simple, he attempted to give a round-about answer.

495. In any case, the concepts 'simple hurt' and 'grievous hurt' are essentially legal. They are not medical concepts. From the evidence of these doctors

themselves, it can be safely concluded that the injuries suffered by Raees and Nafitulla were also such, which had, in fact, endangered their lives and ought to be termed as 'grievous hurt'. Since it is a legal concept, the Court is competent to give its own finding as to whether the hurt in question is 'simple' or 'grievous' and is not bound by the qualification made by a doctor. It is sufficient to take into consideration the facts in respect of nature of injury, as described by the doctor for enabling the Court to come to its own conclusion in that regard. The observations made by the Supreme Court of India in its decision in ***State of West Bengal V/s. Meer Mohammad Umar, A.I.R. 2000 SC 2998, [para 23]*** indicate that it is open to the Session Judge himself to deduce a particular injury to be 'grievous hurt' after knowing the facts thereof described by a doctor. In this case, as a matter of fact, the evidence of doctor does indicate that the injuries sustained by even Raees and Nafitulla were serious; and that they have simply omitted to qualify them as 'grievous hurt' either because of some misconception, or for any other reason.

496. The evidence of these doctors, anyway, shows that the injuries sustained by the said six witnesses could be caused by sharp cutting weapons.

Evidence of witnesses from locality

A] Smt.Jyotsnaben Bhatt [P.W.43]

497. Before examining the evidence of Zahira and others from Habibulla family, the evidence of Smt.Jyotsnaben Bhatt [P.W.43], Kanchanbhai Mali [P.W.44] and Veersinh Zala [P.W.45], who are the residents of the Hanuman Tekdi locality, may be examined. All these witnesses were declared hostile. They were examined in the original trial also and in that trial also, they had been declared hostile. However, the evidence of Jyotsnaben Bhatt and Kanchan Mali establishes the happening of the incident almost in the same manner, as is claimed by the supporting eye witnesses.

498. Jyotsnaben states that on 01/03/2002, riots had taken place at Hanuman Tekdi; and that those were communal riots; and that at about 8.30. p.m. to 9.00 p.m. the mob was near the Hanuman Temple. Jyotsnaben also speaks of the noise of the mob and shouts like '*maro*' '*maro*'. The size of the mob is given by her as of about 1000 to 1200 persons. From the attitude of Jyotsnaben, as reflected from her evidence, it is clear that she did not want to disclose anything in the matter and had decided to say that when the riots started she went inside and had not seen anything. However, pursuant to the permission to put questions in the nature of

cross-examination, as granted, the learned Spl.P.P. has been successful in securing evidence from Jyotsnaben, supporting several aspects of the prosecution case. Thus, after confronting Jyostnaben with her previous deposition [X-75 for identification] recorded during the original trial, Jyotsnaben has admitted that she heard the noise and shouts; and that they were to the effect '*mari nako' 'salgavi do*'. Jyotsnaben also admitted that the mob was of Hindu persons; and that the persons in the mob were holding weapons - i.e. swords, '*guptis'* and sticks. She also stated that the persons in the mob were having cans of petrol and kerosene with them. Jyotsnaben also states that the mob was there throughout the night; and that the persons in the mob were moving around the bakery building. Jyotsnaben has also stated that she did state about it during the original trial. Jyotsnaben admits having stated during the previous trial that when the persons in the Best Bakery building had climbed down, the persons in the mob had attacked them and also admits that this fact is true. Jyotsnaben also states that when the police arrived in the morning the Best Bakery building was burning; and that the persons from the fire brigade were attempting to extinguish the fire by spraying water. Jyotsnaben also states about burnt dead bodies of small children, men and women, as also the injured persons being put in the ambulance and

taken to the hospital.

499. It is apparent from the evidence of this witness that she was certainly not inclined to depose in favour of the prosecution, but still, had to admit basic facts of the prosecution case, barring - of course - the connection of the accused with the alleged offences. It is also clear that she did not want to say before this Court even as much as she said during the previous trial and it is only after being confronted with the record of her deposition in that trial, she admitted certain things. Even then, she tried to qualify her statements by saying that she had not seen those happening herself, but had heard that they had taken place. Since the house of this witness is situated extremely close to and right in front of the Best Bakery building, it is clear that she must have heard, seen and known much more than what she states.

500. The deposition of this witness during previous trial having been marked and exhibited by consent as Ex.158, the same can be read. It makes an interesting reading. Jyotsnaben had claimed in the previous trial about it being dark, though she had described the incident. The darkness did not prevent her from seeing the incident, but it prevented her from describing the persons in the

mob. Before that Court and before this Court also, she does not dispute the morning incident. Moreover, even though she claimed in her deposition [Ex.158] in the previous trial that there was dark, she is positive that the mob was of persons who had come from '*outside*'. In the cross-examination before that Court, it was got elicited from her that the mob was of strangers; and that the persons who were produced as accused in the Court were the persons of her '*mohalla'.* She has repeated in her previous deposition at another place also about the accused being from her '*mohalla*' and having saved the Muslim families in their area. Here, before this Court, Jyotsnaben has not said anything about the accused having saved lives of any Muslim families in the area. Jyotsnaben can not be considered as truthful witness and her bias against the prosecution is apparent. However, even she does not dispute the happening of the incident – also of the happening of the morning incident. What also requires to be noted is that she was reluctant during this trial to say even as much as, she had said earlier.

B] KANCHAN MALI [P.W.44]

501. Kanchan Mali [P.W.44] states that the Best Bakery building is situated at a distance of about 40 feet from his house. He also speaks of the riots; and that on

01/03/2002 at about 8.30 p.m. to 9.00 p.m. a mob of persons had assembled near Hanuman Temple; and that those persons were slowly moving towards the bakery and were shouting to the effect '*maro' 'todo', 'bakery jalao*', etc. The witness initially wanted to avoid saying anything further and therefore stated that on noticing this, he was frightened and closed the door of his house and remained inside. Obviously, as his evidence reveals, this was stated with the object of avoiding any further questions and answers about the incident. A curious aspect of the evidence of this witness is that he deposes about the happenings and then suddenly says that 'i*t had indeed happened that way, but he had not seen it*'. Ultimately, what he admits is interesting. That he had seen the members of mob that had gathered at Hanuman Tekdi; and that they were having sticks and stones. When confronted with his deposition [X-77 for identification] in the Court at Vadodara, he admitted having said there about the rioters being armed with '*guptis*' also, but claimed that he might have stated so because he had heard it. He also admits having stated so during the previous trial. Thus, he does indeed support the prosecution, but then suddenly withdraws and states that all this had happened is true, but he had not seen it. It is obvious that he is not willing to disclose all that he knows. Though much can be said about his

evidence, it would not be of a much use in the ultimate analysis and therefore, I would concentrate on what he ultimately admits as personally experienced and seen by him.

502. He does speak that he had seen the mob of rioters. According to him, some persons from the locality had come in the morning for helping the inmates of the Best Bakery building. Kanchan Mali says he himself saw the happening on the rear side of the Best Bakery building; and that those persons were trying to help the inmates of the Best Bakery building from the rear side. Thus, according to him, the persons who had gathered there in the morning were not the assailants, but the persons assembled for helping the inmates. He also says that he saw a ladder. He also states that help was being given by those persons to the inmates of the Best Bakery building, by putting up something like ladder. However, curiously, he states that when the police came, those persons, whom he refers to as '*hamarewale*' ran away. He has clarified that by '*hamarewale*' he meant 'Hindu'. He said that he could not say who were those Hindu people; and that he did not know their names. He was therefore questioned as to how then he understood them to be 'Hindus', to which he has replied that '**because in that locality, only Hindus were residing**'.

After prolonged questioning, apparently the witness was anxious and worried over the answers which he was giving and then gave, deliberately confusing, inconsistent and rather foolish appearing answers. His idea seems to be to make his evidence absolutely incomprehensible.

503. He admits having said to the police that the persons in the mob were having sharp weapons like swords and '*guptis*' and also petrol, kerosene '*kaarba*', but claims that it was stated on the basis of what he had heard. He however, admits that he ***did not*** state before the police that what he was telling them was based on what he had *heard*. He stated before the police, as if, he had seen those things himself. He adds that it was his mistake not to have stated to the police that the facts which he was stating to them were not *seen* by him, but were *heard* by him. This is how he tries to resile from what he has stated. At the same time, he states that in the Court at Vadodara, he stated only the facts which he had personally seen or observed. He agrees that it did happen that the mob of Hindus had ransacked the Best Bakery building; and that they had set on fire the Best Bakery building and the house adjoining the bakery building. After having said so, he takes a pause and volunteers as follows: ***This had happened certainly, but I had not seen it***' This is ridiculous and this is what

the attempt of the witness appears to be viz:- to make it appear that the evidence given by him is ridiculous so that it can be excluded from consideration.

504. I have no hesitation to conclude that he has given false evidence.

505. What he, however, admits as having seen himself is that people from Best Bakery building were getting down, that they were being attacked by the mob as soon as they get down, that the ladies were being dragged; and that when the men tried to run away, the persons in the mob tied their hands and legs and set them on fire. He confirms that on seeing this sorrowful scene ['*dardnaak drishya*'] and since he was not able to bear it he went to his house [Page 1654, Para 31 of the Notes of Evidence]. Thus, this, he himself has actually seen. It was got clarified from him as to what was the 'sorrowful scene' which he was unable to see when he answered as "*woh jo maar-jhod kar rahe the*". He admitted again, that the persons were beaten and blows were being given to them. He however, made an obvious attempt to dilute the same by saying that the assault was by 'sticks'. This is inconsistent with the injuries sustained by the concerned persons who were obviously the inmates of the Best Bakery building.

506. Apparently, the witness himself was unable to think of an explanation regarding the absurdity in his evidence viz: mentioning of certain facts as having happened and then adding that he had not seen or perceived the said facts.

507. Shri Shirodkar, the learned Senior Advocate in the cross-examination supplied some explanation to this witness of his evidence which the witness gladly accepted. Thus, it was asked to the witness that the police were asking him something whether it had happened in particular way and he saying 'Yes', to which naturally the witness has agreed, having found out a way of explaining how facts not seen by him are appearing in his evidence and the statement before the police. A reason for his going on answering in affirmative to the questions put by the police is also supplied. Thereafter, the theory of darkness is introduced which also, is accepted by this witness. Unfortunately for the accused, it could not be suggested that it was dark in the morning also and as such, the evidence regarding the incident in the morning as given by Kanchan Mali could not be established to be false, though Kanchan Mali would have been certainly willing to indicate the same, had he got any suggestion as to how it could be done.

508. If at all, any doubt, about Kanchan Mali's determination not to support the prosecution and about his falsehood remained, the same is removed from the questions put to him, in the cross-examination and the answers given by him to those questions.

C] Veersingh Zala [P.W.45]

509. Veersingh Zala [P.W.45] is also a resident of Daboi Road locality. Though he claims that Hanuman Tekdi is situated at a distance of about 1/2 kilometer from his house, the same does not appear to be correct. He is supposed to have witnessed the incident, but in his testimony before the Court, denied any knowledge about the same. He was declared hostile during the previous trial also. He was contradicted with certain portions from the record of his statement [X-78 for identification] recorded by the police during investigation. These contradictions are duly proved and have been marked as Ex.438 to Ex.444 respectively. However, even after confronting him with the relevant portions, this witness did not admit the truth or correctness thereof, or even the fact of having stated so. His evidence is therefore of no assistance to the prosecution. According to him, he does not know the

accused or any of them. He however admits that the accused in this case, are from his locality and from nearby locality.

510. A consideration of the evidence of Smt.Jyotsaben Bhatt [P.W.43] and Kanchan Mali [P.W.44] shows that both of them were clearly unwilling to depose in favour of the prosecution. The reluctance was more than was in the previous trial. Though, these witnesses were declared hostile and though I have held that they have given false evidence, it is not that their evidence is to be totally excluded, from consideration. The part of their evidence which is found to be true, can be accepted. The evidence favourable to the prosecution, as obtained from these witnesses is of great value, coming as it is, from witnesses unwilling to support the prosecution.

HOSTILE WITNESSES [VICTIMS] FROM THE FAMILY OF HABIBULLA SHAIKH

511. I shall now consider the evidence of the other occurrence witnesses who had, all, turned hostile. These are Zahira [P.W.41] - the first informant - and her brothers Nafitulla [P.W.31], Nasibulla [P.W.30], her sister Saherabanu [P.W.35] and her mother Saherunnisa [P.W.40].

512. Hostility is not uncommon in criminal courts. In fact, jurists have recognized that there exists a problem of hostility of witnesses which problem has assumed great proportion in recent years posing a threat to administration of justice. However, I may observe that the hostility of these witnesses in this case is rather unique. An analysis of their evidence leaves no manner of doubt that they are interested not only in denying the connection of the accused persons with the alleged offences, but have tried their best to deny the happening of the incident itself; and where it became impossible, to try to reduce the enormity of the offences. Zahira's evidence gives a clear impression that she was keen on disputing one factor – viz. that she had made any complaint to any authority, or publicly, about the improper conduct of previous trial, or had asked for a retrial at any time.

513. Much discussion on the evidence of these witnesses is not necessary for adjudication of the guilt or otherwise of the accused persons. However, as these witnesses have attempted to make a mockery of the whole system of administration of justice, the matter can not be ignored altogether and the discussion should not be curtailed. These witnesses appear to have turned hostile

at the instance of some persons and tutored not with the limited object of ensuring the acquittal of the accused, but for much broader objects. There was an attempt to show through these witnesses that there was a conspiracy of a particular community or of a group of people to make false allegations for getting an order of retrial. All this is required to be exposed, when the issues in question have been put forth for consideration by this Court.

A] EVIDENCE OF NASIBULLA [P.W..30]

514. It would be convenient to discuss the evidence of Nasibulla [P.W.30] first as he was the one who was examined first out of these 5 witnesses.

515. It is not in dispute that Nasibulla himself was injured in the incident. On examination, Dr.Smt.Meena Robin [P.W.46] found patient Nasibulla to be unconscious. He had a head injury. Three I.W.s on left occipital parietal region were noticed, as follows.

i) Size – 15cm X 2cm X scalp deep,

ii) Size – 10cm X 2cm X scalp deep,

iii) Size - 8cm X 2cm X scalp deep,

Nasibulla had burn injuries on both lower limbs.

516. Nasibulla does speak about the riots and also admits that he sustained an injury on his head and also burn injuries on his leg. He also states that the head injury and the burn injuries were suffered by him on one and the same day; and that he was taken to S.S.G. Hospital. He also states that the whereabouts of his maternal uncle Kausarali, who was looking after the bakery business after the death of Habibulla, could not be ascertained after the riots.

517. Interestingly, though Nasibulla speaks of the riots having started at about 9.00 p.m., he states that he does not know till what time they continued; and the reason which he gives for the same, is that, after sustaining an injury on the head at about 11.00 p.m., he had lost consciousness and what happened thereafter, he does not know. Thus, according to him, he sustained the head injury while he was on terrace. As shall be discussed later at an appropriate place, this part of his evidence – viz. that he had sustained an injury on the head in the night while he was on terrace and had lost consciousness thereafter, which he regained only in the hospital – is false and cannot be accepted at all. At this stage, it may only be noticed that this is a feeble attempt to suppress the morning incident.

518. Though the witness has exhibited a reluctance to give the information regarding the incident, Smt.Manjula Rao, the learned Spl.P.P. has been able to get sufficient material on record through him which confirms the happening of the incident in the night. Nasibulla does speak of rioters setting fire to Lal Mohammad's *wakhar,* then to Aslam's room and to the Best Bakery building. The Spl.P.P. has been able to wrest evidence supporting the story of the rioters coming in big number, they occupying the entire area surrounding their house, setting fire, throwing stones and burning glass bottles over the terrace, etc., from him.

519. He claims not to know whether any persons known to him were among the mob of rioters and the absence of this knowledge, he attributes to smoke and darkness. He has volunteered to state, after having spoken about stone throwing, that they [he and others] pulled the mattresses over their heads so that the stones would not hit them. It is interesting, however, that he still sustained an injury on head. He also volunteered that it was dark and there was smoke. He was keen on expressing at the earliest opportunity, the impossibility to see anything and at any rate, to make it clear that *he* had not seen anything.

520. Consistently with the story that he lost consciousness in the night itself and while he was on the terrace, and of his regaining consciousness only after he was taken to the S.S.G. Hospital, he states, naturally, that he did not know *how* he got down from the terrace. He himself makes it clear that it is obvious that somebody might have got him down as otherwise, he would not have reached the hospital. This is significant in the context of the fact that the police, or the fire brigade, have definitely not brought him down from the terrace. There is sufficient evidence, as discussed earlier, to indicate how the incident came to an end and how the inmates were rescued. Nasibulla was reluctant even to admit that the bakery had caught fire and came to learn it only through newspaper '*Gujarat Samachar*' on the next day.

521. Nasibulla claimed that he did not know any of the accused before the Court and denied having seen any of the accused in the mob of rioters. Nasibulla has been contradicted with his statement [X-23 for identification] recorded during investigation. The contradictory version has been properly proved through PI Baria [P.W.72] which shows that Nasibulla had claimed in his statement recorded by the police about his having seen certain persons known to him in the mob of

rioters and had given the names of some of them. The contradictory versions of Nasibulla, duly proved through P.I.Baria, establish that he had also claimed that besides those named by him, there were others whom he could identify if he would see them. The version which he gave before the police disclosed the morning incident also - i.e. that he claimed that he was attacked, assaulted and injured in the morning; and that while the assault was going on, the police arrived and saved him and others. Even after having confronted with the relevant portions in his statement, Nasibulla claimed that he never stated so; and that the happenings, as recorded in the relevant portions [Ex.319, Ex.320, Ex.321, Ex.322 and Ex.323], never took place. His version [Ex.324] about one Nasru Pathan residing in the bakery, is also brought on record in order to contradict him. Nasibulla maintained that he never stated anything, as is reflected in the portions marked Ex.319 to Ex.324, to the police; and that he could not say why it was so recorded by the police.

522. That Nasibulla and even the other hostile witnesses were tutored, is very obvious from the way they have deposed. After the commencement of the retrial, Zahira, it may be recalled, had gone to Vadodara and held a press conference making statements contrary

to what she was supposed to have stated earlier. Nasibulla was questioned in the examination-in-chief regarding the said press conference and it would be appropriate to reproduce the said question and answer here.

> *'Ques.-The press conference was called by whom ?*
>
> *Ans.- 'Gunda' Raees Khan – a man of Teesta Setalvad- was troubling us by coming to our house. To explain that, Zaheera had called the press conference.'*

One can clearly see that Nasibulla was anxious to disclose the *cause* of holding the press conference and since that had not been asked, though he was in the witness box for quite some time, he decided to disclose the same on his own.

523. The cross-examination of Nasibulla shows that he had been completely won over and was quick to admit everything that would destroy the prosecution case. The attempt in the cross-examination was to make him stick to the evidence which he gave in the Court at Vadodara, which was obviously in favour of the accused. To the contention advanced on behalf of the accused, that the witnesses Taufel [P.W.26], Raees [P.W.27], Shehzad

[P.W.28] and Sailun [P.W.32] were actually not sitting on the cot when the mob of rioters came, support was attempted to be derived from Nasibulla but it has not been very successful. Nasibulla was asked in the cross-examination whether it was correct that the servants were, from the beginning only, on the terrace. Nasibulla replied that the servants used to sleep on the terrace and further told to the Court that they were **not** on the terrace from the beginning. Naturally, on further questioning, Nasibulla realized what answer is required by the defence and agreed to the suggestion that on that day also, they were on the terrace, but added that they were '*sleeping*' on the terrace. Ultimately, the following precise question was required to be put to him which was precisely answered by him.

'*Ques.- When the mob came, the servants were already on the terrace. Is it correct ?*

Ans. - Yes. They were on terrace.'

This entire questioning and answering on this topic clearly shows that Nasibulla changed his version on being aware of what is required or expected of him by the cross-examiner and duly obliged him by giving the required answer.

524. The collusion between the defence and Nasibulla is

obvious and can be pointed out *inter alia* from the following. A question was asked to him in the cross-examination '*whether he stated in his evidence before the Court at Vadodara that the police had obtained his signature on his statement*'. Nasibulla stated that he did not state so. The purpose of this question was not realized and therefore it was thought rather curious. The object behind that is revealed to be, to come out of what Nasibulla had stated before the Court at Vadodara. The record of Nasibulla's deposition in that Court shows that Nasibulla had stated that '*he had not stated who were in the incident with which weapons and instruments they were armed and what they had done; and that police had just obtained his signature*.' Though not much turns on this, it exhibits clear collusion between the defence and this witness. Ironically, Shri Adhik Shirodkar, the learned Senior Advocate, who was very vehement in suggesting the witness to be audacious, in addition to be a liar, whenever any witness supporting the prosecution tried to deviate even a little from the record of the previous trial [and though was willing to explain or speak about supposed inconsistency or contradiction,] does not mind such a drastically opposite statement made by Nasibulla. Rather, he invites such a statement, leaving aside his views about the sternness with which such a witness - who implies the Court record to be false - should be dealt

with, as expressed by him during the cross-examination of some other witnesses, and emphatically put forth during arguments.

525. After the video cassette [Ex.283] was introduced in evidence, Nasibulla was recalled and further examined by the learned Spl.P.P. The C.D. [Ex.283/3] equivalent to the relevant part of the cassette [Ex.283] was played over to him. Nasibulla has admitted the shooting to be of his house at Hanuman Tekdi; and that it being in respect of the fire that had been caught to their bakery. He has also admitted the shooting to be of 2nd March.

526. His further examination by the learned Spl.P.P. reveals that certain amounts have been credited to his and Zahira's account in Syndicate Bank. There seems to be no proper explanation of how and from where these amounts were got deposited in the relevant bank accounts.

527. Nasibulla's evidence shows that he ***is*** hostile, that he has been tutored and is obviously lying on several material aspects.

EVIDENCE OF NAFITULLA [P.W.31]

528. Nafitulla [P.W.31], though hostile, undoubtedly and

admittedly sustained injuries in the incident and was required to be admitted into hospital. The injuries sustained by him have already been mentioned earlier.

529. Nafitulla does speak about the riots that took place on 01/03/2002, and also states that the riots took place in the entire State of Gujarat; and that they took place because of the incident of train burning at Godhra. He speaks of the bakery of his father and their house situated at Hanuman Tekdi. He also gives the details of the persons working in the bakery as Sailun, Shehzad, Taufel, Raees, Prakash, Baliram, and Rajesh, etc. He speaks of the house of Aslam being situated by the side of his house. Nafitulla also states that *Kausarmama* was also living in their house when the riots started. What he disputes is the presence of Yasmin.

530. Nafitulla states that the bakery was burnt on 01/03/2002, by a mob of about 1000 people. He also states that while he and other members of his family, together with the servants, were on the terrace, one of his sisters - Sabira - was on the first floor in one of the rooms along with members of Aslam's family.

531. The hostility of Nafitulla is manifest and visible from the fact that though he says that Sabira died in

riots, he is not ready to say that she was burnt to death. To a question, '*how did she die*' he gives an evasive answer to the effect that '*those people had closed the door from the inside; and that therefore he did not know what had happened thereafter'.*

532. Nafitulla states that they all were hiding on the terrace. Nafitulla states that he was admitted into the hospital, but it is remarkable that without any questioning, he volunteers '***"but how I went there, I do not know"*** [Pages 587-588 Notes of Evidence]. This anxiety seems to be for the purpose of avoiding disclosure of the incident that took place in the morning, or avoid questions which would be put regarding that.

533. Nafitulla states that he was admitted in the hospital on the next day - i.e. on 02/03/2002;- and that he was admitted therein for about 8 days. Nafitulla admits having sustained injuries on his head and neck. He also claimed to be not aware of the whereabouts of *Kausarmama*.

534. Interestingly, after answering in reply to a question, that they had gone to the terrace at 9.00 p. m. Nafitulla volunteers ***"there was no light and there was much smoke"***. This shows that Nafitulla, like

Nasibulla, had been tutored to say certain things which were expected to come up, in the examination-in-chief, but probably having been aware of the hostility of the witnesses, the learned Spl.P.P. adopted a different line of questioning whereby such straight questions were not forthcoming. It is apparent that therefore, Nafitulla decided to volunteer to state as was tutored or as, at any rate, had been already decided by him to state.

535. Nafitulla also adopts the theory of losing consciousness on the terrace itself, on being hurt by the stones and bottles that were being thrown. As discussed earlier while discussing with evidence of Nasibulla, there exists an anxiety on the part of these witnesses to claim that they lost consciousness in the night itself and therefore, did not know what happened thereafter, as they regained consciousness only in the hospital. This is obviously because of the desire to avoid speaking about or being questioned, regarding morning incident. Both Nafitulla and Nasibulla are undoubtedly lying about their having lost consciousness in the night on the terrace itself and about the injuries that were sustained by them being caused to them in the night itself. It is clear that, in that case, they could not have got down from the terrace on their own. Neither Zahira, nor Sahera, nor Saherunnisa, nor any of the supporting witnesses claimed that they brought Nafitulla and

Nasibulla down from the terrace, which even otherwise seems to be rather impossible, considering the fact that all these persons got down from a bamboo ladder and the extent of injuries sustained by Nafitulla and Nasibulla.

536. Nafitulla has given the reason for his going to Vadodara after the commencement of the re-trial as the threats given to them by Teesta's Raees Khan and other '***Gundas'.*** The theory of the threats given by Smt.Teesta Setalvad and '***her Gundas***' shall be discussed later, to show how improper and unbelievable the story of these witnesses is. At this stage, what needs to be observed is that Nafitulla is anxious to disclose what were the threats and therefore without asking, volunteers to say '***that the threats were to the effect that false statement will have to be made; and that it was a matter of the community***'.

537. The evidence of Nafitulla and Zahira reveals that these witnesses are assisted by one '*Jan Aadhikar Samiti*' which is said to be consisting of only person – viz. Tushar Vyas - who is an Advocate. At any rate, nobody else from such *Samiti* is known to either Nafitulla or Zahira. Nafitulla states that the expenses of the Press Conference which was held by Zahira after secretly going to Vadodara from Mira Road-Bhayander [which was after the

commencement of this trial] were born by '*Jan Adhikar Samiti*'. The services of Advocate Atul Mistry also were provided by '*Jan Adhikar Samiti*' only. The role of '*Jan Adhikar Samiti'* and Advocate Atul Mistry, can be discussed more conveniently while discussing Zahira's evidence.

538. Nafitulla had appeared before the Court after the commencement of the re-trial. He was lodged at the '*Visava Guest House*' where arrangements had been made for the stay of the witnesses in this case. However, he disappeared from the '*Visava Guest House*' without informing anyone and with Zahira and others went to Vadodara. He left his second wife - Heena @ Kailash - and his child at the Guest House itself. Thereafter, a press conference came to be held by Zahira at Vadodara which, as aforesaid, was financed by '*Jan Adhikar Samiti'.* In the Press Conference, Zahira made statements contrary to what she had or supposed to have stated in the Supreme Court of India. Nafitulla has admitted that he was aware of the fact that a retrial of the 'Best Bakery Case' to be held in Maharashtra, was ordered by the Hon'ble Supreme Court of India; and that he had come to know before going to Vadodara that the retrial had been started. The learned Spl.P.P. has specifically questioned Nafitulla as to what he stated before the

Television could have been stated by him before the Court, and Nafitulla has agreed that he could do so.

539. Nafitulla was unable to explain the injury on his neck and has stated that it must have been suffered by him, on account of bottles, which were being thrown on the terrace from below on 01/03/2002. He claims that the said injury was caused to him after he had lost consciousness; and that therefore, he could not say in what manner and by which weapon or object the injury on his neck was caused.

540. Nafitulla, however, admits that a mob of about 1000 to 1200 persons had come to the 'Best Bakery building on 01/03/2002 at about 9.00 p.m.; and that the persons in the mob were shouting '*jalao', 'jalao' and 'bakery jalao*'.

541. Nafitulla further admits that the mob surrounded their house; and that they burnt the house and bakery. Interestingly, when asked as to whether the mob consisted of certain persons named in the question, Nafitulla answered in the negative. It is worth reproducing question and answer here:

Ques.- Did it happen that among the mob that had assembled there, social

worker Thakkar from your zopadpatti area, Jayanti tea vendor, Jayanti's nephew – Mahesh -, Munno and Pratap, Jayanti's son, Mahesh's friend – Kiran -, and Lalo, as well as Painter – residing in front of Sindhi's shop -, and Jitu - who resides opposite your lane -, were playing major role and leading the mob?

Ans.- No. They were not there.

542. Now, this negative answer, suggests two things – first that these persons were known to him and second, that he *could* see the persons in the mob. A question as to whether he knew those persons was therefore asked to Nafitulla by the Court when Nafitulla replied that '*he did not know any of these persons whose names were mentioned in the question*' and on further questioning replied that what he wanted to say was that '*he did not know any of those persons and not that they were* ***not*** *in the mob*'.

543. Nafitulla has been contradicted by the statements made by him to the police during the investigation on a number of aspects. These contradictions are duly proved,

marked and exhibited. It is not necessary to refer to all these contradictions separately, but it is sufficient to state that Nafitulla having stated about Nasru Pathan, about he having given the name of certain persons as present in the mob and leading the same and moreover about the morning incident is proved. The version of Nafitulla in the statement [X-25 for identification] recorded by the police, dated 04/03/2002, to the effect that the persons in the mob tied the limbs of Nafitulla and Nasibulla as well as the employees working in the bakery after all of them had got down from the terrace in the morning; and that the persons in the mob thereafter, assaulted them by sharp edged weapons like swords knives etc. has been brought on record for contradicting him. Nafitulla's version 'that the persons in the mob inflicted blows on him, his brother Sailun, Taufel, Raees, Shehzad'; and that 'the blows were inflicted with sharp weapons' and that; 'the injuries were caused by the persons from the mob' has also been brought on record. The contradictory versions of Nafitulla in his subsequent statement recorded on 10/03/2002 and on 01/04/2002 have also been brought on record and duly proved.

544. The evidence of Nafitulla about losing consciousness in the night and while on the terrace itself, leaves many questions unanswered and if the version before the police

is taken into consideration, it provides answers to those questions. Unfortunately, even if the Court comes to the conclusion that the version of Nafitulla and Nasibulla as appearing in the statements recorded during investigation is true, and their version before the Court is false, no use of the version as appearing in the statements recorded during investigation can be made by way of evidence. Apart from the prohibition imposed by Section 162 of the Code, it is elementary that pre-trial statements can not constitute evidence, save and except those made admissible by some provisions in the Evidence Act. It is only the statements made by the witnesses before the Court that are evidence and the previous version of a witness, even if duly proved, can be used only for the purpose of corroborating or contradicting a witness with regard to his testimony in the Court. Since these statements have been recorded during investigation, keeping in mind the prohibition imposed by Section 162 of the Code, they can be used only for contradicting him which has been done. The version of Nafitulla as found in those statements even though duly proved, can not be made use of as evidence. *Ironically, had Nafitulla died on account of injuries sustained by him, the statements of Nafitulla would have been admissible in evidence as his dying declaration*. The same would be true with respect to the contradictory version of Nasibulla also.

Both of them had sustained injuries which endangered their life and in the event of their death, certain statements made by them before the police would have been substantive evidence and could be acted upon. Though the Court is empowered and competent to come to the conclusion that version of Nafitulla and Nasibulla as given by them before the police represents a rather accurate, though not full picture of the happenings, no use of those statements as and by way of evidence can be made, because Nafitulla and Nasibulla both survived to turn hostile and disown their own statements.

545. That Nafitulla had been fully won over and was out to destroy the prosecution case, is clear from many facets of his testimony, one of which can be given here by way of an example. Nafitulla stated during his examination-in-chief that in this case F.I.R. was lodged by Zahira. He further stated that he learnt it about after about one and half months from the date on which she had lodged it, though he did not come to know what was written in the F.I.R. Nafitulla further confirmed these aspects. In further questioning he states that he had a talk with Zahira in which she told him that she had lodged the F.I.R., in this case. As shall be discussed later, it has been attempted to project that no F.I.R. had been lodged at all by Zahira and no report had been

made at all, by her. In order to show that, it was the order for retrial was fraudulently secured, it was essential to make a claim that Zahira had not lodged any 'F.I.R.' at all; and that the whole case was a creation of some interested elements. When this requirement of the defence was realized by Nafitulla, he tried to do what could be done maximum, to resile from the statement to the effect Zahira having lodged the F.I.R. In the cross-examination, he stated that he did not know what is 'F.I.R'; and that he did not know the meaning of this term. This can not, at all, be believed in view of his previous evidence. If he did not know what is 'F.I.R.', he would have never said that in this case 'F.I.R.' was lodged by Zahira, that he did not know what was written in the 'F.I.R.', that he learnt about Zahira having lodged it after one and half months, etc.

546. Though Nafitulla was fully hostile, he was, still, cross-examined at length, by the Advocates for the accused, in an attempt to discredit the testimony of the supporting witnesses on certain points such as place where the supporting eye witnesses were sitting, when the rioters came, etc. The reliable testimony of the supporting witnesses can not be discredited by answers obtained from a hostile witness who is utterly unworthy of credit and a positive liar; and that too, by putting

him leading questions. As shall be discussed later, the claim of there being an '*improvement*' as to the place of sitting, as made, has failed.

547. It has been elicited from Nafitulla by putting leading questions to him in the cross-examination that when he and others were hiding themselves on terrace there was thick smoke, no light and nothing could be seen. It is further got confirmed from him that due to smoke and darkness, who were setting fire to the bakery below, could not be seen by him; and that it was so stated by him before the Court at Vadodara. No importance to such statements of a patently hostile witness, can be given and certainly not to discredit the evidence of other witnesses who are found to be trustworthy. Even otherwise, the theory itself is absurd and in the zeal to get admissions from Nafitulla, it has been lost sight of that the question of smoke would arise after fire and therefore, who were setting fire to the bakery would not be impossible to see on account of the smoke which would not be there at that time.

548. Several false admissions from Nafitulla such as he did not know how the injury on his neck below left ear was caused; and that he had not seen the persons who set the fire and did other acts; and that he had not seen

anyone taking away the articles in their bakery; and that he had not seen anyone setting fire to the vehicles have been obtained on behalf of the accused. All these statements are sought to be confirmed and corroborated by his admission of having stated so in the previous trial also. These admissions are contrary to be probabilities of the case, apart from being totally in conflict with the weight of evidence on record. It is one thing to say that he had not seen any person known to him or that he could not identify any of the persons who set fire or took away the articles, etc., but it is quite another to say that he had not seen anybody at all, in spite of having seen the mob.

549. Nafitulla has filed a complaint against Madhu Shrivastava on 27/09/2003. According to him, he was falsely made to make that complaint by Mohammad Vora, Munna Malik and Arif Malik. That complaint has nothing to do with the involvement or otherwise of the accused in the present case or more particularly with the offences in question. Nafitulla not having supported the prosecution in this case, whether the complaint lodged by him against Madhu Shrivastava was false or not would not be relevant and the aspects, whether it was likely to be true or not, whether it had not been written by him, would not be relevant at all. The relevancy thereof

would have arisen, had Nafitulla supported the prosecution case here. In that case, he would have been challenged with reference to his claim in the nature of explanation of why he gave false evidence in the previous trial.

550. The subject of the organization of Smt. Teesta Setalvad spending money on Nafitulla and his family members - i.e. towards their ration, etc. - was taken in the cross-examination and it was got clarified from the Nafitulla that Teesta Setalvad and Raees Khan and other '***Gundas***' used to say that false statements will have to be made in the Court at Mumbai.

551. The following questions and answers are worth reproducing before they are commented upon.

Ques.- Did they also tell you what false statements you will have to make before the Court in Mumbai ?

Ans.- They said that I will have to make false statements as would be tutored by them.

Ques.- They also told you that you will have to identify the accused persons in the Court, as would be told by them to you. Is it correct ?

Ans.- Yes.

Ques.- In what manner, they had said, you will have to identify the accused persons ?

Ans.- They said that they would show the photographs of the accused persons to me.

552. A story offering an elaborate explanation as to how and in what manner false allegations of previous trial having been unfair were made, how the Supreme Court of India was misled, how Zahira was deceived or forced to make false statements, how, after a re-trial was ordered, she was being threatened to make false statements and how all this was the act of the N.G.O. - *Citizens for Justice and Peace* - and Smt.Teesta Setalvad, the Secretary of the said organization; was attempted to be developed and emphasized by the defence as a possible and plausible explanation of the unbelievable happenings. It was emphasized that the evidence needs to be appreciated in the context of these facts. These aspects can be conveniently and more effectively dealt with after discussing Zahira's evidence. At this stage, and in the light of the questions and answers reproduced above, it may only be observed that Nafitulla has been completely won over, not only with the object that the charge against the accused should not be proved, but with the object of suggesting a great conspiracy of a particular

community to falsely use the machinery for administration of justice. Interestingly, the answers do not reveal that any tutoring was ***actually*** done as to what false statement Nafitulla was supposed to make. The answer to the first question reproduced above, shows that actually nothing was tutored to Nafitulla and the stage of tutoring was yet to come. The next question reproduced above is rather interesting and one can not help observing that it has been a marked feature of the cross-examination to confront only a favourable witness with the aspects desired to be brought on record. In order to offer an explanation which was apparently thought necessary by the learned Advocates for the accused as to how supporting witnesses who had been earlier examined had identified the accused persons in the Court, the story of Smt.Teesta Setalvad and others telling Nafitulla that they would show the photographs of the accused persons to him, has been introduced. There is no wonder that Nafitulla who was too ready to oblige the defence has accepted this suggestion, but what is curious is that the witnesses who have identified the accused persons – though have been cross-examined with respect to the question of tutoring - have not been suggested of being told that they would be shown photographs of the accused persons or being actually shown the photographs, etc. It is indeed ironical that Natifulla who does not identify

anyone has been asked to 'expose' the attempts made to make him identify the accused persons falsely, but those who have identified the accused persons actually, have not been asked about the photographs of the accused persons shown to them. The powerful weapon for discovery of truth – the cross examination – is used against those whose evidence was not adverse to the accused at all, but no use of this weapon was made to elicit from the supporting witnesses, the alleged fact of photographs of the accused having been shown to them. No value therefore, to such statement of Nafitulla can be given. Moreover, even according to Nafitulla, no photographs of the accused persons were actually shown to him. All that he says is that Smt.Teesta Setalvad and others had at all said that the photographs '*would be shown*' to him.

553. The cross-examination of Nafitulla by Shri Jambaulikar is rather interesting and all that the defence wanted was systematically put to him one by one and Nafitulla went on admitting all that was so put, as correct. Thus, he admitted that the lights in the house were switched off, the door of the room on the first floor was closed from inside, that no outsider was in a position to enter inside, that on the road in front of bakery there was no electricity, no lights; and that there was complete darkness, etc. He accepted as correct

the suggestions that there was no light either on the left side or rear side of the Best Bakery or that there is no electricity pole in that area, that there was total darkness in that area, that it was not possible due to the darkness to see who was or were there, etc. etc. It was put to him that when the mob of rioters came the servants were not sitting on a cot outside the bakery, which Nafitulla readily accepted. No reliance can be placed on these admissions of Nafitulla as they are patently false, as can be judged from the other evidence on record. That Nafitulla is totally unworthy of credit, has lied on several material points and has been clearly won over to depose against the prosecution is well established. These statements of Nafitulla intended to discredit the version of the supporting witnesses have no value whatsoever, in my opinion.

554. What is remarkable is that in the cross-examination, minute details - not based on any information disclosed from the record or not supposed to be known to the accused - have been put to Nafitulla. There is a clear indication of collusion between the accused or somebody interested in affecting the prosecution case on one hand and Nafitulla and the other hostile witnesses on the other hand.

555. Mohammed Vora, Munna Malik and Arif Malik are named by Nafitulla as the '***persons from his community***' who used to visit him in the hospital and tell him that in order to get compensation, he should do what they would be telling him to do. By this statement Nafitulla has paved a way for explaining his future conduct in making allegations against the accused.

556. Nafitulla was recalled for further examination by the learned Spl.P.P. after the cassette [Ex.389/A] containing the record of statements made by Nafitulla during his interview taken on 18/04/2002, by Pankaj Shankar [P.W.73], was tendered in evidence. Nafitulla was confronted with the relevant part of the interview. I shall consider the contentions and objections raised with respect to the testimony of Pankaj Shankar and as to the date on which the Nafitulla is said to have made the statements separately. It is however, a fact that when confronted with the record of his interview Nafitulla does admit that this is a record of his interview; and does admit having said, what is heard as being said by him. The only explanation of his, is that he was saying what was tutored to him. He also agrees that the statement that were made by him in the said interview related to the Best Bakery incident. He admits having made various statements implicating the accused during

the interview, but states that it is because Teesta had tutored him, to say so. Each and every statement that was put to him he admits having been made by him, but only states that it was said by him as tutored by Teesta and others. All this can not be accepted if the date of the said interview as '18/04/2002', as given by Pankaj Shankar, is accepted. I wish to discuss this aspect separately while dealing with the evidence of Pankaj Shankar, as it is relevant from the point of view of and in the context of the evidence of other hostile witnesses – including Zahira – also.

Saherabanu [P.W.35]

557. The next hostile witness is Smt.Saherabanu Habibulla Shaikh [P.W.35], sister of Zahira Shaikh [P.W.41]. She is also an occurrence witness and she is also extremely hostile. Without wasting much time on the discussion of her evidence, the extent of her hostility may be illustrated by giving a few examples.

A] That Sabira – Saherabanu's and Zahira's sister – died in the riots; and that she was burnt in the fire that was set by the rioters to the Best Bakery house, is not in dispute at all. In fact, such an admission does not even remotely implicate the accused or connect any of them with the alleged offences. In spite of this, what

is the attitude of Sahera [P.W.35] on this, can be best illustrated by the following questions and answers, from the notes of her evidence.

'*Ques- How did Sabira die ?*

Ans.- That I do not know.

Ques.- When did she die ?

Ans.- When we were residing at Hanuman Tekdi.

Ques.- Do you know what had happened to her ?

Ans.- I do not know.' [pg.799 of Notes of Evidence]

This speaks for itself.

558. After some further questioning, Sahera was further questioned on this subject and the notes of her evidence that are being reproduced below, make an interesting reading.

'*Ques.- How do you know that Sabira has died?*

*[**Court Note** :- Witness takes some time and then states, “I do not remember”. She is explained as to what is the question and the question is repeated again].*

Ans.- When my father was alive, we all were staying together.

[The same question is repeated again].

Ans.- Sabira had not died. She was studying in school.

[The same question is repeated again].

Ans. - Sabira's death occurred in the riots that had taken place.'

B] The witness displayed such an attitude that to bring her to the point, questions were, on certain occasions, required to be put to her by the Court itself. The evidence reproduced above clearly indicates that the witness was avoiding, as far as possible, to say even that Sabira's death occurred in the riots. It is only after repeated efforts and after cornering her in that regard, she had to admit that Sabira's death occurred in the riots that had taken place. Though Sahera has denied it when asked by the Court, it is obvious that she did not even want to refer to the riots to say that Sabira died in the riots and this speaks volumes of the frame of mind of this witness.

559. Instead of saying that the *wakhar* opposite their house was set on fire, when questioned as to what happened after the shouts and noise were heard, Sahera used the expression as *'wakhar opposite their house was*

burning'. Further, instead of saying that fire was set to the wood that had been kept at the ground floor of their building, she says *'the wood was burnt*'.

C] When Sahera stated that she had come for telling the truth in connection with the 'bakery case', she was asked a question by the Court as to '*what was the bakery case about?*' The answer given by her is very interesting and worth reproducing below.

> '*Regarding the damage caused; the wood was burnt, other articles were burnt, vehicles were burnt.*'

Now, there is no dispute that in the incident of Best Bakery, which the witness is referring to as *'bakery case*', several persons died, but Sahera has scrupulously avoided saying this. She poses as if the whole case is about the damage to the property and not about the loss of several lives.

560. Interestingly, Sahera had admitted many more things in the previous trial than in the present trial. Here, she said that she did not know the names of any of the workers working in the bakery and whether any relative of her was working therein. When questioned, after being declared as hostile, she denied having given names of any servants in the Court at Vadodara. She also denied

having given names of neighbours in the Court during the first trial, when she was questioned in that regard in view of her statement before this Court that she did not know their names. She was confronted with the relevant portions - i.e. portions marked 'JJJ', 'KKK' and 'MMM' - appearing in her original deposition [X-36 for identification] in the Court at Vadodara but in spite of such confrontation, she denied having said so. The denial of Sahera in that regard cannot be accepted, firstly, because the record of the Court cannot be lightly disbelieved and secondly, because the facts which she denies as having stated before that Court, are such that ordinarily, she was expected to know those facts. Not to know the names of the persons working in their bakery, or not to know the names of the neighbours, would be rather extraordinary and cannot be believed.

561. The witness is so discrepant and inconsistent that that she is telling lies, or at any rate not telling the truth, is apparent. In fact, there are discrepancies on every aspect about which she has spoken, or was made to speak. A number of questions were put to her by Smt.Manjula Rao, the learned Spl.P.P., to show that her claim of not having made any grievance about the previous trial, or for that matter, of not having said to the police about the relevant incident at all, was false.

Much examination of this witness was directed towards establishing that her claims of not having sought any retrial were false. These aspects are collateral aspects and as such, I do not propose to discuss the evidence in that regard in depth. What needs to be observed in brief, as in the case of other hostile witnesses, is that there is a reluctance to state about the incident itself, and not merely regarding the involvement or otherwise of the accused persons. There is an express and clear desire not to let the details of the incident made known, to project it as an incident in which damage to the property was caused, rather than an incident in which several lives were lost. Unfortunately for this witness, and also for the other hostile witnesses, they had taken several steps after the previous trial had ended in acquittal, by approaching various authorities and by making grievances at various levels. Obviously, Sahera, as also the others, required explanation of their actions when they made a claim before this Court as if nothing had happened and out of a blue moon, they are suddenly again called to give evidence in this Court. The stories advanced by Sahera, similar to the stories advanced by the other hostile witnesses, are inherently improbable, weak and contrary to reason. They are to be rejected forthwith.

562. Sahera [P.W.35] has tried to avoid stating about the injuries sustained by her brothers also supposedly while they were on the terrace. Nafitulla and Nasibulla have stated that both of them lost consciousness in the night itself while they were on the terrace and at that time, they had sustained injuries by the objects that were thrown on the terrace by the rioters. Sahera however does not know whether any of them had sustained any injury. She has found out a convenient way of avoiding any answer on several material aspects by saying that she was frightened; and that she was '*bebhaan*', or in some cases, that she does not remember. There has been no point in the lengthy examination of Sahera taken by the learned Spl.P.P. because even after eliciting a clear and unambiguous admission, Sahera would not hesitate to make a drastically contrary statement thereafter. Apparently, these witnesses, or those at whose instance they have turned hostile, have realized that there would be no point in saying that nothing had been done at all by them by approaching any authority in the matter. They have, therefore, found out a way of explaining their actions - viz. that they were doing it for compensation. However, all this is clearly false, in as much as, Sahera has admitted that she knew about the case in the Vadodara Court and of the acquittal of the accused. The words in Hindi used by her in this regard are '*aaropiyon ko sazaa*

nahin hui".

563. Sahera's statements were recorded during investigation on 04/03/2002 and on 12/03/2002. The versions in those statements, as are contrary to the statements made by her in her deposition before this Court, have been duly brought on record and they show that Sahera had given information about Nasru whom she claims, in her deposition, not to know. It is also established that she stated before the police about Kausarali having gone downstairs to persuade the members of the mob; and that they did not listen to him, etc. That she had stated before the police about the presence of her '*Nani*' at the time of the incident, whose presence she denied during evidence, is also established. That she stated before the police as to how the incident happened, that she had seen certain persons known to her in the mob; and that she had given the names of some of such persons, is also satisfactorily proved. That the persons in the mob dragged Kausarali and Lulla and threw both of them in the burning wood, is also proved to have been stated by her in her statement recorded on 04/03/2002 by PI Baria [P.W.72]. That the women were being dragged towards the bushes by the rioters; and that the police came at that time, is also established to have been said by her to PI Baria. All these contradictions

have been proved and exhibited as Ex.345 to Ex.354. Her evidence is unworthy of any credit.

Saherunnisa [P.W.40]

564. The next hostile witness Smt.Saherunnisa Habibulla Shaikh [P.W.40], it may be recalled, is the mother of Zahira [P.W.41]. During the investigation, her three statements were recorded - first on 04/03/20002 [X-45 for identification], second on 10/03/2002 [X-54 for identification] and the third on 12/03/2002 [X-59 for identification]. While the first two statements were recorded by PI Baria [P.W.72], the third one was recorded by PI Kanani [P.W.74].

565. A number of common features of the evidence of the hostile witnesses have been discussed earlier and I do not find it necessary to discuss the same aspects again with respect to Saherunnisa's evidence also. Saherunnisa, like other hostile witnesses, has proved to be a liar of the highest degree. She also exhibits an anxiety to suppress, or at least reduce, the severity of the incident. She also is unwilling to speak about the incident itself. It has taken a great deal of trouble for Smt.Manjula Rao, the learned Spl.P.P., to get elicited from this witness primary and undisputed facts such as the riots having taken place, the rioters setting

on fire the Best Bakery building and other buildings, several persons dying in the fire, etc. She pretended not to know how her house had caught fire. She refuses to admit that the others, apart from Sabira, died because of burns in her house and claims that they died in their house which was adjacent to Saherunnisa's house - i.e. Best Bakery building. She denies the presence of her mother at the time of the incident. She, however, does speak of rioters giving and shouting as '*jalao, maro, kato*', etc. Though Saherunnisa is hostile and determined not to support the prosecution, she has disclosed certain facts during her evidence which support the prosecution case in certain respects. The signs of tutoring were however very apparent. She exhibited hatred and bias for Smt.Teesta Setalvad.

566. In spite of happening of such a serious communal incident in which her house and bakery were burnt, the witness volunteered to state during her evidence as '*we would now carry on our business from there*'. The learned Spl.P.P. is right in contending, in my opinion, that this showed that already there had been some sort of an understanding between her and the persons at whose instance she and other witnesses have turned hostile. The learned Spl.P.P.'s contention that apparently, the witness had received some assurance in that regard, is

quite acceptable. That she was tutored and asked to say all sorts of bad things about Smt.Teesta Setalvad and her conduct with Zahira, is apparent. She has volunteered to state in her deposition, suggesting that Smt.Teesta Setalvad had kept Zahira in captivity; and that she escaped from her place and came to Saherunnisa crying; and that she had been badly treated by Smt.Teesta Setalvad, etc. This is falsified by the evidence of Zahira who has said about Smt.Teesta Setalvad having looked after her well.

567. Saherunnisa's evidence also reveals several shocking things about the role of '*Jan Adhikar Samiti*' in the matter, the nature of the financial assistance given by them to Saherunnisa and others, the role played by Advocate Atul Mistry and his conduct, which shall be discussed later.

568. Smt.Rao, the learned Spl.P.P., had drawn my attention to some part of the evidence of this witness and contended that this has brought out the truth of the matter. It is contended by Smt.Rao that why the witnesses were turning hostile and what were the facts could easily be grasped if this evidence of Saherunnisa [P.W.40] is studied. It is also pointed out by Smt.Rao that this particular evidence has not been challenged at

all on behalf of the accused. I find great force in the submissions of Smt.Rao in this regard. The relevant evidence therefore needs to be dealt with and discussed in a somewhat detailed manner.

569. Saherunnisa, as is the feature of her evidence, criticized one Mohammad Vora and stated about his having forced to say what was tutored by him before a representative of channel '*Aaj Tak*'. Apparently, all these witnesses have found no other way of explaining the statements made by them previously of which electronic record was available in visual and electronic form. Since some of the 'tutored statements' were made by them before they had met Smt.Teesta Setalvad, the original zeal and enthusiasm for putting the entire blame of the so called 'conspiracy' on Smt.Teesta Setalvad was given up, but keeping that aside, what is important is what Saherunnisa said on this topic. According to her, Mohammad Vora started teaching her as to what was to be said before the representative of the channel; and that he made a gesture which she showed to the Court and which was as indicative of '*cutting the neck*'. Thereafter, Saherunnisa volunteered to make a statement as follows.

> '*zabaan palte na, uske baare mein bol raha tha*'. [•¸•„¸› ¢¸¥¸' ›„¸ „¬¸^Å •„£ Ÿ¸ •„¸¥¸ £-¸ ˜„¸] [page 1063 of Notes of Evidence].

Saherunnisa then told him that she had no strength for fighting.

> '*mere me ladne ki taaqat nahin hai, mere koi aage peeche nahin hai, mereko case mein matlab nahin hai.*'
>
> [page 1063 of Notes of Evidence].

Her grievance is that Mohammad Vora still insisted that she would have to fight; and that she would have to fight for the community. When she was questioned by Smt.Rao, Saherunnissa has admitted that her family had changed the testimony. She also very clearly admitted that she was talking about 'changing the testimony' in the Court at Vadodara. A question was asked, thereafter, to Saherunnisa by the Court and it would be most appropriate to reproduce the question and answer here.

> **Question by the Court** :- That means you have changed your testimony in the Vadodara Court [*"Matlab Vadodara Court mein aapne apni zabaani palti thi*?].
>
> **Ans**.- What else could be done ? *"Mere aage peechhe koi nahin tha. Mera aadmi nahin tha, ladki nahin thi. Jab kamaanewala nahin tha, to kya case karen, kis par case karen?"*

Saherunnisa, of course, did not accept the suggestion of

the learned Spl.P.P. which followed this question and answer, to the effect that she changed her testimony out of 'fear'. However, she voluntarily addressed to the Court as follows.

> *“Judgesahab, jab wahin rahena tha to dushmani kya leni kisi se ?”*

It was got verified by the learned Spl.P.P. as to with whom she did not want enmity, to which a remarkable answer, as follows, was given by Saherunnissa.

> *'I did not want enmity with anyone; neither with 'Gujaratwalas' nor with 'Mumbaiwalas'.'*

570. This is significant. It is clear that Saherunnisa admits as '*zabaan palte*'. Since she speaks about 'changing the testimony' in the Court at Vadodara, it can only mean that earlier what was intended to be stated, was changed. There is no doubt about the meaning of this phrase '*zabaan palte*'. This throws light on all the relevant aspects of the matter. Not only that she maintains that she did change the testimony, but also gives a plausible explanation for the same which is reflected in the question and answer reproduced above. It is also significant, as reflected from the last answer reproduced above, as to how the matter is perceived by Saherunnissa. It is not perceived as an ordinary criminal case where the State is interested in

prosecuting and proving the guilt of the accused and the accused are interested in showing that there is no evidence to support the allegation levelled against them. **Saherunnisa views the case as a fight between two groups**. Obviously, she is referring to those who are interested in showing that nothing had happened, that there was nothing wrong with the previous trial; and that some mischievous elements are making a false claim of an unfair trial, improper investigation, witnesses being threatened, etc., as one group and to those who are interested in showing how unfair the trial was, how insecure the minorities were, how the investigating agency had been partial and had displayed partisan attitude, etc, as the other. Saherunnisa also admits that after the riots, she and her family members were running '*here and there*' out of fear; and that the fear was caused on account of the riots that had taken place and because what had happened during the riots.

571. In my opinion, this reflects the truth of the matter. This throws light on the attitude of these hostile witnesses. It nevertheless makes it clear that they did initially complain about the incident; and that there is no substance in their claim that they had not made any complaint. It is clear that their claim that whatever allegations were made by them, were so made on

being tutored, etc., is false.

572. After the video cassette [Ex.283] was tendered in evidence, Saherunnisa was recalled at the instance of Smt.Manjula Rao, the learned Spl.P.P., for further examination. After being confronted with the relevant part of the video cassette [Ex.283], as contained in the C.D. [Ex.283/3], Saherunnisa was most evasive but it could no more be suppressed by her that the video cassette [Ex.283] did relate to the shooting of the place of offences, done on the next day morning when the police came there.

573. Saherunnisa [P.W.40] had earlier stated that on the next day and after the arrival of the police, she had got down from the terrace by the cement staircase inside the building. After having seen the relevant part of the video cassette [Ex.283], she said that she got down from the ladder which was behind; and that she and others were made to get down from there. Undoubtedly, she does add that the ladder had been brought by the police, which cannot at all be accepted. The police had no reason to falsely suppress the fact of having brought a ladder. In any case, this is because viewing the relevant part of the video cassette [Ex.283] made Saherunnisa realize that when so much fire had been caught, it was not possible to

come down by the cement staircase inside the building.

ZAHIRA SHAIKH [P.W.41]

574. The last and most important among the hostile witnesses is Zahira Shaikh [P.W.41] - the first informant. It is she, on the basis of whose grievances, or at least supposed grievances, that the re-trial was ordered. That Zahira should turn hostile again during this retrial is indeed shocking, in as much as, Zahira had given several press statements, had approached various authorities, had filed a petition in the Supreme Court of India, filed certain affidavits before the statutory authorities after the incident and even after the trial ended in acquittal, raising several grievances against investigation and the machinery for administration of justice. In spite of that, she did show the courage of turning hostile. Naturally, she was confronted with the records of her previous statements, contrary to what she deposed before this Court and had therefore to give certain explanations regarding having made those statements, as shall be discussed at an appropriate place.

575. Zahira [P.W.41], when caught in such an awkward situation, initially attempted to deny having made the previous conflicting and contradictory statements, but

when confronted with some record of that and when it would be thought of as impossible to deny having made statements, attempted to attribute it to the tutoring and threats given by Smt.Teesta Setalvad and others. Unfortunately, even this has not helped always, as some of the statements related to the period prior to Zahira coming in contact with Smt.Teesta Setalvad. Zahira, in such situations, had to find out different names of different persons as the persons who had tutored her to say those previous conflicting statements.

576. Though the evidential value of Zahira's evidence in the matter of adjudication of the guilt or innocence of the accused would be very limited in this case, her evidence, nevertheless, is required to be discussed in some depth. It is because the situation that has been created by Zahira amounts to making a mockery of the system of the administration of justice. It is my opinion, after going through the entire evidence of Zahira [P.W.41], Saherunnisa [P.W.40] and other hostile witnesses that they have fallen in the hands of such people who have made them speak lies, not only with respect to the involvement or otherwise of the accused persons, but with the object of indicating that there was nothing wrong in previous trial; that they never thought of making any prayer for retrial; and that the order of

retrial had been falsely obtained by Smt.Teesta Setalvad and her organization. Repeated and emphatic claims were made by Shri Shirodkar, the learned Senior Advocate, that the accused would prove that a blunder had been committed by the Supreme Court of India, in ordering the retrial.

577. Before proceeding to discuss the evidence of Zahira further, it may be noticed that in spite of such a tremendous hostility, ultimately, Zahira has been made to admit the happenings of the incident almost in the same manner in which the prosecution has alleged it having taken place. Barring the connection of the accused with the alleged offences, Zahira has admitted almost every part of the prosecution case.

578. Zahira, thus, does not dispute that there were 12 servants working in their bakery. She has also admitted the knowledge of the names of some of them as Prakash, Rajesh, Baliram, Taufel, Shehzad and Sailun. That Taufel was the brother-in-law of her maternal uncle Kausarali, has also been admitted by her. About their house being adjacent to the Best Bakery; and that after it was constructed she and her family started residing there, is also not in dispute. Zahira also admits that the riots took place on 01/03/2002; and that stone throwing and bottle throwing was going on throughout the night.

Zahira does state about the stones being thrown on the terrace from all four sides, about the '*wakhar'* in front of their house being burnt, the wood kept in the downstair portion in their house having caught fire, etc. She also admits that she got down from the terrace in the morning; and that it was after the police and fire-brigade had come, who according to her, made her – and others also - to get down.

579. It can at once be seen, that there is not much distinction between Zahira's version of the incident and of the supporting witnesses or the prosecution case as revealed by the police report and accompanying documents. The incident of riots did take place. Stone throwing, bottle throwing, fire taking place, Best Bakery building being set on fire, the inmates and victims of the incident being rescued in the morning, indicative of the fact that the riots went on till then and till the arrival of the police, are facts which have not been – or rather *could not* be - disputed by Zahira and even by other hostile witnesses for that matter. What is significant is that there is a methodical insistence to stick to the version of the injured having been brought down on the next day morning by the fire brigade. As already observed, while discussing the evidence of other witnesses there is a concerted effort, obviously as a

result of tutoring, to hide or suppress the morning incident.

580. According to Zahira, her brothers were injured in the night itself, because of throwing of the bottles, etc. and even the servants had been injured in the night itself. This is consistent with the stand that all of them came down from the terrace only after the police and fire brigade came. Fortunately, no story of an attack by some persons after the police had already arrived on the scene and had rescued these persons is devised. The injuries sustained by Nafitulla [P.W.31] and Nasibulla [P.W.30] and the other injured witnesses however, can not, at all, be accepted to have been caused by throwing of bottles. That this is a lie, is already clear from the earlier discussion and also from the evidence of the supporting witnesses, but what should be emphasized in this context, is the anxiety felt by the hostile witnesses to avoid speaking anything about the morning incident. This is remarkable, in as much as, it is a clear indication of they having been tutored in that regard. The persons tutoring them are obviously those at whose instance they have turned hostile. The difficulty that would be created for the accused, if the morning incident were to be admitted, has been rightly realized by those persons. The factors creating the alleged

impossibility or difficulty in observing – viz. smoke, darkness, distance, etc. - could not be brought in aid for the morning incident when the assailants and victims had faced each other.

581. Like other hostile witnesses from her family, Zahira has also volunteered to make a statement that it was dark and there was smoke; and that it was not possible to see who were throwing stones and soda water bottles. The volunteering of this statement shows an anxiety to introduce this aspect, rather than waiting for being questioned as to the reasons for not knowing who were the offenders.

582. It is indeed a sad commentary on human nature, that Zahira even does not wish to admit clearly that Sabira had died in the riots and due to the fire, that was set to the Best Bakery building. Zahira stated about Sabira being in one of the rooms on the first floor and when questioned as to what had happened to her, stated that she did not know what had happened to her. Zahira claims to have learnt only in the hospital that Sabira had died. Like other hostile witnesses Zahira also uses very mild expressions as '*due to heat*' and '*as there was smoke*' as the reasons for the death of Sabira, instead of saying that she died due to the burn injuries suffered on

account of the fire. Again, while describing the condition of the dead body of Sabira, Zahira said that her face *'had become dark because of the smoke'*. It is remarkable that the use of the word '*fire*' or '*burn*' is very methodically avoided by this witness, obviously in an anxiety and in the false hope to make things appear less gruesome. There is no conceivable reason, otherwise, for not using expressions such as *'fire'*, *'burns'*, *'burnt'* etc., when speaking of a person who had died due to fire and burn injuries and using the expression *'smoke'*, instead, frequently.

583. The most shocking aspect of the matter is that Zahira refuses having lodged the F.I.R. itself. To the question whether police made inquiries with her at any time, Zahira replied that when she was in the hospital, after two days a policeman had come; and that he took her signature on a paper and went away. Looking to the question and the manner in which the above answer came, it becomes clear that Zahira had been tutored, or was at least aware, that she would have to pass through the hurdle of the F.I.R. signed by her, being in existence.

584. According to Zahira, after coming down from the terrace she was immediately taken to the hospital; and that she did not wait on the spot after getting down for

any time; and that no inquiries were made with her, at any time. This is obviously false, in view of the record contained in the cassette [Ex.283]. An interesting aspect can be noticed properly by first reproducing the following question and answer from Zahira's evidence.

> ***'Que.-*** *That, that was your bakery, that it was burnt, your name, your father's name, etc. - when this information was given to the police by you ?*
>
> ***Ans.*** *- When I went to the hospital, after 2-3 days, a policeman had come and he took my signature on the paper brought by him.' [Page* 1141 of Notes of Evidence].

585. This is remarkable. This shows that not only Zahira is aware of there being an F.I.R containing her signature, but is also aware of what it contains. There was no reference in the question to any statement and there was no occasion to connect the question of information given by Zahira to the incident of a policeman taking her signature on a paper, unless Zahira would know that in that particular paper, the information referred to in the question was available.

586. Zahira admits that the F.I.R. [Ex.136] is the

document on which her signature was obtained by the policeman in the hospital; and that her signature had been obtained by a policeman only on one paper. The question and answer reproduced above clearly indicates that Zahira does know what is written in the document [Ex.136].

587. Curiously, the record of the deposition of Zahira as given by her during the previous trial does show that Zahira did state before that Court, that she had talked to the police about the incident. Zahira was confronted with the portion [Ex.137 and Ex.137/A] in her original deposition [X-60 for identification] before that Court which reads as '*I had talked to the police about this incident*' and the '*police had obtained my signature on my statement*', but still denied having made the statement. Zahira was also confronted with the other portion [Ex.137/B] in her original deposition, which shows that Zahira admitted in that Court that the F.I.R. bore her signature; and that it was recorded in Sayaji Hospital, but Zahira denied even having said so. This denial can not, at all, be accepted. There is nothing to show that this particular record of the Court is not accurate. The facts stated in those portions are natural and probable and the denial of the fact that she lodged F.I.R., is, what is actually unbelievable and unnatural.

588. Why Zahira is hostile to such an extent and what are the reasons for her making statements which are obviously false and which one is ordinarily expected to realize, as would not be believed, is a matter difficult to understand and requires deep probe. Though ultimately Zahira does not dispute the incident, it has taken a great deal of efforts to get the facts from her. By way of illustration, the following may be taken into consideration.

589. Zahira was not willing to admit that after the rioters had assembled around the Best Bakery building, there was danger in coming outside their house. Zahira was questioned as to why, when the house was burnt, she and others did not try to go out and why she did not try to escape from the rear side of their house. To avoid admitting the fact that it was not possible to escape as the bakery had been surrounded by a mob of rioters who were violent, Zahira gives the reason as '*her mother was observing iddat and therefore, they did not try to escape therefrom*'. Again, she said that '*since it was the time of ishaan namaaz, they did not try to go out of the house*'. When made to admit that the time of *ishaan Namaaz* was 10.00 p.m., Zahira gave the reason of not going out of the house as '*because curfew had been*

ordered'. Thereafter, when specifically questioned whether it was on account of the curfew that they did not try to go out of the house, Zahira answered as follows,

> '*How could we go ? Stones were being thrown, bottles were being thrown.*'

It is after long and persistent questioning, Zahira ultimately admitted as follows,

> '*It is correct that we did not try to go out of our house and save ourselves because there was danger outside.*'

The evidence preceding that [from page 1160 onwards in the notes of evidence] shows the attitude of the witness. It is not that the witness only wants to refuse to say anything about the connection of the accused with the alleged offences. Whether the accused are the culprits or offenders or not and what Zahira says in that regard would be a different matter, but even after admitting that riots had taken place and also admitting in what manner they had taken place and how serious the incident was, she is not ready to say that there was a danger to their lives. This makes it clear that the interests of those at whose instance she is speaking lies, are totally different and much larger than merely protecting the accused. This, as contended by the learned Spl.P.P, might be a sign of the pressure that is in the mind of the witness, apart from the possibility which clearly

exists that she has secured monetary benefit from the interested persons to depose in the manner in which she has. It is further remarkable that even after admitting that there was danger outside, to the very next question as to 'from whom was the danger', Zahira was not ready to say that it was from the rioters. The Court note in that regard [on page 1164 of the notes of evidence] records that Zahira gave irrelevant answers to the effect that throwing of stones and bottles was going on, curfew was there and after much time was spent, Zahira stated that she did not know from whom the danger was. Obviously, the idea is again to emphasize that she did not know who were the rioters, but this is rather unusual. At that stage, nobody expected her to say who were the rioters and a person who would not be determined to tell lies at all costs and to shake the basic version of the prosecution case on the basis of his or her own statements only, would have certainly said that the danger was from the rioters. In fact, the previous answer given by her does say so; and that outside there was danger, had been said by Zahira with respect to the rioting going on outside only, but still, she is not ready to utter the simple words that '*there was danger from rioters*'. That she does not know the rioters is eagerly and before waiting for that subject to be touched, said by her. Anyway, Zahira did admit, after

persistent questioning, that it is due to the fact that the riots were going on outside, she and her family did not come outside her house for saving their lives. In spite of her refusing to clearly admit that there was danger to their lives from the rioters, or at least they felt so, this is clearly established because, that though there was danger to their lives by remaining in the house, still they did not come out of the house. The only conclusion therefrom is that the danger that was - or was so perceived by them - outside, was more than the danger in remaining inside the house. Even thereafter, Zahira was not ready to admit the simple undisputed and already spoken fact by her that because of the riots, they were in danger till the police arrived in the morning. The questions and answers in that regard are worth reproducing to give a correct idea of the attitude of this witness.

> '*Ques- Because of the riots, you were in danger till the police arrived in the morning ?*
>
> *Ans.- At that time, we were frightened and were therefore unable to understand anything.*
>
> *[Court Note :- The question is again repeated].*
>
> *Ans.- That time, we were injured also, we*

were frightened also and that is why, throughout the night, we were on the terrace only.

Ques.- You and your family were in danger throughout the night and till the police arrived in the morning ?

Ans. - We were so much frightened that we did not understand anything.

Ques.- Whether the reason for your being so much frightened was that you felt danger to you and your family ?

Ans.- At that time, even the servants were injured and also my brothers were injured and therefore, we were unable to understand.' [Page 1166 of Notes of Evidence].

The object of reproducing this is to highlight how serious the matter is from the point of view of administration of justice. The witness, it seems, is determined to make a mockery of the whole system of administration of justice.

590. As to why Zahira and the others went to Vadodara from Mumbai after the retrial had started, Zahira has given the reason that '*gundas*' started coming to their

house and threatening them that they would have to give evidence as the '*gundas*' would say; and that they would have to do as the '*gundas*' would tell. According to Zahira, she and others refused by telling that they would tell the truth. The '*gundas*' then said that they would shoot them dead. Thereafter, Zahira and others decided to go to Vadodara. This story was revealed when the *question, as to when* the decision to go to Vadodara was taken, was asked. This story did not provide an answer to what was asked - viz. '*when*'. The question was repeated and the opportunity to speak further and give the names of certain persons as '*gundas*' - i.e. Raees Khan, Mohammad Vora - was seized by Zahira. Zahira mentioned about Smt.Teesta Setalvad also coming to their house and telling them that they would have to do as she would say. It is obvious that this all is a tutored version of the original stand of the persons who had tutored Zahira and other hostile witnesses. Obviously, this tutoring was thought by them as necessary to explain the happenings leading up to the retrial. Considering the background in which the retrial came to be ordered, considering the various statements made by Zahira and others- not only before media but before statutory authorities as well - before and after the first trial, turning hostile and disowning everything that had transpired before the retrial, was not easy.

The only story could be of being abducted to Mumbai, kept in confinement, tutored and threatened and then when the retrial was about to start, ultimately escaping from the clutches, going to Vadodara, feeling secured thereafter and telling the truth. As discussed at various places and as shall be dealt with more specifically later, this story cannot be accepted at all. It is so incredible, so improper, so contrary to reason and logic that it must have taken a great deal of courage to put forth such an improbable story. What is further surprising is the estimate of Zahira and those who tutored her, about the degree of credulity that the Court may possess.

591. A tendency on the part of Zahira not to give straight answers to the questions put by the learned Spl.P.P., to introduce certain matters which apparently were already decided as to be said, was noticed and therefore she was allowed to narrate her version. Zahira then narrated all the events from the riots till she, along with others, went to Vadodara after the retrial had started, contacted Advocate Atul Mistry and demanded help from '*Jan Adhikar Samiti*'. This narration [from page nos.1170 to 1178 of Notes of Evidence] is what Zahira's initial version before this Court is. Smt.Manjula Rao, the learned Spl.P.P., has immediately, after the said narration was recorded, got it confirmed from Zahira that

it has been accurately recorded. It is with reference to this story that the various different stands taken by Zahira are to be examined. It would be therefore appropriate to reproduce the entire narration here.

> '***Question by the Court:-*** *Tell us what happened since 01/03/2002 and from the time you were on terrace and when the stone throwing, bottle throwing, shouting, etc., was going on ?*
>
> ***Ans.*** *- When the riots took place in the year 2002, we were in our house. At about 8.00 p.m. to 8.30 p.m., Lal Mohammad's 'Wakhar' was burnt. Thereafter, the wood which was kept downstairs in our house, caught fire. Then somebody said that fire had caught and so we went to the terrace. Then, bottles, stones, etc., were being thrown in the night on the terrace and there was fire and smoke and there was no light also. There was noise of shouting and of beating of 'thalis'. On account of the stone throwing and*

bottle throwing, our servants and my brothers were injured. We were very much frightened. We were sitting on one side of the terrace in the hope that if we would get the help of police, in the morning, then we would be able to escape. In the morning, police came. The ambulance and fire-brigade also came there. The police and fire-brigade made us get down. They took us to the hospital. 2-3 days after we had gone to the hospital, one policeman came and took my signature. I was shown the dead bodies of Sabira and our servants in the hospital. After all this happened, my evidence was recorded in the Court at Vadodara. There, I took the oath in the name of almighty and spoke the truth. Thereafter, the verdict was given by the Court and I went to my native place. When I came back to Vadodara, within 2-3 days, Mohammad Vora, Arif Malik and Munna Malik came to our house and forcibly took

us – i.e. I and Nafitulla – to Mumbai. Teesta Madam then explained that she will see that we are compensated for the loss caused to us and that she would restore our bakery and house and that we would have to do as she would say. After about 5 to 6 days, those persons got a press conference held ["press conference karaya tha woh logo ne"]. Then she kept me with her for one month. Then I was kept with Ishag. There, my sister – Sahera – and her husband came to meet me. Thereafter, they had given address to me and had left. They did not talk much. She only asked whether I wanted to come home, when I said that I was unable to come home. Thereafter, papers, blank papers, stamp papers, computer papers were being brought to me [Expression used is, 'mere paas late the']. I was told that the bakery was to be transferred in the name of my mother. My signatures on several

papers were obtained. They used to politely tell us that they were doing so much for us. This way, four months passed. I then asked Teesta Madam, “Aunty, why are you taking my signatures on so many papers ?”. She said, 'Jo korat mein dala tha paper, uski arji nahin hui, ab doosra dalna padega'. Then I said, I would not make any more signatures. When I was residing with Ishag, Teesta Madam had taken me to Delhi. After I had refused to make more signatures, Teesta and Raees Khan started pressurizing me saying that I would have to make more signatures. They made several attempts to pressurize me. Then I came to my mother's house. There also, Raees Khan came and troubled us. He said that I would have to do everything for the community. Before 'Dasara' and after 'Dasara', Raees Khan and Teesta came to our house. They started quarreling with my mother. They were saying,

"Zahira ko humko deo. Hum usse Court mein jhoothi zabaani dilwana chahate hain". We refused saying that we will not do any such false thing. Thereafter my brother – Nasibulla – was returning from his place of work when 'gundas' of Raees Khan caught hold of him and put him forcibly in a vehicle. One person who was there, came to my mother and told her that her son was being put in a vehicle, by force. My mother then went to that spot. When those persons were making my brother sit in the vehicle, by force, my mother reached there. At that place, some 'Magajmari' took place. Raees Khan gave a push to my mother, started the vehicle and went away.

Question by the Court *:- And you kept observing?*

Ans. *- No. I was in the house. Then my mother went to lodge the complaint ['fariyad'] at the police station. However, Raees Khan reached there also.*

Question by the Court *:- You said that Raees Khan had left. Did he still reach the police station?*

Ans. *- My mother had gone to the police station for lodging the complaint on the next day. The police did not record any complaint and therefore, we were forced to go to Vadodara.*

We went to Vadodara by a car. There also, Mohammad Vora and others were searching for us. I and Nafitulla met 'Vakeelsaab'. It was in the Court. The name of that 'Vakeelsaab' is Atul Mistry. We narrated the things to him. He wrote it down and prepared an affidavit. I then demanded help from 'Jan Adhikari'. This is what I have to say.'

The salient features of the initial version of Zahira before this Court are as follows.

a) That the riots indeed took place. Their building and some other premises had caught fire. Rioters were throwing stones and bottles due to which her brother and the servants were

injured.

b) In the morning, police, ambulance and fire-brigade came and made Zahira and others get down and took them to the hospital.

c) Two to three days after going to the hospital, one policeman came and took her signature.

d) Zahira was shown dead bodies of Sabira and their servants in the hospital.

e) Her evidence was recorded in the Court of Vadodara which she gave on oath and spoke the truth.

f) After the verdict was given by the Court, she went to her native place.

g) When she came back, Mohammad Vora, Arif Malik and Munna Malik came to her house and forcibly took Zahira and Nafitulla to Mumbai.

h) At Mumbai, Zahira met Teesta Madam who explained that she would see to it that Zahira and her family were compensated for the loss caused to them, that she would restore their bakery and house; and that they would have to do as she would say.

i) Smt.Teesta Setalvad held a press conference thereafter and kept Zahira initially with her for a month and then with one Ishaq, her relative.

j) Papers, blank papers, stamp papers, computer papers were being brought to Zahira. Zahira was told that the bakery was to be transferred in the name of her mother and her signatures on several papers were obtained. This way, four months passed.

k) At one point thereafter, Zahira asked Teesta Madam why her signatures were being taken on so many papers. Smt.Teesta Setalvad gave an answer suggesting that they were required for some proceeding in the Court. Zahira refused to make any more signatures.

l) Earlier, Zahira had been taken to Delhi by Smt.Teesta Setalvad.

m) After Zahira's refusal to make more signatures, Smt.Teesta Setalvad and Raees Khan started pressurizing her.

n) Zahira then came to her mother's house, but there also Raees Khan came and troubled Zahira and others.

o) Raees Khan said that Zahira would have to do everything for the community.

p) A few days before Zahira went to Vadodara, Smt.Teesta Setalvad and Raees Khan came to Zahira's mother's house and quarreled with her mother. They wanted to have Zahira with them

for making her give false evidence in the Court.

q) Zahira and others refused to do such a false thing.

r) Thereafter, Nasibulla was caught by the '*gundas*' of Raees Khan and was being forcibly taken somewhere in a vehicle.

s) Zahira's mother rescued Nasibulla but when she went to lodge a '*fariyad*' at the police station, Raees Khan reached there also. The police did not record any complaint and therefore Zahira and others were forced to go to Vadodara.

t) Even after they went to Vadodara, Mohammad Vora and others were searching for them.

u) Zahira and Nafitulla met '*Vakilsaab*' Atul Mistry in the Court and narrated the things to him. Advocate Atul Mistry wrote it down and prepared an affidavit.

v) Zahira then demanded help from '*Jan Adhikar Samiti*' [which is frequently referred to by the hostile witnesses as '*Jan Adhikari*' and stated to be a person by name Tushar Vyas].

592. The story would be put to test during the discussion on Zahira's evidence, but what is significant and must be noted at this stage is that as per this version, which is the basic version sought to be advanced by Zahira, she

never made any statements about this case or did not make mention to anybody about this case either before or after the previous trial. At the most, the suggestion is that after the previous trial, some written complaints purporting to be of Zahira, might have been made by Smt.Teesta Setalvad on the basis of Zahira's signatures obtained by her on various papers. This is to be kept in mind because the later examination of Zahira reveals that almost everything that led to the retrial was stated by Zahira to various authorities and on various occasions and this included even the names of the accused persons in this case and it is after she was forced to admit having made the statements, a theory of she having made the statements as tutored, has been advanced. In this original narration, there is no mention of her being made to say certain things. Apart from there being no express mention, the story is consistent enough to indicate the absence of any such mentioning on the part of Zahira. From this, Zahira appears to be a very truthful person and the moment she suspects some foul play, she refused to make signatures and the moment she was told that she will have to speak lies, she refused and escaped from that place and went to Vadodara. Interestingly, even when forced to admit having made some statements concerning this case contrary to what she is now telling to the Court, the initial attempt was to attribute those

statements to the tutoring of Smt.Teesta Setalvad only. However, when caught in a situation where the period of having made those statements was indicated as prior to Zahira's meeting Smt.Teesta Setalvad, the tutoring came to be attributed to various others - i.e. local people from Vadodara. Why this has been dealt with in depth by reproducing the entire version, is because it is necessary to expose the conspiracy behind advancing such version and by highlighting improbabilities contained therein. This is necessary to be done because this is an attempt to show that retrial has been wrongly ordered and in fact, such arguments were advanced on behalf of the accused.

593. Shri Adhik Shirodkar, the learned Senior Advocate, repeatedly contended that Zahira is telling the truth; and that it would be revealed to the Court at the end of the trial, that it was 'blunder' to order a retrial. Much was spoken about the conspiracy behind getting a retrial ordered, but after going through the entire evidence and considering all the relevant matters, it appears to me that there was, perhaps a conspiracy to make a fiasco of the retrial, by whatsoever means.

594. Zahira went to the extent of denying that she lodged the F.I.R. This is clearly falsified by the evidence of

PI Baria [P.W.72]. First of all, that the F.I.R. bears the signature of Zahira is not in dispute at all. There are various entries in the station house diary showing that the F.I.R. was lodged at 1515 hours on 02/03/2002; and that it was lodged by Zahira. The time of making these entries could not be manipulated beyond a particular limit. Moreover, PI Baria had no conceivable reason to make a false claim of Zahira having lodged the F.I.R. Apart from this, there is a clear indication that Zahira's denial in that regard is false by what has been got elicited from her by Smt.Manjula Rao, the learned Spl.P.P.

595. Zahira was questioned about burning of four vehicles belonging to them in the riots and she claimed that she had learnt about it from her brother later. Smt.Rao asked her whether that the vehicles were burnt was told by her to anyone, when Zahira stated that she had told it in the *fariyad* to the police. However, immediately realizing that she is not to admit having lodged the F.I.R., Zahira hesitated and continued the answer to the effect that they had asked and it was told; and that whatever was asked, was told. The word '*fariyad*' was used by Zahira only [and not by the Spl.P.P.] while replying that the burning of the vehicles was told to the police. Zahira certainly knows what is the *fariyad*

because in connection with the incident allegedly taken place between Raees Khan and Nasibulla, Zahira speaks of her mother going to Mira Road Police Station for lodging the report [“*fariyad likhane ke liye*”] [page 1181 of the notes of evidence]. Thus, not only Zahira does know what is '*fariyad*', but it is also clear that PI Baria's evidence that she had lodged it, is true.

596. PI Baria's evidence clearly shows that copy of the F.I.R. was also given to Zahira and her acknowledge in that regard was obtained.

597. Zahira admits that she knows what was the result of the case in the Vadodara Court and what was the decision of that Court. It is remarkable that when asked as to what was the decision which she claimed to have heard from somebody, she states that she heard about the decision as 'whatever was true had happened'. She is however unable to explain what was the so called truth. This indicates that she merely saying something that is tutored. She claimed that she did not know, till the date she was giving evidence, as to what had happened to the case after it was over in the Court at Vadodara; and that she did not know why case is now being tried in Mumbai. Thus, what she wants to claim is total unawareness of the grievances about the previous trial,

the proceedings before the Gujarat High Court and the Supreme Court and the order for retrial made by the Supreme Court. However, this stand which is consistent with what was the original tutoring to Zahira does not stand to scrutiny. Zahira was forced to admit, as a result of further questioning, that she knew what was going on; and that she had made certain statements, though on being tutored by Smt.Teesta Setalvad and others. Thus, expressing total ignorance as to what had happened in the Court at Vadodara and thereafter leading to the present retrial is absolutely false.

598. Document marked [X-51 for identification] was produced by the prosecution through Smt.Teesta Setalvad. This document purports to be a letter written by Zahira in her own handwriting. Zahira when confronted with this document denied it to be written by her. She denied that it was in her handwriting. However, she did admit signature thereon, as her. Zahira tried to explain this by saying that her signatures were obtained on several blank papers. I am not inclined to believe Zahira on this at all. Ordinarily, when a person admits his signature on a document it would be rather difficult for him or her to dispute the authorship or the contents thereof. The document has been produced by Smt.Teesta Setavad to whom it purports to have been addressed.

Now, when the signature is admitted by Zahira and the document is produced by Smt.Teesta Setalvad there are only two reasonable possibilities in that regard. The first is that the letter is indeed written by Zahira and the other is that it is forged by Smt.Teesta Setalvad. I have considered this aspect. Zahira was made to write certain matter while in the witness box itself in accordance with the provisions of Section 73 of the Evidence Act, in order to enable the Court to compare her handwriting with the handwriting of the document [X-51 for identification]. These writings obtained from Zahira under section 73 have been marked as Ex.140, Ex.141 and Ex.142. Upon a careful consideration of all the handwriting in Ex.140, Ex.141 and Ex.142, with the handwritings in X-51, together with the fact that the signature thereon is admitted to have been made by Zahira, I have no doubt whatsoever that the letter [X-51 for identification] has been written by Zahira only. Though, ordinarily, a Court would not undertake upon itself to get decided the authorship of a disputed handwriting and would ordinarily depend on opinion of experts on it, nothing prevents the Court from forming any opinion on its own in that regard.

599. The observations made by the Supreme Court of India ***in Murarilal Versus State of M.P. AIR 1980 Supreme Court***

531, leave no manner of doubt, in respect of this position. The Supreme Court observed that:

> *"The argument that the Court should not venture to compare writings itself, as it would thereby assume to itself the role of an expert is entirely without force. Section 73 of the Evidence Act expressly enables the Court to compare disputed writings with admitted or proved writings to ascertain whether a writing is that of the person by whom it purports to have been written. If it is hazardous to do so, as sometimes said, we are afraid it is one of the hazards to which judge and litigant must expose themselves whenever it becomes necessary."* [para.12] [Emphasis supplied].

600. The Supreme Court of India, went on to observe that it becomes the plain duty of the Court to compare the writings and come to its own conclusion whether or not experts have been called and examined. It was observed as follows :

> *"The duty cannot be avoided by recourse to the statement that the Court is no expert".* [Para.12]

601. Further, here the opinion is not being based only on the comparison of handwriting, but upon considering the entire facts including the one that the signature on the letter is admittedly of Zahira.

602. Moreover, the other possibility would only be the possibility of forgery having been committed by Smt.Teesta Setalvad [or somebody on her behalf] after obtaining signature of Zahira on a blank paper. Now, every forgery has some motive. It is done with some object. In order to ascertain the authorship of the document, contents thereof can certainly be looked into, though not as evidence of the facts stated therein or as to the truth of the contents. Thus, the document [X-51 for identification] only speaks of Zahira's intention to fight her case from the beginning and explaining how she had changed her statement in the Court due to threats. Now if Smt.Teesta Setalvad wanted to forge a letter by taking advantage of the signature of Zahira on a blank paper, she could have written much more damaging matter in this letter. It may be recalled that the motive attributed to Smt.Teesta Setalvad is to malign the Government of Gujarat for ulterior motives. It is not alleged that she has any personal enmity or ill-will against the accused. What is alleged is that she wanted to show that the previous trial was tainted, that it was

designed to ensure the acquittal of the accused, that the investigation had been faulty, that the State did not take any interest in punishing the culprits and protect the minority. If at all forgery was to be committed, in the circumstances, many more damaging things could have been written, instead of a plain letter merely expressing desire to fight the matter all over again and attributing the previous testimony to the threats.

603. In the circumstances, I have no manner of doubt that the document [X-51 for identification] has been written by Zahira only and her denial in that regard is false.

604. Zahira has admitted that while she was residing at the house of Iqbal Ansari [P.W.39] after the incident and thereafter at *Madar Mohalla* reporters and persons used to talk to her and make inquiries with her. However, when questioned further as to in what connection they used to come to her and talk to her and take her photographs, etc., Zahira realizes that if she would give the answer as '*regarding the Best Bakery incident*', then some previous statements were, in fact, made by her on the subject, might be established; and therefore answers as 'whether she had received compensation'.

605. There is much to be discussed about Zahira's

evidence if that what she speaks are total lies, is to be emphasized. Almost everything that she states is contradictory, inconsistent and incredible. It is easy to understand that this is happening because the story which she wants to advance and which she narrated as referred to earlier is itself absurd and improbable. To resile from the statements, after going much ahead and to explain the allegations and assertions made before various competent and statutory authorities, before the media, would indeed be a difficult task; and in an attempt to do so by reason of fear felt or on account of having been offered monetary inducement, or by both, it is no wonder that Zahira's evidence has rendered itself visibly unreliable and false. I shall therefore deal only with certain aspects of the matter which are more relevant from the point of view of the present trial instead of touching numerous other examples of the falsehoods and lies, which she has resorted to.

606. Zahira has admitted that she had been before the *Manav Adhikar Ayog* when she was residing in the house of Iqbal Ansari i.e. immediately after the incident and within a period of one month thereafter. She states that she was taken there by Mohammad Vora and Munna Malik and was tutored to say certain things which she did. This she states was done by her on 2-3 occasions. She wants to

suppress the fact that she had made a grievance before *Manav Adhikar Ayog* and therefore states that she does not remember what she told but that whatever was told was as was tutored to her. It may be incidentally be observed that this any way demolishes the theory of Zahira being tutored by Smt.Teesta Setalvad, as admittedly, Smt.Teesta Setalvad was not in picture at all before the previous trial had ended.

607. When an attempt was being made to confront Zahira with certain document purporting to contain a record of statement previously made by her, all sorts of objections were raised by the Advocates for the accused, which objections were without any substance.

608. As discussed earlier, the persons at whose instance Zahira and others from her family had turned hostile, obviously appear to have a desire to attribute all the allegations made by Zahira about the improper conduct of the previous trial, regarding her demand for retrial, etc., to the fraud played upon her by Smt.Teesta Setalvad. The narration of Zahira reproduced earlier indicates what was the initial attempt – as if Zahira knows nothing. This has not succeeded as discussed aforesaid, in as much as, there is ample evidence on record - even of Zahira herself - that she did, in fact,

make certain statements and that was before she had met Smt.Teesta Setalvad. It is after realizing that she could not implicate Smt.Teesta Setalvad in the matter of having made those supposedly false statements, that Zahira started saying about the tutoring and pressurizing by Mohammad Vora, Munna Malik and Arif Malik, etc., from Vadodara.

609. Thus, the initial theory was that Zahira had not made any statements at all. Then the theory – when having made statements could no more be denied - was changed to the effect that statements were made, but on being tutored or pressurized by Smt.Teesta Setalvad. Thereafter, the theory is further changed - because of the realization that at that point of time, Smt.Teesta Setalvad could not be brought into picture - and the tutoring is attributed to the persons from her community. The theory of pressure by Smt.Teesta Setalvad which was thought to be a solution to all the questions that would crop up in any reasonable mind, after Zahira would turn hostile again in the retrial, has, any way, miserably failed. This needs to be further highlighted by pointing out from Zahira's evidence itself that the claim of Smt.Teesta Setalvad having abducted Zahira, being kept her in confinement etc., is false. Zahira was questioned as to how were her and her family's relations with

Smt.Teesta Setalvad when she was residing at Yari Road, and Zahira Said that at that time her relations and also of her mother, her brothers and her sister with Smt.Teesta Setalvad and her children were good. Zahira has admitted that Smt.Teesta Setalvad used to treat her very well and behave very well with her. Zahira has categorically stated that she used to maintain and look after Zahira properly, though has added that Smt.Teesta Setalvad might be getting help. But there has been no denial of the fact that Zahira was being looked after properly by Smt.Teesta Setalvad, [in the words of Zahira, '*achhe se rakhti thi*'] [Pages 1278-1279 of the Notes of Evidence]. This has been repeated by her during her evidence. [pages 1508-1509 of the Notes of Evidence]

610. It is contended by Smt.Manjula Rao, the learned Spl.P.P., that Zahira has claimed as having approached Advocate Atul Mistry for help, because of the threats that were being given to her, but she has not been able to give any proper answer for not going to Gujarat Police before that. How ridiculous and how shameless the attempt to avoid a precise answer to the simple question was, can be best explained by reproducing the question and answer in that regard.

'*Que.- Can you tell why you did not go to the Gujarat Police for*

help/assistance ?

Ans.- Because Mohammad Vora, Munna Malik and Arif Malik were giving threats to us.

[Court Note :- Question is repeated after explaining what the question is].

Ans.- I had given an application to the Collector and further things were to be decided by the Collector.

Ques.- That is after meeting Advocate Atul Mistry. The question is why did you not go to Gujarat Police before meeting Advocate Atul Mistry ?

Ans.- Because we were hiding ourselves.

[Court Note :-Question is repeated again].

Ans. - Because we were hiding ourselves. Raees Khan, Mohammad Vora were searching for us.'

It is only thereafter, and when the question was again repeated Zahira said that she thought it necessary to take the opinion of an Advocate. However, she had to admit that even after taking the opinion of the Advocate she did not lodge any complaint at any police station. Mrs.Rao is certainly right in contending that this shows that Zahira was unable to explain her conduct. However, what is significant, in my opinion, is quite different.

A more pertinent aspect of the matter is why did she not go to the police, or to any Advocate, earlier - i.e. when the first trial was to be held. It is because according to Zahira, persons from her community were pressurizing and threatening her at that time. The question is how and why she did not bother about the threats from the people at that time? Would the Gujarat Police have not given her protection from the threats that were being given by Mohammed Vora, Arif Malik and Munna Malik to tell lies in the Court? Why Zahira did not consult any Advocate at that time even assuming that she did not want to go to police for some reasons at that time is not capable of being explained. Moreover, interestingly, she did not pay any heed to the threats and was not scared of the same persons at that time. She proceeded to speak 'the truth' during the first trial without bothering about the threats by the persons from her community. Thus, by pressure, she used to make the 'tutored statements' before media, various authorities, etc.; but when the trial took place, the pressure disappeared. She spoke the truth. When the trial was over, again pressure mounted to speak the lies. She succumbed to that but when the retrial started, again the pressure disappeared. Thus, the pressure works on all occasions, except when the stage of trial comes. This may be left at that only, without making any further comments.

611. The witness having earlier admitted, [on Page 1166 of the Notes of Evidence] that when the police came in the morning [of 02/03/2002] she felt that the danger was no more there [*'khatra tal gaya'*], she was asked by Smt.Rao, the Special Public Prosecutor, as to why she felt so when Zahira said that the danger was no more there as the police came. However, when attempted to get from Zahira that '*had the police not come there at that time, there was danger to the lives of her family members*', Zahira denied that there was any danger to their lives in the morning.

612. Mrs.Rao contended during the course of arguments that the collusion between the hostile witnesses and the accused was apparent; and that the Advocates for the accused have resorted, deliberately, to taking frivolous and baseless objections at such times when they apprehended that an answer favourable to the prosecution could be elicited from the witness. It is contended by Smt.Rao that rather than the own Advocates of the witnesses, the Advocates for the accused have been zealous in guarding the rights of those witnesses under the garb of protecting the rights of the accused.

613. In the facts and circumstances, I do not wish to go

deeper into this matter, the same not being necessary. It is however a fact that many of the objections raised by the defence during the recording of evidence seem to be utterly baseless, as elaborately held in the relevant Court notes.

614. Ultimately, Zahira has admitted that in a press conference held previously she had stated before the media that due to fear Zahira and her family members did not speak the truth before the Court at Vadodara. She certainly qualifies it by saying that she had stated so on being tutored by Smt.Teesta Setalvad, but does not deny having stated so.

615. Zahira has said about Smt.Teesta Setalvad tutoring her and also about Smt.Teesta telling her that she would call for the photographs from Gujarat and Zahira would have to identify the photographs. However, according to Zahira, she did not actually see the photographs. She refused to see them. Though Zahira wanted to offer an explanation of her previous statements and to attribute the same to tutoring, one fact has been clearly revealed from whatever she stated that she *does* admit that she gave the names of the prisoners in the 'Best Bakery Case'. Though initially she denied this, later on, she admitted having given the names, though - off course -

on being tutored by 'persons from her community'. She has also admitted that she had given the names of the prisoners in the 'Best Bakery Case' before giving evidence in the Court at Vadodara. **Zahira has admitted having given the names of the prisoners in the Best Bakery Case, to National Human Rights Commission, Election Commission [though, of course, on being tutored]**. This completely destroys the contention which is emphatically put by the defence that a false case has been cooked up at the instance of Smt.Teesta Setalvad. What emerges from Zahira's evidence is that she had undoubtedly given the names of certain prisoners as the culprits in this case, though she says that she does not remember those names now and though the names were given on being tutored by '*persons from her community*'. It also emerges that these names were given by her even before the previous trial. It is however remarkable, that in spite of admitting this, Zahira was categorical in maintaining that she had not given the names of anyone to the police. Her denial of not having given the names to the police can not be accepted. If she had gone to so many authorities, there was no reason for her not giving the names to the police. If the persons from her community were tutoring her to name certain persons as culprits before statutory authorities, there was no reason for them not to make Zahira give those names to

the police. In fact, giving the names to the police would have been more important, and would have fetched the desired results. Zahira's explanation in that regard [Page 1535 of the Notes of Evidence] that the names were not given to the police as the police did not come to her, can not be accepted.

616. Zahira also admits having stated before the media that she had not spoken the truth in the Vadodara Court, due to fear.

617. Smt.Rao, the learned Spl.P.P., has rightly, in my opinion, got it confirmed again from Zahira that she did state before this Court that she had given the names of the prisoners in the 'Best Bakery Case' to various authorities [although on the persons from her community having tutored her to that effect].

618. Zahira has admitted that neither Mohammed Vora, nor Munna Malik nor Arif Malik were residing in Hanuman Tekdi locality. I agree with the contention advanced by the Special Public Prosecutor in this regard that this is important from the point of view, as to the likelihood of the witness having been tutored the names by the persons residing outside the locality. The contention of the learned Spl.P.P. is that the accused are undoubtedly from

the locality [which aspect shall be discussed and dealt with latter] and since Mohammed Vora, Munna Malik and Arif Malik are not the residents of the same locality, it was highly unlikely that they knew the names of the persons residing in Zahira's locality.

619. In my opinion, that Zahira might have forgotten to state the fact of tutoring, cannot be accepted. It is crystal clear that had the fact been true, it being such an important aspect, Zahira would never have forgotten to mention about it. It is clear that community people approaching her, her going to various authorities, making allegations, giving statements, would have been an aspect ultimately leading to the stage when a retrial came to be ordered and in narrating the happenings till then, no one would omit this most important aspect. It is clear from Zahira's evidence that the initial trend was towards denying the happenings itself. There was a definite a claim of not having stated or alleged anything at all. The trend was towards indicating that no culprits or offenders were seen at all, no complaint had been made at all and that there was no question of having any grievance about the previous trial at all, there was no question of having demanded a retrial at all, etc., etc. However, the steps taken by Zahira were so many and as the record of many of them was available in some form or

the other, it could no longer be denied by her, as the examination by the learned Spl.P.P. progressed, that she ***had made*** certain statements. In this regard also, the admissions have developed slowly; firstly about having complained about the incident, then gradually developing and finally coming up to a stage where even the admission of having given the names of the '*prisoners of the Best Bakery case*', has been made. It is when the admissions regarding the previous statements, contrary to what is now being stated by her became unavoidable, a theory of tutoring was simultaneously introduced.

620. Zahira claimed that in the papers filed before the Supreme Court of India, whatever had not happened was wrongly written by Smt.Teesta Setalvad. Zahira claimed that no photographer or videographer had come to the place of the Best Bakery along with the police in the morning of 02/03/2002, which is obviously wrong and incorrect in view of the clear evidence of not only Gautam Chauhan [P.W.69], but also of PI Baria [P.W.72] and the video cassette [Ex.283] itself.

621. The video cassette [Ex.389] which has been produced by Pankaj Shankar [P.W.73] contains a record of the interviews of Zahira [P.W.41], Nafitulla [P.W.31], Nasibulla [P.W.30] and Saherunnisa [P.W.40] taken by

Pankaj Shankar. According to Pankaj Shankar, these interviews were taken by him on 18/04/2002. Much criticism of the evidence of Pankaj Shankar is made by Shri Shirodkar, the learned Senior Advocate. The first contention that is advanced with respect to his evidence is that he is a highly interested witness. It is contended that his bias in favour of Smt.Teesta Setalvad is too obvious.

622. It appears from the cross-examination of this witness that he has, indeed, concluded that Smt. Teesta Setalvad is right; and that Zahira [P.W.41] was doing injustice to Smt.Teesta Setalvad by changing her version and accusing Smt.Teesta Setalvad. The witness has not made any attempt to hide his feelings and suppress his opinion in that regard. He has specifically stated that his idea was to show that Zahira lacks credibility.

623. However, the question is whether on that ground, the witness can be disbelieved. I am not able to hold so. It is clear that the case arises out of communal violence and it has created, unfortunately, factions in the society. It is apparent that some section of society is interested in helping the accused by providing all the necessary help to the hostile witnesses to give them strength and the courage to turn hostile and maintain the

hostility, regardless of the consequences. If, in this background, somebody would think of exposing the falsity of the claims of the hostile witnesses and to show that the allegations against Smt. Teesta Setalvad were motivated and false, there is nothing wrong in it. Much has been said about his abilities, his status etc., but I do not find it very material, looking to the limited value his evidence has. The only question is whether the record of the interviews taken by him is fabricated or bogus. In ascertaining this, his bias in favour of Smt.Teesta Setalvad will be kept in mind, but only on that basis he has fabricated the record can not be accepted. The record is clearly not fabricated, in as much as, Zahira [P.W.41] and Nafitulla [P.W.31] have, both, admitted having given the interviews in question and having made the statements in question. Their claim is only that the said statements were made by them on being tutored; and that they were not true.

624. That Zahira, Nafitulla and other hostile witnesses were indeed making statements contrary to what they have now deposed before the Court, has been duly proved by voluminous evidence and record, and the video cassette [Ex.389] is only a part of such record. The contentions advanced by the learned Spl.P.P., to treat the statements of Zahira, Nafitulla and others, as recorded in the video

cassette [Ex.389] as substantive evidence, can not be accepted, the same being legally impermissible. These statements can not be stated as statements made before the Court, so as to be the evidence of the facts which they state. They are also not admissible under any provisions of the Evidence Act, as substantive evidence. Zahira and Nafitulla having admitted the record of the interview to be genuine, it becomes immaterial whether the witness has a keen desire to help Smt.Teesta Setalvad.

625. The only dispute about the genuineness of the record is with respect to the date on which the interviews were taken. This aspect is being dealt with, but for the present, so far as the criticism of the evidence of Pankaj Shankar is concerned, I do not think it justified, except that he has an obvious bias in favour of Smt.Teesta Setalvad. It is also possible that he had taken legal advice before approaching the Court for giving evidence. The attempt to show that he had committed an impropriety by coming to this Court is not, at all justified. It is ironical that Pankaj Shankar's action of coming before this Court and introducing the cassette in evidence is considered as '*interfering*' with the Court's proceedings, but Zahira's making public statements just before the trial, contradicting her

version before the Supreme Court of India, apart from several other authorities including the police, is sought to be justified by saying that she is telling the truth.

626. According to Pankaj Shankar [P.W.73], the interviews were taken on 18/04/2002 and this date, month and year is reflected in the cassette itself. The hostile witnesses have claimed that the interviews were not taken on 18/04/2002, but were taken much after - i.e. after the previous trial was over and after Zahira was abducted and brought to Mumbai. Pankaj Shankar has been questioned about the possibility of manipulating the time setting a video camera, and he has admitted that it exists. However, there is no possibility in my opinion of the interviews having been taken ***after*** the first trial, for a number of reasons.

627. After the video cassette [Ex.389] containing Zahira's interview taken by Pankaj Shankar was tendered in evidence, Zahira was recalled for the purpose of further examination. Smt.Rao, the learned Spl.P.P., confronted her with Pankaj Shankar by bringing him in the Court hall. Zahira denied having seen Pankaj Shankar at any time before that. Zahira was then asked as to whether while she was residing in the house of Iqbal Ansari, a number of persons such as photographers,

cameramen, etc., used to meet her, when Zahira answered in affirmative and added that Iqbal Ansari used to bring those persons. It is at that stage, she first introduced the theory of Iqbal Ansari having tutored her to make certain statements. This is particularly surprising because the aspect of tutoring was off and on being repeated during the lengthy examination of Zahira which had preceded before this and not even once during such lengthy examination-in-chief, Zahira had indicated any tutoring done by Iqbal Ansari. In my opinion, this requires serious consideration whether this goes to support the claim of Pankaj Shankar that the interview of Zahira and others recorded in the video cassette [Ex.389] was taken by him on 18/04/2002 - i.e. the time when Zahira was, in all probability, staying that Iqbal Ansari - going by the evidence on record. It is difficult to accept that Zahira coming across Pankaj Shankar and the interview recorded by him and disclosing tutoring by Iqbal Ansari at the same time, was an accident.

628. Interestingly, Zahira states that during the relevant period, several persons used to come to the place of Iqbal Ansari, take photographs, interviews, etc.

629. Zahira does not dispute the fact that she and others are indeed seen speaking what is recorded in the video

cassette [Ex.389] and there is no dispute that she and others indeed said so. What she claims is that she and others were speaking what was tutored to them by Smt.Teesta Setalvad. Going by the date to which the interview came to be recorded as 18/04/2002, it is not possible to accept that at that time, Zahira and others had been tutored by Smt.Teesta Setalvad, it being an admitted position that at on that day, Smt.Teesta Setalvad was not in picture at all. The remedy in that regard is found to be in the claim that the interviews were not taken on 18/04/2002 at all, but that they were taken after Zahira and others were brought to Mumbai after the first trial was over. It can be safely concluded that the interviews recorded in this video cassette [Ex.389] could not have been given by Zahira and others after they came to Mumbai. The statements in the interview themselves indicate that they were being made soon after the incident. The contents of the interviews recorded in the video cassette [Ex.389] belie the theory of they having been recorded after Zahira and others came to Mumbai - i.e. much after the previous trial was over. Though no such claim is to put forward, I have considered the possibility of the interviews having been recorded after the first trial but falsely shown as having recorded earlier - i.e. before the first trial. However, this also does not seem to be likely at all. The reason

is obvious. First of all, Smt.Teesta Setalvad would have had no reason to record the interview as if it was of a previous date and it would have served her alleged purpose well to show it as of the day on which it was really taken. In fact, that would have been more advantageous. In that case, she could have also introduced the statements of having received threats during the previous trial, about involvement of local leaders, etc., etc., in which she is allegedly interested. Secondly, if at all there was some purpose in making the interviews ante-dated, so many more damaging matters could have been introduced.

630. Further, the injuries on the person of Nasibulla are seen to be fresh, indicating that the interviews were taken soon after the incident. Shri Shirodkar has conceded this, by saying that the record of Nasibulla's interview is genuine. The contents of the interview are such that the possibility of having been taken later on and shown as if they were taken earlier, does not exist at all. Thus, indeed, it is a fact that Zahira and others have made statements that are recorded during those interviews. It is a different matter that they may not be treated as substantive evidence and would merely qualify to be introduced as previous and pre-trial statements.

631. Shri Shirodkar, the learned Senior Advocate, has contended that the interviews recorded in the video cassette [Ex.389] were the result of tutoring, as stated by Zahira and Nafitulla. He submitted that there were intrinsic elements indicating that the statement contained in the interview were as a result of tutoring.

632. Before dealing with the contentions raised by Shri Shirodkar, it must be observed that Zahira and Nafitulla have both admitted the interviews to be genuine. It is not that they have disputed having made those statements. What is disputed by them is that those statements were not made voluntarily on their own by them; and that they were not true. According to them, they made those statements as were tutored. Thus, what is in dispute is the truth of the statements made by them and not that the statements were in fact made.

633. I shall now examine the grounds on which Shri Shirodkar contends that the statements made by Zahira and Nafitulla in the interviews themselves indicate that they were made as a result of tutoring. Shri Shirodkar has elaborately discussed this aspect in the written arguments [Ex.521/A] filed by him [at pages 117, 118 and 119 of written arguments (Ex.521/A)]]. Shri Shirodkar

has referred to various statements made by Nafitulla, Saherunnisa and Zahira in their respective interviews recorded in cassette [Ex.389], which statements are patently false, according to him. It is not necessary to discuss and comment on each and every sentence reproduced by Shri Shirodkar, the learned Senior Advocate, as a false statement from out of the interviews. It may only be observed that the contention that those statements were false, can not be accepted. For instance, Nafitulla's statements as *'nau log jo neeche the unhen bhi jala diya'* and '*andar petrol daal rahe the'* are contended to be false and this falsity is contended to be indicative of '*tutoring*'. I fail to understand how the statement that 9 persons who were below were burnt is false, if Kausar and Lulla are included in those 9 persons. Further the basis for saying that the statement that '*ander petrol dal rahe the*' is false, seems to be only that no residues of petrol were found on chemical analysis of the relevant samples. Absence of petroleum hydrocarbon traces does not rule out the possibility of petrol or inflammable substance having been used. The evidence of Maheshchandra Champaneria [P.W.21] makes this position clear. As such, to claim that this is proved to be a false statement is rather strange. Similarly, the statement of Nafitulla in the cassette as '*sab pariwar ke hi the sab*' is also claimed to be a false

statement, on the ground that Aslam and Firoz were not belonging to their family. I am not impressed by this. It is certainly not unknown or uncommon to describe the persons with whom family relations are existing for years and who reside in the neighbourhood to be described and treated, as if members of family. It is not unknown to refer such persons as '*chacha*' '*nana*' '*bade abba*', etc. Saherunnisa's statement to the effect of her '*devrani*' '*jethani*' being they are among those who were burnt, Zahira's statement that her '*do chachia*' were among those who were burnt, are also claimed to be false. As aforesaid, I do not agree with this. On the contrary, it explains in my opinion, the statement of Nafitulla that '*sab pariwar ke hi the sab*'. It shows how close the family of Aslam was to the family of Zahira.

634. Without wasting further time in this discussion, I come to a more relevant aspect of the matter. Assuming that the statements are false, I fail to understand how that would indicate tutoring. It would indicate that the witnesses were lying, but it would not necessarily indicate that they had been told by somebody to lie.

635. When Zahira [P.W.41] was confronted with the C.D. [Ex.283/3 equivalent to the relevant part of the video cassette (Ex.283)], she admitted that the shooting was

relating to their house and of the morning of 02/03/2002. In spite of previously denying the presence of Yasmin and after having seen Yasmin present on the scene recorded in the C.D., Zahira did not express any surprise. Ultimately, in the process of questioning and answering Zahira has admitted that at the time of the incident she had seen that Yasmin was sitting. Thus, ultimately, Zahira has admitted the presence of Yasmin. Further, Zahira has again confirmed the presence of Yasmin by saying that when the police and the fire brigade came they - i.e. she, her mother and her sister-in-law - were on the terrace, though that they were on the terrace at that time is obviously false as disclosed earlier. It is pertinent to note that Yasmin's presence on that day along with Zahira and others has not been denied by Zahira and the previous denials in that regard were given up when confronted with the relevant part of the cassette.

636. After her lengthy examination, Zahira was asked certain questions by the Court. Zahira admitted that she, her mother, her brothers and servants were brought down by a ladder put on the rear side of the house, though of course she claimed that the ladder was put by the fire-brigade. The initial story of having got down from the staircase has been given up after realizing that

a viewing of the relevant part of the cassette would convince anyone by looking at the fire that had caught to the 'Best Bakery building, that from inside the building it was not possible to come down. Thus, even that part of the prosecution story - viz. that all the victims got down by the ladder - is also ultimately admitted and the dispute merely remains on the aspect whether the ladder had been brought by the rioters before the police and fire-brigade arrived or whether it was a ladder brought by police and fire brigade. As already observed, the story of Zahira and others including her brothers and servants coming down after the arrival of the police, is patently false.

637. Thus, the following aspects are admitted even by them [or such of them as are concerned with respect to a particular aspect].

i) The incident of a mob of rioters setting fire to Best Bakery building and other premises such as Lal Mohammad's '*wakhar*' and Aslam's house indeed took place.

ii) The mob was of Hindu persons and was giving slogans to the effect '*maro' 'kato' 'bakery jalao' 'har har mahadeo*' etc. That in the fire that was set, immovable and movable property of considerably huge

amount was damaged and destroyed.

iii) That seven persons died in an as a result of burn injuries sustained by them, due to fire that had been set to the Best Bakery building.

iv) That Nafitulla and Nasibulla were injured in the riots.

v) That the rioting was going on throughout the night; and that the mob was throwing stones, bricks, soda water bottles and bulbs filled with kerosene on the terrace of the Best Bakery building.

vi) After the police and fire-brigade came, the injured including Nafitulla, Nasibulla and also Zahira, Saherunnisa, Sahera and Yasmin were taken to S.S.G. Hospital.

vii) Zahira appeared before the various authorities, such as Human Rights Commission, Election Commission, etc., and narrated the incident. She also named certain persons as the culprits.

viii) Zahira did give the names of the prisoners of the Best Bakery Case as the culprits before certain authorities, though not to police.

ix) In the hospital, police had come and

obtained Zahira's signature on a paper which paper is admitted to be the document [Ex.136 (F.I.R.)].

638. Thus, almost everything relating to the prosecution case has been admitted by Zahira and the other hostile witnesses. What is not admitted is the connection of the accused, though even the fact that some names - and that too of the prisoners of the 'Best Bakery Case' - were being given by Zahira from time to time to various authorities is admitted. The dispute is only about having given names to the police. In the ultimate analysis, the claim is not that the names of some persons as the culprits were not given at all by Zahira at any time to any authorities, but the claim is that they were given on being tutored; and that presently she does not know or remember what were those names. The alleged tutoring also has been done not only by Smt.Teesta Setalvad, as originally suggested, but by various different persons at different periods of time.

639. There is a conscious effort, as already observed, to avoid disclosing the morning incident as deposed to by the supporting witnesses. There is, therefore, an assertion on the part of these witnesses that those who were injured including Nafitulla and Nasibulla were

injured in the night itself and had lost consciousness. These hostile witnesses claim that they and even the others came down, or were brought down from the terrace only after the police had arrived. Therefore, if this is true, Sailun, Baliram, Prakash, Rajesh, Raees and Taufel all sustained injuries in the night itself. Apart from the fact that the injuries sustained by them, including those by Nafitulla and Nasibulla, are not such which can be caused by throwing of stones, bottles or bulbs etc., the absurdity of this claim is exposed by the fact that none of the women who were on the terrace were injured on account of the stone throwing and bottle throwing etc. In the at random stone throwing and bottle throwing which was going on throughout the night only the men would sustain so severe injuries, without even one of the women sustaining any serious injuries, can not be believed by any sensible person. The story of the hostile witnesses of the police coming and rescuing them therefore, leaves this aspect - viz. how the men were so badly injured and how the women were not injured, unanswered. This theory is explained only if the morning incident as deposed to by the witnesses is true.

640. In the ultimate analysis, therefore, the evidence of the hostile witnesses supports the prosecution case to a large extent and in spite of the initial extreme stand

taken by them, they ultimately admitted a substantially large part of the prosecution case, except the part relating to establishing the connection of the accused persons with the alleged offences.

641. The examination of the hostile witnesses has revealed certain disturbing aspects. These witnesses who are hostile and who are obviously speaking lies, as amply demonstrated by a discussion of their evidence, have been actively assisted and supported by some person or persons from Vadodara, by looking after all their financial needs and by providing for the expenses of their Advocate. It emerges from their evidence, that Advocate Atul Mistry used to come along with these witnesses and used to remain present in the Court during their examination. Nasibulla states that he did not know Advocate Atul Mistry at all; and that he was introduced to him by his brother. All his fees are paid not by anyone of these hostiles witnesses, but by '*Jan Adhikar Samiti*'. According to Nafitulla, '*Jan Adhikar Samiti*' provided the services of Advocate Atul Mistry to him and others. According to Nafitulla, he and Zahira met Advocate Atul Mistry only on the day on which the press conference was held by Zahira after going to Vadodara. It was after the retrial had started.

642. Sahera [P.W.35], though knows Atul Mistry to be her Advocate, claims that she has never met him. What is interesting is that Sahera was not able to state what was the necessity for her to engage an Advocate. In spite of repeated questions, she was unable to give an answer as to what was the requirement of an Advocate. Advocate Atul Mistry is the one who told Sahera to appear before this Court - atleast Sahera states so. The evidence of Sahera [P.W.35] shows that Advocate Atul Mistry had given a vehicle to her by which she and 3 policemen travelled up to Mumbai. Sahera did not pay any money for the petrol, which was already filled in, in the vehicle. She also did not pay any money to the driver.

643. Saherunnisa [P.W.40] speaks of Atul Mistry being her Advocate. Her evidence shows that when she came for giving evidence, she came by the police vehicle, and that three policemen, one women police constable and her Advocate also travelled by the same police vehicle.

644. When Sahera was being examined, it was noticed that she had been given police protection. A number of irregularities which were shocking and surprising were noticed in the matter of giving police protection. Curiously, Sahera and these witnesses did not want protection from Mumbai Police.

645. Sahera was not accompanied by any woman constable. Male police constables had been sent with her, supposedly for her protection in an irregular manner. No order requiring them to accompany her to Mumbai was produced. Sahera, however, had no complaint or grievance and there was nothing to indicate that she was under any threat or fear, etc.

646. The evidence of Saherunnisa [P.W.40] shows that Advocate Atul Mistry used to do reservations in the lodge, reservation of vehicles and also used to take decisions as to where the witness would be staying etc. The Government of Maharashtra had made available accommodation to the witnesses in the government guest house, but the hostile witnesses preferred to stay at different places with their Advocate. '*Jan Adhikari',* though was helping these witnesses financially, was not giving any money directly to them. The money was being given to Advocate Atul Mistry and the details of the payment were not being disclosed to these witnesses. Saherunnisa was unable to explain what help was being given to them by the '*Jan Adhikari*'. '*Jan Adhikari*' is understood to be a person by Saherunnisa and even the other witnesses.

647. How Zahira met Advocate Atul Mistry is an interesting story. When Zahira and others went to Vadodara by a car after the commencement of the retrial, she and Nafitulla met Atul Mistry in the Court. When she went to the Court of Vadodara and told one Advocate that she wanted to engage an Advocate, that Advocate pointed out to Advocate Atul Mistry and said that they [Zahira and Nafitulla] should talk to him. Zahira had never met Advocate Atul Mistry at any time, prior to that and she asked the first mentioned Advocate whether he would take up her case. According to Zahira, the Advocate previously contacted by her in the Court told her by pointing out towards Advocate Atul Mistry '***woh wale vakil ke paas jao***'. According to Zahira, she herself found out Advocate Atul Mistry by going to the Court and nobody recommended or introduced him to her. This is a cock and bull story, which the Court is expected to believe. According to Zahira, they narrated things to Advocate Atul Mistry and he wrote them down and prepared an affidavit. That then Zahira demanded help from '*Jan Adhikari*'. Interestingly, Nafitulla [P.W.31] says that he met Advocate Atul Mistry at the time of the press conference and not in the Court as spoken by Zahira. Nafitulla categorically states that he had met him only on the day, on which the press conference was held. Zahira's evidence on the contrary, says that she first

met Atul Mistry and then she approached '*Jan Adhikari*', and it is thereafter that a press conference was held. According to Zahira, it was about 5 to 6 days prior to the holding of the press conference. According to Zahira also, '*Jan Adhikari*' is a person by name 'Tushar Vyas'. Coming to the payment of fees, Zahira states that she has not paid any fees to any of her Advocates including Atul Mistry. Advocate Atul Mistry had even gone along with Zahira to Gandhinagar. The booking of the room where Zahira stayed at Gandhinagar was done by Atul Mistry. Zahira apparently had gone for meeting '*Mahila Ayog*'. There was no occasion to bring '*Mahila Ayog*' in picture in this case, as Zahira's grievances, if any, in respect of this case were not connected with she being a woman and it is difficult to understand what was expected to be done by the' *Mahila Ayog'*. Reason given by Zahira in that regard is that 'only a woman could understand the difficulties of a woman'; but it is obvious that this statement does not make any sense and has been said by Zahira as tutored. There were no problems of women in this case, requiring cognizance to be taken by '*Mahila Ayog*'.

648. Interestingly,during the evidence when the question of production of her pass-book arose, Zahira said that she would make inquiries with her mother who was at

Vadodara at that time,regarding it.When she appeared before the Court on the next day,she did produce the relevant pass book.She said that she had contacted her mother on telephone. She said that the telephone call was made by her from the mobile telephone of Advocate Atul Mistry. However, on which telephone that call was made, could not be told by her. Zahira was asked as to who gave her telephone number on which she spoke to her mother, to which she replied that she did not know and she even did not know whether Advocate Atul Mistry knew the telephone number of her mother.Advocate Atul Mistry apparently knew the telephone number on which Zahira's mother Saherunnisa could be contacted, but who gave him that number, Zahira does not know. Though according to Zahira, appointment of Advocate Atul Mistry has nothing to do with the '*Jan Adhikar Samiti*', she says that she would talk to the persons from '*Jan Adhikar Samiti*',if required,through Advocate Atul Mistry. However, by people from '*Jan Adhikari*' she was meaning Tushar Vyas.Apparently, '*Jan Adhikar*' or '*Jan Adhikar Samiti*' is treated and understood as one person Shri Tushar Vyas - by Zahira and other witnesses and it is only when the Special Public Prosecutor would refer to it as '*Jan Adhikar Samiti*' they would speak of '*Jan Adhikar Samiti*'otherwise it would be referred to as '*Jan Adhikari*'.Thus, Advocate Atul Mistry apparently was accompanying Zahira and others,

everywhere. He used to sit in the Court while the evidence was being recorded and though what legal services he was rendering to them is not clear, the fact that he was doing all other chores for them, is clear. He was looking after their comforts in booking vehicles, arranging for lodge, even dialing telephone numbers for them, etc. '*Jan Adhikar Samiti*' had put so much trust in him that though he was introduced to them by Zahira, instead of giving any money to Zahira and others, they used to hand over the money to Advocate Atul Mistry only, who would not be required to give any accounts thereof to Zahira and others. It is also remarkable that no receipts are taken from Zahira or the others regarding the financial assistance given to them, by the '*Jan Adhikari*'.

649. The role played by '*Jan Adhikar Samiti*' in the whole matter is also very interesting. What are the aims and objects of this '*samiti*', if at all, it is a '*samiti*', has not been brought on record except that they help the weak and needy. Why they have chosen Zahira and others as 'needy persons' and what is the understanding between them, is not clear. Why Zahira requires facilities for attending the Court and requiring payment of her Advocate's fees etc., is difficult to understand, when all that she has to say is that she did not lodge any

report, she did not make any complaint, that she did not make any complaint about improper trial held in the Vadodara Court, she never asked for re-trial, she never approached the Hon'ble Supreme Court of India; and she does not know who are the culprits. '*Jan Adhikari*' Shri Tushar Vyas, appears to have done a lot for Zahira and her family. The expenses of travelling not only to Mumbai, but also to Delhi, the expenses of Advocates are all paid by '*Jan Adhikari*' or '*Jan Adhikar Samiti*'. The arrangements for the stay of these witnesses in the hotels, not only when they visited the Court, but even otherwise have been made by this '*samiti*' through Advocate Atul Mistry and the entire financial burden is taken by this committee. Why the rent or expenses of the place where these witnesses were staying, were being borne by '*Jan Adhikar Samiti*', can not be understood as all that Zahira speaks is that she wanted financial assistance from them, only for coming to the Court and going back. It is a matter of record that Zahira was earlier bitterly complaining about injustice done to her, about improper investigation, about the threats having been received by her etc. At that time, '*Jan Adhikar Samiti*' did not assist her. Undoubtedly, it can be said that Zahira did not approach them at that time, but what is significant is that Zahira approached them at a time when she decided to resile from what she had been stated

before several authorities, as admitted by herself [though on being tutored]. Thus, the help of '*Jan Ahikari*' was sought only when Zahira decided to advance a particular version of the incident. Even ignoring whether the version Zahira intended to advance was true or not, it is fact that, it is only when that version was to be advanced, '*Jan Adhikari*' was approached and assistance was sought and obtained.

650. Since '*Jan Adhikari*' is not before the Court, I do not wish to make any further observations on this. The version which Zahira is now advancing before the Court, has been proved to be false in several respects and barring that the accused are the offenders, almost everything has been wrested from her by the learned Spl.P.P.

651. The hostility of Zahira and others is a condition difficult to understand and/or explain. There can be no doubt that they are the victims of the offences in question. There can also be no doubt that Zahira had lodged a report with the police on the basis of which, the crime came to be registered. There is also no doubt that Zahira and the others turned hostile during the first trial, but after the acquittal of the accused, complained that they had been forced to speak lies due to

threats and pressure. After a retrial was ordered, they again turned hostile. To suppress that they had made allegations in respect of the previous trial, they tried to attribute to Smt.Teesta Setalvad and her organization several wrongs. They suggested that the persons from their community – i.e. Muslims – were attempting to force them to speak lies during the trial, supposedly for the benefit of their community. In other words, they wanted to show that persons from Muslim community are interested in causing harm to the accused in the supposed interest of Muslim community. Their evidence elaborately discussed above, leaves no manner of doubt that they are lying in several respects and have been tutored. It also appears that they have been given monetary inducement.

652. Saherunnisa's [P.W.40] evidence discussed above gives me an impression that somehow these witnesses have not felt assured of their safety and security. Having no trust in the society and the system of administration of justice, they probably thought that their interests lie in avoiding confrontation. Apparently, the best bargain, under the circumstances, as thought by them, was to make some monetary gains to make their future life somewhat better. The hostility of these witnesses is a matter which may be of interest to psychologists and sociologists.

653. In my opinion, whatever may be the mental condition of these witnesses and the cause behind their attitude, the wrongs committed by them cannot be overlooked. Whether those at whose instance these witnesses have lied with impunity, would ever be brought to book or would be made to pay for their misdeeds, is doubtful; but the conduct of Zahira, Nafitulla, Nasibulla, Saherabanu and Saherunnisa cannot be condoned. If, in spite of speaking lies persistently, no action is taken against them, an impression would be created that the system of administration of justice takes the lies spoken on oath before the Court of law lightly. In my opinion, Zahira, Nafitulla, Nasibulla, Saherabanu and Saherunnisa have knowingly given false evidence. It is necessary and expedient in the interest of justice that they should be tried summarily for giving false evidence.

654. The aforesaid discussion gives an idea as to the evidence in the case. As while narrating the prosecution case in the earlier part of this Judgement, the entire evidence has been marshalled and time sequencing of the facts has been done, it is not necessary to discuss the evidence of each and every witnesses, particularly when there is no controversy about such evidence. There is circumstantial evidence in the nature of recoveries of

certain articles/objects at the instance of some of the accused persons, which can be conveniently discussed while considering the case against each such accused.

655. However, I propose to refer to the evidence of PI Baria and PI Kanani who are the Investigating Officers, before proceeding further and examining the various contentions raised generally about the prosecution case.

656. PI Baria [P.W.72] is the person who has recorded the initial statements of the occurrence witnesses and as such, his evidence is material and relevant in the context of the alleged omissions and contradictions in the statements of the occurrence witnesses. It cannot be helped observing that much of the cross-examination of PI Baria has been rendered rather unnecessary, in as much as, the points that were intended to be made out from such cross-examination have ultimately been given up during the arguments.

657. A number of shortcomings in the investigation that was carried out by PI Baria have been brought on record. I indeed find that the investigation carried out by PI Baria was unsatisfactory. Baria has not taken charge of the clothes of the injured. Baria has also not taken charge of the coir ropes with which the injured had been

tied. According to Smt.Rao, the learned Spl.P.P., these lapses in the investigation have occurred because of the difficult law and order situation. It is submitted by Smt.Rao that considering the law and order situation, as also the number of crimes that were being reported to Panigate Police Station, it was not possible for Baria to coolly and methodically investigate into the matter as he would have done under ordinary circumstances. I have considered the matter. Even after giving due allowance for the difficulties faced by Baria, it is not possible to hold that he carried out the investigation properly. It appears that Baria was not serious about the investigation and did not try to do his best to collect evidence. However, the shortcomings in the investigation have not prejudiced the accused in any manner. The perfunctory manner in which PI Baria carried out the investigation, does not appear to have been done with the object of implicating the accused.

658. The learned Advocates for the accused were probably more comfortable in questioning PI Baria in the cross-examination, than PI Kanani, as otherwise, the aspects which actually Kanani was competent to deal with, would not have been put to Baria. For instance, the accused No.2 has been arrested on the basis that he is 'Mahendra *Langado'* [who was believed to be involved in the

incident]. According to the Advocates for the accused, he is not lame – i.e. *Langado* - and that there is another 'Mahendra *Langado'* in that locality. Baria was questioned in the cross-examination as to whether the accused no.2 was *Langado* and Baria readily admitted that he did not consider the accused no.2 as *Langado*. Interestingly, it is not Baria who has arrested accused no.2 as 'Mahendra *Langado*'. It is PI Kanani [P.W.74] who has arrested him as 'Mahendra *Langado'*. Since a 'Mahendra *Langado'* was to be arrested and since PI Kanani arrested accused no.2 as Mahendra *Langado*, it would have been more appropriate to make the demonstration that was made before Baria making accused no.2 walk, hop, jump, etc., before PI Kanani and to invite Kanani's comments on that. The procedure, as adopted by Shri Adhik Shirodkar, the learned Senior Advocate, has led to this result – viz. Baria who never claimed that accused no.2 is *Langado*, is made to admit that he is not *Langado*, but Kanani who arrested him on the basis that he is Mahendra *Langado*, is not asked whether the accused no.2 was *Langado*.

659. The evidence of PI Kanani [P.W.74] in the context of the details of investigation, have already been discussed. Further, his evidence would need discussion in the context of specific contentions urged by the

learned Advocates for the accused. I shall, therefore, make only a general comment on the evidence of PI Kanani here. PI Kanani's evidence has been much criticized by the learned Advocates for the accused. PI Kanani has been termed as 'dishonest', 'liar', 'an arrogant liar' and 'deceitful'. It is urged that comments on Kanani's evidence should be made by the Court while recording the Judgement and it would be essential to pass strictures against him. In my opinion, the criticism of PI Kanani's evidence is absolutely unjustified, unwarranted and uncalled for. On the contrary, the lengthy cross-examination of PI Kanani [the notes of which run into more than 450 typewritten pages] does not seem to be very fair. Several improper questions were put to PI Kanani and he was unnecessarily grilled over matters which are basically in nature of the arguments. PI Kanani was, during his cross-examination, frequently asked questions, inviting his opinion about the effect of the evidence given by the witnesses and in some cases also regarding the effect of the evidence given by himself. Questions were frequently asked to him, so as to initiate a discussion on the merits of the case and the legal issues involved, obviously with the idea of benefiting by such discussion between him and the cross-examiner. The grievance about the arrogance of PI Kanani also does not seem to be justified. It is the form of the questions

put to him, that has sometimes forced him to volunteer certain matter and to show how the question is misleading, or how the basic supposition therein is wrong. Kanani has refused to meekly submit to the propositions canvassed by cross-examining counsel. It appears to me that it is the feeling of frustration that has resulted in uncalled for criticism of so called attitude of PI Kanani.

660. The cross-examination is full of improper and unfair questioning, but I propose to give only a few illustrations thereof here.

661. Because Kanani stated in his examination-in-chief that he was called in the Court at Vadodara during the previous trial only on 20/06/2003 – i.e. the date on which his evidence was recorded –, thinking that this would show that in the previous trial, his assistance was not available to the Public Prosecutor, in-charge of that trial, and disliking it, Kanani has been questioned in the cross-examination as to 'whether he was told by anyone not to come to the Court at Vadodara during the trial'. This question is absolutely improper. That nobody had given information of the trial to Kanani; and that he had not received any summons; and that he attended the Court only on the date on which his evidence

was recorded is not challenged, but the suggestion is that he could have very well attended the Court earlier, 'because he was not told by anyone **not to come** to the Court'. Such a suggestion is absurd. It cannot be expected that a police officer posted in Ahmedabad would or should simply leave his duties and come to Vadodara during the trial because 'he was not told by anyone not to come to the Court'. The question of his going would arise if he is told by his superiors or connected officers with the trial to go to the Court. An official witness cannot be expected to attend the Court simply because nobody had told him **not** to come. This has been discussed as it shows an improper attitude in the cross-examination.

662. Kanani has been questioned during the cross-examination as to whether he knew why the case was transferred and what directions were given by the Supreme Court of India while ordering re-trial. Kanani has replied that he had not read the judgment of the Supreme Court and as such, he did not have detailed information regarding it, but that he had some knowledge about it. Interestingly, what knowledge he had, has not been asked and the matter has been dropped there itself by the cross-examiner.

663. PI Kanani has been extensively questioned in the cross-examination regarding his action or reaction pursuant to the re-trial ordered by the Supreme Court. The questioning is done on the basis that the cases are ordered to be retried because of some *lacuna* or mistake in the investigation. There is no basis for such assumption; but by assuming this, a number of questions have been put. Kanani was asked whether he asked his superior officers or the Legal Department of the State as to what went wrong and what was lacking in the investigation that was carried out by him, so as to require a re-trial. This type of questioning, which is based on the assumption that retrials are ordered because of defects in investigation and the orders of acquittal are passed on the basis of investigation, is not proper. Cases are not decided on the investigation or supposed *lacuna* in investigation, but on the basis of sufficiency or otherwise of the evidence. The supposition or expectation of Shri Shirodkar, as implicit in the questions, that Kanani should go on inquiring and seeking opinion from his superior officers and the Legal Department, as to 'what had been lacking in the investigation' is ridiculous. When Kanani said that he did not do so, he was then again grilled as to why he did not do it; but in all this questioning, 3 things are presumed.

i] Acquittals take place [only] because of defect in investigation.

ii] Re-trials are ordered [only] if the investigation is faulty.

iii] That Kanani had formed and should have formed an opinion that the re-trial had been ordered because of some lacuna in investigation.

664. All this is so absurd that it does not require any further comment. In any case, Kanani has stated, when specifically questioned about the reason for not asking the Special Public Prosecutors as to what was the defect in the investigation, that there was no defect at all in the investigation. Even thereafter, Kanani was questioned as follows :

'Did you, on your own, ask the Spl.P.P. that the investigation was proper; and that there was no defect in it; and that still, why the case had been transferred ?'

Here, again, it is assumed that the case **could be** transferred only if the investigation was not proper and defective. Kanani has answered that he had some knowledge as to why the case had been transferred. Now, instead of asking what was the

knowledge, the subject is given up and no reasons, as known to Kanani regarding the transfer of the case, have been sought from him.

665. Kanani was wrongly asked a question as to whether he carried out further investigation after said judgment was delivered to the Supreme Court. When he said 'no', it was put to him that it was because he believed that whatever investigation had been carried out, was proper and sufficient; and that there was no necessity of any further investigation and he was asked to state whether it was correct or not. Kanani has given a simple explanation of the fact -viz. that he had been transferred to Vadodara on 01/12; and that therefore, the investigation of the case was not with him at all when re-trial was ordered. Kanani has also rightly pointed out that in such matters, a decision would be taken by the superior officers and not by the Investigating Officer. The matter had gone to the Supreme Court of India where the State of Gujarat was a party and highest police officers of the State had appeared before the Supreme Court before it passed the order of re-trial outside the State of Gujarat. It was impossible under the circumstances that PI Kanani would abruptly start investigation again, as soon as he would hear about the Supreme Court of India verdict, though he was not posted

at the concerned Police Station, had no case papers with him and though he had not been told to do so, but questions based on such supposition have indeed been asked.

666. The questioning of PI Kanani in the cross-examination with respect to the F.I.R., is a model of improper and unfair questioning. Many of the questions could have been disallowed, but in view of the claim that the Court would be satisfied about the relevancy and the propriety of the questions which could not be disclosed at that stage to avoid arguments, many doubtful questions were permitted. Moreover, PI Kanani was an experienced Investigating Officer and as such, an experienced witness who appeared to be capable of giving proper replies to such questions, which factor was also weighed in favour of permitting the questions. PI Kanani was asked as to whether the FIR is the information, in respect of the commission of a cognizable offence, which is first in point of time, to which he agreed. Now, this being a legal question, need not have been asked, particularly when the position is not correctly put. All the legal aspects to make it F.I.R. were not included in the question. Questions touching the rules of evidence regarding burden of proof were asked to him. He was asked that the burden of establishing that a particular

information was first in point of time, was on the prosecution only. Since Kanani had earlier stated in reply to the question as to why he did not investigate into the aspect of 'establishing the date and time of the lodging of the FIR', that he did not imagine that Zahira would turn hostile again, he was asked whether he agreed that 'that it was the 'first information', was required to be established by the prosecution only; and that it would be immaterial whether the first informant would turn hostile or not'. Kanani has accepted this as correct. All this is shocking, wrong and improper. That it is required to be established by the prosecution, does not mean that it is not required to be established through any witnesses. In fact, there is no other way for the prosecution, than to establish a fact relied upon by them, through their witnesses. Kanani has properly answered that had Zahira not turned hostile, the prosecution could have established the date and time of the lodging of the FIR, through her evidence. In spite of such clear answer, the matter is not given up and it was put to PI Kanani that he wanted to claim that the burden of establishing the date and time of the lodging of the FIR, which was on the prosecution, was thrown upon Zahira by him. Kanani has naturally denied the suggestion, but the suggestion is absurd. It is difficult to understand what is the concept on the part

of the cross-examiner as to how the prosecution is to discharge its burden. The concept of the cross examiner as apparent from this type of questioning seems to be that the prosecution has to discharge the burden on it without the evidence of any witnesses; and that discharging the burden on it, does not include discharging the same by examining a witness for the prosecution. All this is so absurd that it does not deserve any further comment from the Court.

667. I refrain from giving any further illustrations of such improper questioning of PI Kanani, save and except where such discussion would be necessary in the context of a particular contention. Even this has been mentioned because the 'attitude' of PI Kanani was severely criticized by the defence, as mentioned earlier, and it was repeatedly urged that strictures should be passed against him.

668. I shall now consider the contentions raised by the learned Advocates for the accused one by one except those which have already been dealt with earlier in the course of discussing the evidence.

669. Though, at the commencement of the arguments, it was submitted by Shri Shirodkar, the learned Senior Advocate,

that the happening of the unfortunate incident was not being disputed, still, a number of contentions have actually been raised, challenging the happening of the incident itself, particularly the morning incident.

670. It is submitted by Shri Shirodkar that the reasons why the Supreme Court of India transferred the case here while ordering a retrial, are entirely irrelevant so far as proving the charges against the accused is concerned. There can be no doubt about the correctness of this proposition. However, a number of contentions have been vehemently advanced during the course of arguments, which involve comparison of the evidence of the witnesses in the previous trial and the present one. The explanation of the concerned witnesses in that regard, are also required to be taken into consideration. Contentions have been advanced that a fraud was played upon the Supreme Court of India in securing an order of retrial. It has been contended that everybody is acting under fear of the persons at whose instance the retrial came to be ordered; and that it is due to fear of those persons and of the Supreme Court of India, witnesses are deposing in favour of the prosecution. If it is expected of the Court that the evidence should be appreciated in the 'background' of certain alleged facts, then a scrutiny of whether the 'background' projected and alleged facts

really exist, cannot be avoided. Why a retrial was ordered, is certainly not '*per-se*' relevant. Relevancy is governed by the provisions of the Evidence Act. If some issues become relevant in this case, then they can not be overlooked only because they touch some aspects of the previous trial, order of retrial, reasons for the hostility of the witnesses. etc.

671. The questions posed by Shri Shirodkar, the learned Senior Advocate, as to 'whether the exercise of examining the hostile witnesses at length was undertaken to prove the guilt of the accused, or whether it was undertaken to salvage the image of Smt.Teesta Setalvad and her organization', or 'whether it was an attempt to convince the Supreme Court of India that it was not misled by Smt.Teesta Setalvad in transferring the trial from Gujarat to Maharashtra', etc., etc., are not very proper. In particular, the supposition - implicit in the question posed - that the Supreme Court of India had started doubting the correctness of its order and was therefore required to be convinced about the correctness of the same, is objectionable. Even in the arguments, it is mentioned that the accused are made sacrificial pawns in a game of 'one-up-man-ship' undertaken by Smt.Teesta Setalvad [page 5 of the written arguments (Ex.521/A)]. Therefore, examination of the correctness of these

contentions can not be avoided. At any rate, the relevancy thereof, has been projected by the defence only.

672. It is contended that though there have been consistent improvements in the evidence of the witnesses who have supported the prosecution, '*no one has cared to ask even one question about the source of their 'enlightened' evidence'*. It is contended that the failure ***of the prosecution*** has thus 'subverted and perverted the fairness of trial'. This contention is strange. What was expected of the prosecution, according to the Advocates for the accused is difficult to understand. These witnesses have been extensively cross-examined. All possible latitude was given to the learned Advocates in the matter of cross-examination and no attempt was made to curtail the length of the same at any time.

673. It is contended that the sketch plan about the topography of the place of offence is not properly drawn. It is contended that the evidence of R.D.Wariya [P.W.1] and C.K.Patel [P.W.2] shows that there are a number of shortcomings in drawing of the said sketch plan [Ex.7]. All this is immaterial because the accused are not at all prejudiced by the errors, if any, made by the plan makers

in drawing the plan.

674. It was also contended that the incident had nothing to do with the communal riots. It was contended that the incident occurred because Nafitulla [P.W.31] had married a Hindu girl. This was based only on the supposed statement made by Yasmin [P.W.29], not in the Court, but prior to her giving evidence. This contention was just raised and given up without elaborating it further. It is needless to say that this is without any substance.

675. An interesting contention is advanced to the effect that there are two important points which show that the prosecution version is not true. It is contended that if the prosecution case is true, why Lal Mohammad [P.W.36] was not killed. The other point is said to be why the mob did not enter inside the Best Bakery building in the night and kill the inmates. It is also contended that if the object of the unlawful assembly was to kill Muslims, why all the persons were not killed. There is no substance in these contentions. These contentions have also been repeated by Shri Jambaulikar, the learned Advocate for accused nos.1 to 5, 10, 11 and 12, while advancing separate oral arguments and are being dealt with later.

Was it impossible for the occurrence witnesses to have seen the mob ?

676. It is contended by Shri Adhik Shirodkar, the learned Senior Advocate, that it was impossible for the eye witnesses to have seen the persons in the mob. The first basis of this contention is that there was only one road light which was situated on the right side of the bakery which was not functioning; that there was no other light and '*therefore*' there was ***total darkness***. It is contended that as it was the first day of March, at about the time given by the witnesses [as the time when the mob of rioters came – i.e. at about 8.30 p.m.], there would be total darkness in the absence of any artificial light.

677. That there was no light is claimed to have been established by the evidence of Bhimsinh Solanki [P.W.61]. It may be recalled that Bhimsinh Solanki is the Assistant Sub-Inspector of Police, who had, while patrolling in Wadi Mobile-I wireless van at about 8.35 p.m., gone to Daboi Road, Hanuman Tekdi. Bhimsinh Solanki states that when he went to Hanuman Tekdi, he saw that a godown and a house were burning. In the cross-examination, it was put to him that the street lights in Hanuman Tekdi and nearby area were not working when he had gone there on 01/03/2002, which suggestion has been accepted as correct

by this witness. Thus, on the basis of this evidence, it is contended that there was no street light available, when the mob of rioters came and as such, the witnesses could not have seen the persons in the mob.

678. I have examined the correctness of this contention, carefully. That the street lights were not working, would not, by itself, indicate that there was no artificial light at all at that place. There is no evidence that electricity was not available in the houses in that area at the material time. There is not even a suggestion that the electricity supply to that area had been affected or disconnected at the material time. On the contrary, even the evidence of hostile witnesses shows that at the material time, lights were there in their house and that they were switched off. The evidence of Sahera [P.W.35] shows that she and other members of family were reading at the material time and that there were lights in the house. Existence of light in that area cannot be disputed. The evidence indicates that there was no problem with the electricity supply to that area.

679. The locality of Hanuman Tekdi is predominantly a residential locality and it is difficult to accept that the evidence 'street lights in that area were not working

at the material time', can be construed so as to mean that '***there were no lights in any of the houses at that point of time – i.e. at about 8.30 p.m. to 9.00 p.m.***'.

680. The evidence of Mohammed Ashraf Mohammed Haroon Shaikh [P.W.33] also clearly indicates that there ***were*** lights in the houses in the Hanuman Tekdi locality. His categorical assertion in that regard is not challenged at all, and what is suggested is merely that those lights were inside the houses. The contention implicit in the suggestion – viz. that therefore that light from those lights would remain only in the houses and would not come out, or on the road – cannot be accepted even for a moment. Mohammed Ashraf was sought to be contradicted by a portion [Ex.450] in his statement [X-34 for identification] recorded during the investigation, which reads as,

> *"Moreover, I could not see in the darkness at night as to who were there in the mob",*

but as the evidence of PI Kanani [P.W.74] indicates that this darkness and inability to see, as has been spoken, does not relate to the place where the mob was, when the eye witnesses are supposed to have seen the mob and/or the persons present in or forming the mob. As such, inference ruling out of the possibility of the witnesses having been able to see the persons in the mob cannot be

drawn therefrom. No attempt has been made to show the position of lights in the houses in that locality in the cross-examination of the eye witnesses. The particular hour of night was not so late so as to presume, in the absence of any evidence, that the lights in the houses would be switched off by that time. It also cannot be accepted that even if there would be lights in the houses, they being inside, there would be 'total darkness' on the street. Some light is bound to come on the street from the houses and at that hour of the time, one can hardly expect 'total darkness' in a residential locality. In view of the evidence on record and since the aspect of the position of light in the houses in the locality is not even touched in the cross-examination of any eye witnesses, I am unable to hold that there was no light in the locality at the material time.

681. The alleged impossibility of the eye witnesses having seen the rioters or persons in the mob is also highlighted by contending that there was very thick smoke which would affect the vision and prevent the witnesses from being able to see the happenings that were taking place. Apart from the difficulty to the vision as would be caused by the thickness of the smoke, it is also contended that because of the smoke, eyes would be irritated; and that, in such circumstances, one would not

even attempt to see as to what was happening. It may be observed that this is, on the face of it, unacceptable, for the simple reason that the existence of fire and the consequent smoke are the happenings that took place ***after*** the mob of rioters arrived. There was no fire or smoke, much less ***intense fire*** and ***dense smoke***, when the rioters came. Alleged existence of smoke is, in any case, an event subsequent to the coming of the mob of rioters at the relevant place; and therefore, is absolutely irrelevant for ascertaining whether the eye witnesses were in a position to see the persons in the mob at the time when the mob came. However, even if this is ignored and the evidence is examined to see what was the position after the fire was set or caught, I do not think that it can be concluded that due to smoke, it was impossible for the witnesses to have seen the mob or any members in the mob.

682. In the cross-examination of Kiritbhai Patel [P.W.10], Fire Officer, certain general questions about the tendency of smoke, etc., have been put to him. The admissions of this witness on general questions that 'whenever there is smoke, it would be difficult to see through it', that '***if there would be smoke and night time, a mere torch would not be sufficient and halogen light would be required***', that '***where there would be***

smoke and fire and there would be night time, the eyes would get irritated, would start watering and it would be difficult to see' are pointed out for advancing a contention on the impossibility of the witnesses having been able to see anything at the material time. In my opinion, this exercise is futile. What was the situation at a particular point of time, at a particular place, cannot be decided on the basis of general answers given by the witnesses unconcerned with the identification of the accused. The circumstances to which the general answers given by Kiritbhai Patel [P.W.10] and other witnesses from the fire-brigade may be applied, have not been shown or indicated to be in existence at the time when the occurrence witnesses are said to have seen the rioters.

683. In this context, it is remarkable that the inability to see, firstly, because of lack of light and secondly, because of existence of smoke affecting the vision due to its thickness and also by causing irritation to the eyes, is sought to be established from the witnesses ***other than the supporting eye witnesses***. It is ironical that the witnesses who claimed ***to have seen*** the offenders have not been confronted with these aspects – viz. the lack of light and the existence of smoke and the consequent impossibility to see or identify anyone from the mob. It

logically follows that it is the person who says that ***'he saw***' should be challenged by bringing on record facts establishing, or at least indicating, inability to see; and one would ordinarily expect the witness who says 'he saw' to be questioned in the cross-examination about the position of light, smoke, etc., etc. The very fact that this has not been done at all, speaks for itself. The learned Advocates for the accused apparently felt comfortable and certain of eliciting such evidence only from the hostile witnesses who were too obliging.

684. Curiously, in the cross-examination of PI Kanani [P.W.74], he was questioned on the lack of light, existence of darkness and smoke and the consequent impossibility to see or identify anybody from the mob. Kanani has been criticized on the ground that he did not ascertain *how* the eye witnesses could see the rioters in the dark. It is that the suggestion of the defence that it was necessary for him to have questioned the witnesses and gathered information as to how they could see the culprits. Without putting the eye witnesses who claimed to have seen, any question about the condition of light, PI Kanani was put the following question in the cross-examination, which is worth reproducing here, with the answer given to it.

***'Ques**.-In that season, at about 9.00*

p.m., when the persons were on the terrace, to know about the condition of the light at that time, was an important aspect of the investigation. Do you agree ?

***Ans.** - No.'*

PI Kanani [P.W.74] was then asked the following question which also, together with the answer given by him, is worth reproducing.

***'Ques.**-Do you mean to say that even in the dark, witnesses would be able to see from terrace, the persons who were on the road ?*

***Ans.** - Whether they could be seen or not, is the concern of the witnesses, and not mine. If the witnesses would see, the witnesses would say that it is seen. How it could be seen, is to be answered by the witnesses.* [page 3058] [Emphasis supplied].

Since PI Kanani's evidence and his so called 'defiant' attitude has been severely criticized by Shri Shirodkar and even by Shri Jambaulikar during the arguments, it may

be observed that the second question has been aggressively put and a wrong claim is attributed to the witness, though he never meant it. Had the evidence not been recorded in question and answer form, it might have resulted in putting the words of the cross-examination in the mouth of witness though he never meant it. If the form of a question compels a witness to emphatically clarify certain matter while answering in order to avoid an answer not intended to be given by him, being attributed to him, then he can not be called as rude or arrogant. Anyway for the present, and in the context, what is significant is that though emphasis is placed on the necessity on the part of PI Kanani [P.W.74] to question the witnesses and know about the condition of light, about their ability to see from the terrace, etc., such questioning to the same witnesses has not at all been done in the cross-examination. PI Kanani's failure to ask the witnesses as to 'how it could be seen' was criticized during the course of arguments, but surprisingly, when the Advocates for the accused had opportunity to question the witnesses on this, they all have chosen to remain silent.

685. In my opinion, all these factors lead only to one conclusion – viz. that there is no substance in the contention of impossibility of viewing the persons from

the mob on the part of the witnesses - and questioning the eye-witnesses – except the hostile ones – was not thought advisable by the learned Advocates for the accused. The aspects of darkness on the street, there being no light, there being smoke, are not at all touched in the cross-examination of any of the witnesses who claimed to have seen – i.e. Taufel [P.W.26], Raees [P.W.27], Shehzad [P.W.28] Smt.Yasmin [P.W.29] and Sailun [P.W.32]. When the cross-examiner has avoided asking questions on the relevant matters to the supporting witnesses and when the evidence of the witnesses does not suffer from any improbabilities, there is no reason why it should not be accepted. The inference that the cross-examiner thought that the evidence of these witnesses on these aspects could not be disputed; and that an attempt to do so would prove dangerous, is legitimate.

686. The above discussion makes it clear that the evidence on record does not indicate absence of any light whatsoever, or the existence of such 'dense' or 'thick' smoke so as to prevent the assailants or persons in the mob from being seen. On the contrary, the evidence indicates the existence of light - sufficient; at any rate - to be able to see the persons [or at least some persons] in the mob of rioters. It is common knowledge that fire does create ***light***. In the instant case, there

is no dispute about the magnitude of the fire. The flames were coming up to the level of the terrace. Not only the Best Bakery building, but the adjoining house and the '*wakhar*' of Lal Mohammed [P.W.36] was also set on fire. It is impossible to think that the burning of these premises would not create sufficient light so as to enable one to see the persons in the mob. Judging by the evidence on record, there must have been considerable light due to the fire that was set up by the rioters. Thus, apart from the fact that it was very much possible for the witnesses to have seen the rioters [or some of them] when the mob came, when the fire took place, the light that was created by the fire itself, very much made it possible.

687. The next ground on which the contention of impossibility on the part of the eye witnesses to have seen the mob or the persons in the mob is advanced, is physical inability to see them on the basis of the topography. It is submitted that Taufel [P.W.26], Raees [P.W.27], Shehzad [P.W.28] and Sailun [P.W.32] were on the terrace of the Best Bakery building when the mob of rioters came; and that it is physically impossible for anyone to see the mob from the terrace. It is contended that all these witnesses have deposed, falsely, before the Court that when the mob of rioters came, they were

sitting on a cot or '*charpaee*' kept in front of the Best Bakery building. The reason for the said false statement is given as ***because*** that was the place from where they would be in a position to see the persons in the mob. It is contended that in their statements before the police, these witnesses had not stated about they being sitting on a cot or '*charpaee*' in front of the bakery. Thus, it is contended, that there has been a consistent improvement in the version of all these witnesses; and that these witnesses are 'shifting' their positions so as to be able to claim that they could see the mob. This 'improvement' is pressed in service to advance a number of contentions. Firstly, on this basis, it is contended that tutoring is established, or at least indicated. Secondly, it is submitted that this 'shifting of place' was occasioned by the fact that it would not be possible for the witnesses to have seen or identified any persons in the mob had the witnesses been on terrace.

688. The omission on the part of each of these witnesses to state before the police that they were sitting on a cot in front of the bakery when the mob of rioters came, has been brought on record. However, it is clear that the value of the omission depends on the alleged fact – viz. that the witnesses could not have seen the mob of rioters, had they been on terrace at the material time.

689. The entire contention of the defence is devoid of any merit whatsoever. First of all, there is absolutely no basis in stating that the witnesses could not have seen the mob, or the persons in the mob, from the terrace. How the view or the vision will be affected by being on the terrace is not indicated. There is also no basis whatsoever even for holding that sitting on the cot or 'charpaee' in front of the bakery would afford a better view of the mob of rioters than the view that could be obtained by sitting or being on the terrace of the said building. This very supposition, which is the basis of the argument, is unfounded. In fact, the witnesses would be able to see more from the terrace rather than by sitting on a cot/'*charpaee*' in front of the bakery. The visibility would be certainly more from the terrace, as due to increased hight there would be less obstructions and a bigger area would be within the view.

690. The arguments about alleged 'consistent improvements' and attributing of a motive for the alleged 'shifting of place of sitting' are based only on the *ipse-dixit* of the defence. There is absolutely no evidence to indicate that one would not be able to see the mob of rioters or some of the persons therein from

terrace. It is based on the premise, which is the own creation of the defence, that a number of arguments are advanced. When the premise itself is wrong and baseless, question of drawing any inference therefrom and coming to a correct 'conclusion' in that regard does not arise. In the cross-examination of Taufel [P.W.26], a suggestion was put to him to the effect that he could see the mob coming ***because*** he had been sitting in front of the bakery on a '*charpaee*' at that time, which suggestion has been accepted as correct by Taufel [P.W.26]. If it is thought to establish a negative on the basis of such an admission – *i.e. that if he had been sitting on terrace, he could not have seen the mob coming* -, then, all that can be said is that such attempt is futile. After the witness had said that when the mob came, he was sitting in front of the bakery on a '*charpaee*', such an admission from the witness was only natural, but it cannot even remotely be suggested that the '*charpaee*' was the only place from where he could have seen the mob coming. One sees a mob coming ***because*** of several reasons – such as it is actually coming, one has the sight, there is light, etc. No attempts to establish, by questioning the witness in the cross-examination that ***he could not have seen the mob coming, had he been at a place other than the charpaee, or on the terrace***, have been made. [In this context, it may be noticed that in case of Yasmin when she mentioned

about having seen Kausarali and Lulla being dragged away while she was coming down from the staircase, it was immediately put to her that had she been on terrace, she could not have seen this.] As already observed, there is absolutely no basis for this assumption at all. It is certainly not based on any evidence.

691. There is nothing uncommon or unusual in persons sitting in front of their residences after having meals in the night and before going to sleep. Their omission to state this to the police is insignificant and immaterial. Where they were sitting, is not significant and material at all except from the point of view of impossibility or otherwise of viewing the rioters. Perhaps, the contention about impossibility to see the mob of rioters from the terrace has been raised - without any evidence – only to make the 'omission'/ 'contradiction' appear material and significant. Based on the contention of impossibility of viewing the persons in the mob from the terrace, a motive is sought to be attributed to the witnesses for the alleged false claim of their sitting on the cot/'*charpaee*' at the material time. However, all this simply fails for the reason that the premise on the basis of which the whole argument is based, is wrong. Not only that there would not be 'no visibility' or 'no possibility of seeing the mob of

rioters from the terrace', but on the contrary, such visibility and possibility would be much more than that from the cot/'*charpaee*'. In fact, this is established even by Court's own observation made during the local inspection. It may be recalled that a prayer for local inspection was pressed by the defence on this very ground – i.e. impossibility on the part of the witnesses to have seen accused at the time of incident. It was specifically stated that from the terrace of the building, a person standing below near the building could not be seen. During the actual local inspection also, the same thing was canvassed. It was, however, observed that a person standing on the road could easily be seen from the terrace through the balusters without requiring the viewer to get up and see from over the railing. The memorandum of the local inspection which duly records this aspect, was furnished to the learned Advocates for the accused soon after the local inspection, but in spite of the same, such untenable contention is not only advanced, but also stretched to an extraordinary length. Ironically, though the local inspection was carried out on being insisted by the learned Advocates for the accused, on a specific claim, that '*a visit by the Court would prove that none of the witnesses who claim to have seen the accused could have, in fact, seen the accused*', during the arguments, the only necessity felt by them for

referring to it, was to remind the Court of the legal position that 'local inspection is not evidence and can never take place of evidence or proof'.

692. Moreover, the whole argument of the impossibility to see the mob is unrealistic. Seeing or observing 'a mob' is not the same thing as observing a single stationary object. In the instant case, the 'mob' is stated to be consisting of 1000 to 1200 persons and though the correctness of this figure can be doubted, there can be no dispute that the evidence points out to a mob consisting of large number of persons. The area and the space occupied by such a big mob would be considerable and it would be futile to say that the 'mob' could be seen from any particular point only, or that it could not be seen from another particular point. The position of one person in the mob can be at a very far place from that of another in the same mob. Moreover, the mob was not standing still and it was moving. The evidence shows that the mob was there throughout the night. The eye witnesses were also on terrace throughout the night. Under these circumstances, there is nothing to indicate that the claim of having seen some of the accused among the mob of rioters, as made by the eye witnesses in their evidence, relates to any particular point of time. When the witnesses were trapped on the

terrace throughout the night, surrounded by the mob of rioters, it cannot be said that they *could not have seen* the mob of rioters. The evidence of the eye witnesses cannot be construed so as to mean that whosoever were observed by them as persons in the mob of rioters, were so observed only when the witnesses were sitting on the cot; and that after the eye witnesses went to terrace, they did not see anyone.

693. During the course of arguments, when some discussion on this aspect took place, the following answer in the evidence of Taufel [P.W.26] was pointed out by the learned Advocates for the accused.

> *"It is correct that the 3, who have been pointed out by me as having seen by me in the night, were seen by me when I was sitting on the 'Charpaee' and when the mob was coming with the 'Mashals' and swords. It is correct that thereafter, I saw them for the first time only in the Court, when I gave evidence."*

I am unable to hold that this can be construed as an admission on the part of Taufel that after going to the terrace, he did not see any of the accused identified by him. By emphasizing the word '*thereafter*', it is contended that according to Taufel, he did not see the

said accused after he had seen them while sitting on the *charpaee*'. I am unable to accept the same. The very next sentence in the evidence which reads as '*I had no occasion to see their photographs during this period of about 2.1/2 years*' makes it clear that by '*thereafter*', the period after the incident is referred to. The intention to separate or divide the period between the 'period before going to the terrace' and the 'period after going to the terrace' cannot be attributed to Taufel and his admission regarding having seen the said accused for the first time only in the Court while giving evidence, refers to the fact that he had no occasion to see them after the incident and before giving evidence. The incident did not come to an end after Taufel and others went to the terrace. In fact, if the context in which the relevant questions have been put in the cross-examination is seen, there can be no doubt that it was not even the intention of the cross-examiner to question Taufel on the aspect as to whether he saw the said accused after going to the terrace and there is no possibility of Taufel having understood the question in that way. Thus, there is no substance in the contention that the rioters could not have been seen by the witnesses from the terrace. In fact, touching this aspect has been carefully avoided in the cross-examination not only of Taufel, but also of other eye

witnesses, except those who are hostile.

694. To sum up, firstly, the suggestion that from terrace, the witnesses could not have viewed the mob of rioters is unacceptable. Thus, this takes away the motive behind the alleged 'improvement'. It was not necessary on the part of the concerned witnesses to have said so, to be able to claim that they saw the rioters and they could have very well said that they saw the rioters while on first floor or on terrace.

695. Secondly, there is nothing to indicate that the version of the eye witnesses to the effect that they were sitting on a cot/'*charpaee*' at the material time is false. The omission to state specifically to the police that they were sitting on a cot, and/or the contradictory version to the effect that they were sitting 'upstairs' when the mob came, is not material, in my opinion. There is no evidence, except the worthless evidence of the hostile witnesses, that Taufel [P.W.26], Raees [P.W.27], Shehzad [P.W.28] and Sailun [P.W.32] were already on terrace when the rioters came. It is not likely that the place where the witnesses were sitting at the time when the mob came, was specifically asked to them by the Investigating Officer, when, obviously, nothing depended on that, and further, when, it is difficult to pin point

a particular time as the time when the mob came.

696. Thirdly, on the basis of the evidence of Bhimsinh Solanki [P.W.66] that '***the street lights in the locality were not working at that time***', no conclusion can be drawn to the effect that there were no light in that area; and that there was '***total darkness***'. The absurdity of such a conclusion has already been discussed.

697. Fourthly, the inability of the witnesses to see the rioters due to smoke fails to take into consideration that the smoke was due to fire and the fire was set subsequent to the coming of rioters; and before that, there was no question of smoke preventing the eye witnesses from seeing the rioters.

698. Fifthly, even if smoke was there, that it was to such an extent so as to totally impair the vision – and that too for all the time till the rioters were there – cannot be accepted.

699. Lastly, it is ignored that apart from smoke, what fire creates is light and the terrible fire, as has taken place at that time, would certainly create sufficient light so as to negative the theory of impossibility of viewing on account of lack of light.

700. The conclusion is therefore irresistible that there is nothing in the evidence which would indicate that it was not possible for the eye witnesses to have seen or identified any persons in the mob of rioters. On the contrary, the evidence indicates that there was every possibility of the eye witnesses being able to see the mob – at least some persons in the mob – during the long time for which the mob was there.

Whether Zahira's statement [Ex.136] is not the 'real' F.I.R. ?

701. I shall now consider one contention emphatically put forward by Shri Shirodkar. According to him, Zahira Shaikh [P.W.41] is not the first informant in the matter at all; and that her statement [Ex.136] is not the 'first information report' at all. It is contended that the real 'first information report' is the statement [Ex.264] of Raees Khan [P.W.27] recorded by A.S.I. Abhaysinh Patel [P.W.66].

702. It is well settled that the F.I.R. is not a piece of substantive evidence. It is to be used only for corroborating the evidence given by the first informant. Since in this case Zahira Shaikh [P.W.41] has turned

hostile, the first information report [Ex.136] cannot be made any use of for corroborating her. According to Shri Shirodkar, the prosecution is “not willing to accept Raees Khan [P.W.27], as the 'First Informant', with oblique intention.” It is contended that the object of the prosecution is to keep back the statement [Ex.264] of Raees Khan, as that statement affects the case of prosecution adversely. Shri Shirodkar also submitted that showing that Zahira's statement [Ex.136] is not the real 'first information report'; and that actually, it is the statement [Ex.264] of Raees Khan that is the F.I.R., is important from the point of view of establishing that the prosecution, from the beginning, has been dishonest; and that the investigation is tainted, which would be relevant for the purpose of appreciating the evidence of the Investigating Officers and even of the other witnesses.

703. The argument advanced by Shri Shirodkar on the issue 'which is the real F.I.R.', is two-fold. The first is that the statement [Ex.264] of Raees Khan was recorded prior to the recording of Zahira's statement, and the other is that the said statement of Raees Khan had all the necessary ingredients to characterize the same as the 'First Information Report', as contemplated under Section 154 of the Code.

704. The contention of Shri Shirodkar is that Zahira's statement [Ex.136] treated as F.I.R. was actually recorded on 04/03/2002 and falsely shown as having been recorded on 02/03/2002. However, according to him, even by assuming that it was indeed recorded and registered as F.I.R. on 02/03/2002 at 15.15 hours, it would still, not be prior to the recording of the statement [Ex.264] of Raees Khan recorded by A.S.I. Abhaysinh Patel [P.W.66].

705. In view of the contentions, it would be appropriate to first consider as to when the statement [Ex.264] of Raees was recorded. The evidence that needs to be examined in this regard is of Raees himself, Abhaysinh [P.W.66] and Dr.Judal [P.W.70].

706. The statement [Ex.264] itself does not show at what time it was recorded.

707. Raees Khan [P.W.27] does not admit having made the statement at all. According to him, on 02/03/2002, police had come to meet him in the hospital; and that the police asked him his name, address, etc., obtained his thumb impression and left. In the cross-examination, Raees Khan has stated that his thumb impression was taken after something was written on that paper by the police.

However, when the said document [X-19 for identification, and later on marked as Ex.264] was shown to him and he was questioned about the thumb impression on it, Raees stated that the thumb impression *could be* his ['may be mine']. When questioned specifically, Raees Khan stated that he could not say whether it was the same document on which his thumb impression was taken. Thus, the evidence of Raees Khan neither establishes the identity of the thumb impression on the document [Ex.264], nor the fact that it is a statement made by Raees Khan. <u>According to Raees Khan, at that time, he did not say anything about the incident to the police. Raees has specifically stated that at that time, he was not fully conscious</u>.

708. According to Raees, it took about 1 to 1.1/2 hour for the police coming to him, putting questions to him, writing down on the paper and taking his thumb impression on that paper; and that all this was over by 12.00 noon. This time, as given by Raees Khan, is obviously wrong in my opinion. The evidence shows that till 11.50 a.m., Panigate Police Station had not received any information about Raees Khan and two others being admitted in the S.S.G. Hospital. Anyway, since the evidence of Raees Khan does not indicate that any statement of his, about the incident, was recorded by the police on 02/03/2002, his evidence about obtaining of his thumb impression

before 12.00 noon, cannot be brought in aid to show the time of recording of the statement [Ex.264] as at 12.00 noon. The evidence of Raees Khan does not lend any support to the theory that the statement [Ex.264] was recorded ***before*** Zahira's statement [Ex.136] was recorded. The evidence of Raees Khan, on the contrary, creates a doubt whether his statement was *at all* recorded on 02/03/2002.

709. The sequence of events – together with their respective timings – leading to the recording of the statement [Ex.264] of Raees Khan and the respective timings, is either undisputed, or is sufficiently proved. Raees and others were admitted in Hospital. *Vardi* in that regard was received at Panigate Police Station at 11.50 a.m. Then a memo/note [Ex.263] was written by PSO Manharbhai [P.W.68] and given to Abhaysinh [P.W.66] requiring him to go to the hospital and investigate. Abhaysinh then went to S.S.G. Hospital. He wrote a communication [Ex.262] addressed to the Medical Officer on duty seeking to know whether any of the injured was, or were, in a condition to make a statement. Abhaysinh gave the communication [Ex.262] to the doctor at about 1.00 p.m. to 1.30 p.m. Thereafter, Dr.Judal [P.W.71] made an endorsement [Ex.262/1] on the communication [Ex.262]. In view of the endorsement that patient was

not fit, Abhaysinh waited there for some time. After about 35 to 40 minutes, Raees became somewhat conscious when Abhaysinh recorded his statement.

710. After considering all the relevant evidence, it cannot be doubted that the statement of Raees Khan, *if at all indeed recorded*, could not have been before 3.15 p.m. Dr.Judal [P.W.71] is specific about having made the endorsement [Ex.262/1] at 2.00 p.m. The document [Ex.262] shows the time of making the endorsement as 2.00 O'Clock. Dr.Judal has been very specific that whenever such endorsements are made, the doctors always put the correct time and date of making such endorsement; and that they had specific instructions from their Head of the Department to that effect. Dr.Judal had categorically stated that in this case also, the same procedure and same instructions were followed by him. This is quite acceptable.

711. In the context of the communication [Ex.262] and the endorsement on it [Ex.262/1], an objection raised by the defence about the admissibility of the said document, needs to be mentioned. When the document [Ex.262] was tendered, the defence objected to the same being tendered in evidence and exhibited, on the ground that it was a 'carbon copy' and not the 'original'. In view of the

practice directions given by the Hon'ble Supreme Court of India in ***Bipin Shantilal Panchal Vs. State of Gujarat and Another, [2001 Cri.L.J.1254]***, the said document was marked as an exhibit, subject to the objection about its admissibility, on the ground that it was not original, but a carbon copy. During the course of arguments, this question – viz. whether the document was admissible in evidence being only a copy of the original – was addressed to by the parties. It may be observed that there is no other objection to the admissibility of this document, save and except that “it being a 'copy of the original', is not the primary evidence and no case for being entitled to give secondary evidence had been made out”. The contention advanced by the prosecution in this regard is that it is not a 'copy', but 'another original'. This is apart from the submissions of the prosecution that in spite of making efforts, they have not been able to procure the so called 'original'. The question is whether a 'carbon copy' is only a secondary evidence of the 'original', or whether it is 'another original' ? The mode in which such documents – viz. carbon copies – come in existence, is well-known; but apart therefrom, in this case, Dr.Judal [P.W.71] has explained in his evidence as to how such 'carbon copies' are prepared. When the document [Ex.262] was shown to him, he said that it was a carbon copy, and went on to

explain as follows.

> *"There was a paper. By putting a carbon paper below that paper and above this paper, I put the endorsement and made my signature on the original paper. The impression of that, has come on this carbon copy."* [Page 2183 of Notes of Evidence].

It at once becomes clear that the so called 'original' and the 'carbon copy', both, have come in existence at the same time. It is not that there existed some document which would be original, of which a copy was later on taken. Section 61 of The Evidence Act lays down that the contents of a document may be proved either by primary or secondary evidence and though it is true that except in the cases specifically provided by the Evidence Act, documents must be proved by primary evidence, Explanation 2 to Section 62 of the Evidence Act makes it clear that '*where a number of documents are all made by one uniform process, each is primary evidence of the contents of the rest*'. In case of a carbon copy, the same stroke of pen brings in existence two documents – viz. one the so called 'original', and the other as 'carbon copy'. It cannot be disputed that the so called 'original' and the 'carbon copy' or 'carbon copies' come

in existence by one single process – viz. a stroke of writing, or a stroke of a typewriting machine. Thus, in my considered opinion, 'carbon copies' are primary evidence of the contents of the 'original'. The document [Ex.262] is primary evidence. It is properly proved. As such, the objection to the admissibility of this document, as raised by Shri Shirodkar, the learned Senior Advocate, fails.

712. The contention advanced by Shri Shirodkar that deciding the objection as to the admissibility of the said document at this stage, has prejudiced the accused, is not correct. Without going deeper into the general objection that the practice or procedure as suggested in Bipin Panchal's case [*supra]* deprives the defence of an opportunity to cross-examine the witnesses, it may only be observed that in this case, it has not happened that way. The witnesses have been questioned about this document and even about the endorsement. That Dr.Judal made his endorsement on the said document is not challenged. He was made to refer to the endorsement repeatedly in the cross-examination and has been asked about the contents of the document [Ex.262] in the cross-examination. The contents of the documents were freely referred to in the cross-examination and the witnesses were questioned with regard thereto. No prejudice has,

thus, been caused to the defence in any manner by deciding the objection about its admissibility only during the arguments.

713. The document [Ex.262] and the endorsement [Ex.262/1], together with the evidence of Abhaysinh [P.W.66] and Dr.Judal [P.W.71], leave no manner of doubt that the said endorsement had been made at 2.00 p.m. Thus, if by 2.00 p.m., no statement had been recorded and if Abhaysinh, after waiting there for 30 to 45 minutes, commenced the recording of the statement of Raees Khan, it is difficult to accept that it was recorded before Zahira's statement [Ex.136]. According to PI Baria, he recorded statement of Zahira only in the S.S.G. Hospital between 1.15 p.m. and 2.45 p.m. This time also properly fits in with the time of the various relevant entries in official record, including the entry regarding the registration of the F.I.R. at 3.15 p.m.

714. Why then, the Advocates for the accused feel so positive and certain about this aspect – viz. that the statement of Raees Khan was recorded before Zahira's statement -, particularly when this fact is neither borne out from the chargesheet, nor is attributable to the personal knowledge of any of the accused? It is interesting to note that this contention has been taken

up on the basis of the evidence recorded in the previous trial. That this is so, is not in dispute.

715. In the trial held at Vadodara, the statement [Ex.264] of Raees Khan was, by consent, marked and exhibited [as Ex.180], *curiously, without examining Raees Khan as a witness*. In order to establish that the statement [Ex.264] was recorded before 3.15 p.m., the deposition of Abhaysinh Patel [P.W.66], as recorded during the earlier trial, has been tendered in evidence and has been marked as Ex.265. The following statements made by Abhaysinh Patel in his deposition recorded in the previous trial have been brought on record.

> *"It is true that till I returned to the police station with the statement marked exhibit 180, Police Inspector Shri Baria had not come to S.S.G. Hospital."* [Portion marked as A/131]. *"When I went to the police station with the statement marked Ex.180, I learnt from P.S.O. that no offence is yet registered in this respect."* [Portion marked as A/127].

Thus, the claim of the statement of Raees Khan having been recorded prior to Zahira's, has been made only on the basis of the above statements of Abhaysinh, as found in his deposition before the Sessions Court at Vadodara,

in the previous trial. Abhaysinh has denied having made these statements. When confronted with the statement in portion marked A/131 [reproduced earlier], he stated that this portion was not correctly recorded. As regards the portion A/127 also, Abhaysinh has stated that he never stated so. Abhaysinh also stated that his deposition recorded in the Court at Vadodara was not read over to him. Abhaysinh was then contradicted on that aspect also by pointing out the endorsement made by the Court [portion A/125] on the record of his deposition in the said trial which reads as under,

> *"Read out before me and as the same is admitted, it is taken on record."*

Abhaysinh disputed the correctness of this endorsement also. A question, much to the embarrassment of Abhaysinh, was put in his cross-examination as to 'whether he meant that the Judge had falsely recorded the portion marked A/127', to which Abhaysinh replied as 'that I cannot say'.

716. Thus, Abhaysinh has denied the fact of having made these statements [portions marked A/131 and A/125] and also truth of the facts conveyed by these statements. There is a presumption that all judicial acts are regularly performed. Since the authenticity of the record of the trial held at Vadodara is not in dispute,

the fact that Abhaysinh did not state so before the Court of Vadodara, cannot be accepted. Though the bare denial of Abhaysinh cannot be accepted and it is to be held that Abhaysinh did make the said statements before the Court at Vadodara, the crucial aspect of the matter is '*whether the said statements are true*'.

717. The evidential value of these statements should be considered here. In my opinion, the legal position that *these statements being previous inconsistent statements made by Abhaysinh, only constitute a ground for disbelieving his present testimony; and that they are certainly not the evidence of the facts which are stated therein*, cannot be doubted. It is one thing to hold that Abhaysinh is not to be believed or trusted as regards the time of recoding the statement of Raees Khan, as given by him in his testimony before this Court, in view of the said statements made by him during the previous trial, but it is quite another to treat those statements, which he now repudiates, as a substitute for his present testimony. In view of this legal position, the only question that remains is whether Abhaysinh could be trusted as regards the time of recording the statement of Raees Khan so as to hold his testimony before the Court as true, in spite of the said previous statements made by him.

718. The aforesaid discussion and the record of various entries contemporaneously made, leaves no manner of doubt that the statement [Ex.264] of Raees could not have been recorded before 2.45 p.m., by which time, Zahira's statement [Ex.136] was already recorded, according to PI Baria. Assuming Abhaysinh had given evidence in the Court at Vadodara suggesting that the statement of Raees was recorded much prior to 3.15 p.m., then all that can be said is that it is proved to be factually wrong and incorrect. As such, this does not establish the contention of the learned Advocates for the accused.

719. In view of all this, I only briefly mention a flaw in the contention that the statement of Raees is the F.I.R. It would not have been F.I.R. even if it would have been recorded prior to the statement [Ex.136] of Zahira. It is because one of the requirements for any information to be the F.I.R. is that such information should be given to the Officer In-Charge of the police station. Abhaysinh was not the 'Officer In-Charge' of the police station. This is mentioned just by the way because in any case, I am of the opinion that the statement [Ex.264] of Raees, *if at all recorded*, was certainly not recorded before recording Zahira's statement [Ex.136].

720. However, it has also been contended by Shri Shirodkar that Zahira's statement [Ex.136] was not recorded at all on 02/03/2002; and that actually, it was recorded on 04/03/2002.

721. The basis for such a claim is only that a copy of the F.I.R. was received by the Magistrate on 05/03/2002. Interestingly, the fact that a copy of the F.I.R. received by the Magistrate only on 05/03/2002, is not borne out from any record or evidence adduced in this case, but it was based on an admission made by PI Kanani [P.W.74] in the previous trial. Even the said admission was based not on Kanani's personal knowledge, but on the basis of a document shown to him while in witness box. What was that document, cannot be ascertained from the record. Anyway, it is on the basis of the admission of PI Kanani, obtained in this manner in the previous trial, PI Kanani was made to admit this fact in the present trial also. This admission is the only evidence to show that a copy of the FIR was received by the Magistrate on 05/03/2002.

722. It may be observed that the question of time and date of recording of the F.I.R. assumes importance in many cases for the purpose of appreciating the evidence.

If it is established that the F.I.R. had been lodged immediately after the occurrence, it strengthens the case of the prosecution showing that the information contained in it was available immediately and thereby reduces the possibility of concoction, fabrication, etc. When the time of lodging of the First Information Report would be in dispute, the issue as to when a copy of the same was received by the Magistrate under Section 157 of the Code, assumes importance. Under Section 157 of the Code, an Inspector In-Charge of a police station is required to forward a report [commonly called as 'occurrence report'] to the concerned Magistrate forthwith. It is common knowledge that usually the report is sent in the form of a copy of the F.I.R. as it gives all the necessary details to the Magistrate. The delay in sending a report to the Magistrate is relevant for ascertaining whether the F.I.R. had indeed been lodged at the time when it is claimed to have been lodged.

723. A number of authoritative pronouncements of the Supreme Court of India and of the High Court have been cited on the effect of delay in sending the F.I.R. to the Magistrate, by the learned Spl.P.P., as also by the learned Advocates for the accused. It is not necessary to make any reference to the authorities as the legal position is well settled. The delay in sending the

F.I.R. to the Magistrate may create a doubt in the mind of the Court whether the time of lodging the F.I.R., as claimed, is indeed correct. In such cases, the possibility of the F.I.R. having been lodged subsequently or having been tampered with, is required to be kept in mind. However, it cannot even remotely be suggested that the time of lodging the F.I.R. has to be proved only from the fact of the time of its receipt by the Magistrate, though being an external check of an authentic nature, it would assume importance. All that can be said is that receipt of the copy of the F.I.R. by a Magistrate is a surer way of establishing that by that time, the F.I.R. had already been lodged.

724. In the instant case, it is not in dispute at all that the police had come to the scene of offence itself and in fact, that is how the incident ended. The victims – including Zahira – were with the police on the spot itself and even thereafter in the hospital. The suggestion that no F.I.R. was lodged at that time, is too ridiculous to be taken seriously. It is a different matter to contend that the previous document had been fraudulently altered or suppressed, but it is quite another to say that no F.I.R. had been lodged at all till 05/03/2002. In this case, the evidence of PI Baria [P.W.72] and Head Constable Jagdishbhai Choudhary

[P.W.70] is fully corroborated by the entries [Ex.278] made in the station house diary. In the circumstances of the case, when the victims were with the police and the police had taken cognizance of the happening of such an incident that they would omit to record the F.I.R. is something which is unacceptable. The entries in the station house diary do have a continuity and even if one would want to manipulate the same, the manipulation that would be possible can only be limited. A statement recorded on 04/03/2002 cannot be certainly shown as having recorded on 02/03/2002.

725. Much displeasure is expressed by Shri Shirodkar regarding certain observations made by the Court in respect of his cross-examination of Head Constable Jagdishbhai Choudhary on the aspect of sending a copy of the F.I.R. to the Magistrate. Jagdishbhai Choudhary had explained the procedure in that regard and had stated that the responsibility of sending the reports to the Magistrate and the special reports to the superior officers of the police, is on the P.S.O. who makes the relevant entries. Jagdishbhai, it may be recalled, had made the necessary entries [Ex.278] in the station house diary regarding the registration of the F.I.R. He had not stated that when actually it was sent to the Magistrate. He had merely explained the procedure and

had stated that in a routine manner, a person who is deputed for that, takes a copy of the F.I.R. to the Magistrate. He had also explained that he had not specifically told any particular policeman to take the copy of the F.I.R. to the Magistrate and had made it clear that it was a routine duty. Thus, the evidence of this witness was only to this effect – i.e. the police station has got machinery for taking copies of the F.I.R. to the Magistrate and in a routine manner, this duty is discharged by the policeman to whom it is entrusted. This witness did not say when F.I.R. in this particular case was actually sent to the Magistrate, or when it had been received by the Magistrate, or through whom it was sent, etc. In spite of this, he was questioned whether he had anything to show that the F.I.R. in this case was sent to the Court and if so, when and by whom, it was sent. Jagdishbhai clearly answered as 'No'. He was then again questioned whether he had anything to show as to when the copy of the F.I.R. in this case was received by the Magistrate. When he said that he did not have such a record at that time, Shri Shirodkar insisted that the learned Spl.P.P. should produce the record showing when the copy of the F.I.R. was sent to the Magistrate under Section 157 of the Code. At that time, by the Court Note recorded, it was observed that the insistence that the prosecution should be called upon to cause production

showing that the F.I.R. was forwarded to the Magistrate, was **absurd**. Shri Shirodkar contended that the word '**absurd**' came to be used by the Court because the full entry [Ex.278] made by Jagdishbhai was not shown to the Court; and that the portion thereof showing that a report under section 157 of the Code was forwarded, was not pointed out to the Court. For this, he has blamed the learned Spl.P.P. and has submitted in the written arguments filed by him that the stigma of the harsh observation should be removed by censuring the conduct of the prosecution.

726. I do not think that the observation about insistence of Shri Shirodkar being 'absurd' was made because a few lines showing that the copy of the report under Section 157 of the Code was forwarded to the Magistrate were missing from the translation of the copy of the entry [Ex.278] provided by the learned Spl.P.P. It is a fact that the witness never claimed any specific knowledge about the copy of the F.I.R. actually having been sent to the Magistrate. He admitted, that he did not know when it was sent, by whom it was taken, when it was received by the Magistrate, and categorically stated that this is done in a routine manner. He had categorically answered that he had nothing to show that the copy of the F.I.R. in this case was sent to the Magistrate. In spite of

this, there was an insistence that the learned Spl.P.P. should be called upon to produce the relevant record showing that a copy had been sent to the Magistrate under Section 157 of the Code. It cannot be disputed at all that the witness never made a claim that it was sent to the Magistrate actually, or that he had any knowledge in that regard. An attempt was being made during his cross-examination to 'refute' a claim not made by the witness at all, and this resulted in the relevant observation. In view of the discomfort felt and expressed by Shri Shirodkar about the expression 'absurd' used by the Court in relation to the said insistence, I have had a second look at the matter. Even then, I find that the insistence was not at all justified and the Court Note in that regard [on pages 2174, 2175 and 2176 of the Notes of Evidence] is eloquent. By using the said expression no remarks have been made against the learned Senior Advocate, and no disrespect to him was intended; but it was the insistence in question, that has attracted the expression '**absurd**'. Apparently, Shri Shirodkar was expecting an answer that the copy of F.I.R. was received by the Magistrate on 05/03/2002, which the witness could not say, having no knowledge about it. Had Jagdishbhai claimed that the F.I.R. had been sent to the Magistrate on 2nd or 3rd, which was probably expected by the learned Advocates for the accused, the insistence that the record

showing that to be produced would have been justified. I do hold an opinion that it was absolutely uncalled for to insist for the production of the record showing *when* the Magistrate had received the copy of the F.I.R. in this case during the cross-examination of Jagdishbhai who accepted that he had no knowledge of it actually having been sent, let alone the time of sending it.

727. Coming to the point, so far as the present case is concerned, the delay in receipt of the F.I.R. by the Magistrate is satisfactorily explained. I avoid discussion on the lengthy cross-examination of PI Kanani on this aspect, which is proved to be irrelevant. It may only be observed that PI Kanani has given fitting replies to various uncalled for questions and his cross-examination on that point has failed to establish that the delay in receipt of F.I.R. by the Magistrate was due to the fact that it had been sent late; and that late sending was because, earlier, it was not in existence at all. The evidence of PI Baria [P.W.72] clearly establishes that the duty Constable had gone to the Magistrate on 03/03/2002 and at that time, he had taken the copy of the F.I.R. to the Magistrate. PI Baria has said that due to the riots that were going on in Vadodara, Curfew was in force, the Courts were closed and all the arrested accused in Vadodara city were being

produced before a single Magistrate who was by being at the circuit house, receiving all the correspondence addressed to all the Magistrates. In the situation that was prevailing at the material time, the normal working of the Court or Magistrate was certainly affected as clearly stated by PI Baria and therefore, if the acknowledgement shows date 05/03/2002 as date of receipt of the F.I.R., it does not necessarily follow therefrom that it had been sent to the Magistrate on the same day. In any case, there is much other evidence to show that the F.I.R. had been lodged on 02/03/2002 itself and the copies of the same were sent to superior police officers.

728. I have no hesitation to conclude that the contention that the F.I.R. [EX.136] was recorded only on 04/03/2002, has no substance at all. The evidence about its time and date is convincing and reliable. It cannot be overlooked that the police having visited the scene of the offence and having come in contact with the victims, having admitted the injured in the hospital, having drawn inquest panchanamas in respect of dead bodies, could not have afforded not to record the F.I.R.. Further, that the statement of Raees is the actual F.I.R.; and that it was being suppressed, is also without any substance. It may be observed that if the entire thing was to be manipulated, as suggested by the learned Advocates for

the accused, the information in Ex.136 could have been incorporated in the statement of Raees also. It is not as if only by lending the name of Zahira to a concocted and manufactured statement that the investigating agency could succeed in their alleged wicked design of implicating the accused. It could be done by projecting somebody else – Raees also – as the first informant. The whole contention based on the alleged attempt of the prosecution to suppress the statement of Raees is unsound. The question is, if it was to be suppressed, why was it included in the chargesheet ? In fact, it appears to me that the statement of Raees is probably not a genuine record at all. I shall now discuss the reasons for holding this view, one by one.

a] After going to S.S.G. Hospital, Abhaysinh [P.W.66] gave the communication [Ex.262] in order to let him know whether the injured were in a position to give statement or not [the discrepancy in the name of Raees who has been referred to as 'Rafiq' in this communication is immaterial and the identity is established from the E.P.R. number. In fact, no dispute on this has been raised.]. Dr.Judal [P.W.71] made endorsement [Ex.262/a] to the effect that '*patient is not fit to give DD at present*'. This endorsement was made at 2.00 p.m.

According to Abhaysinh, after having waited in the hospital for sometime, he recorded the statement of Raees as by that time, he had become 'somewhat' conscious. The plausibility of this version needs to be examined. It does not seem likely that Abhaysinh would record a statement of Raees without again consulting the doctor. He had an endorsement with him to the effect that the patient was not fit and if in spite of such endorsement, he would record the statement of the same person without again referring the matter back to the doctor, the value of the statement would be open to challenge. This Abhaysinh would be expected to know.

b] This is particularly so because the document [Ex.262] itself shows that the Medical Officer was requested '*to kindly inform the police station on telephone as and when the patients would be in a condition to give statement*'. Thus, the intention of Abhaysinh is clear. He wants to record the statement of the patient only after he would be certified to be fit for that purpose. He wants the doctor to inform the police station as soon as the

concerned persons would be in a condition to give the statements. This portion [A/128] in Ex.262 was specifically put to Abhaysinh in the cross-examination and he admitted that as per the said portion, his expectation was that the doctor should inform when any of the said persons injured would be in a position to make a statement, by telephoning to the Panigate Police Station. When this was the position, it is difficult to accept that Abhaysinh would thereafter record the statement on his own, without waiting for the medical opinion. In fact, the portion A/128 is indicative of Abhaysinh's intention not to wait any longer at the Hospital.

c] A further doubt is felt because of the failure of Abhaysinh to obtain an endorsement from the doctor even after recording the statement [Ex.264]. It was possible for him to contact Dr.Judal or any other doctor after he had recorded the statement [Ex.264] of Raees and get confirmation from the doctor of he being conscious and fit to make the statement at that point of time.

d] The contents of the statement [Ex.264]

also make me doubt the authenticity and genuineness thereof.

The statement shows that Raees told Abhaysinh that 'they were brought to government hospital turn by turn'. He is supposed to have further stated, *“presently, I am in D/4 ward and Cot No.12 for medical treatment and presently, I am under medical treatment and I am in fully conscious state*'. In the condition in which Raees was at that time, it is difficult to believe that he would know and give the details of the ward number, cot number, etc. Raees, admittedly, has not been able to give the names of his colleagues. The other two persons who are mentioned in the relevant *vardi* are Sailun [E.P.R.No.1717] and Ramesh @ Raju [E.P.R.No.1718]. The *Vardi* that was received by Rameshbhai [P.W.16] from Dr.Meena Robin [P.W.46] shows that only the name of Raees was ascertained [though wrongly described as 'Rafiq'] and the other two whose names were not revealed at that time. They were described as 'unknown'. In other words, Raees had not been able to give their names. That the person who could not give the names of his colleagues, would be able to give the ward number and cot

number, is difficult to believe.

e] According to Abhaysinh [P.W.66], the statement [Ex.264] of Raees and the communication [Ex.262] to the Medical Officer was handed over by him to PI Baria on 10/03/2002 along with the hospital *vardi* [Ex.263]. In the cross-examination, it has been brought on record that the endorsement [Ex.263/1] which is in respect of handing over the documents, does not speak of the statement [Ex.264] of Raees and the communication [Ex.262] to the Medical Officer also being returned along with the document [Ex.263]. What the endorsement shows is that only the document [Ex.263] was being returned. According to Abhaysinh, he handed over all the papers together but while writing, a mention of the other documents remained to be made. Thus, the entry does now show that the statement of Raees and the communication to Medical Officer containing his endorsement was also returned to the police station on 10/03/2002. This has been brought on record by the defence. However, what they expect to be inferred from this, is not the same that I think to be the proper inference. According to Mr. Shirodkar, since the endorsement [Ex.263/1], which is dated

10/03/2002, does not show the statement of Raees and the communication of doctor also being returned along with the document [Ex.263] the documents [Ex.262 and Ex.264] must have already been handed over to the police station on 02/03/2002. I am unable to come to such a conclusion. If the endorsement [Ex.263/1] does not show that the statement [Ex.264] of Raees and the communication [Ex.262] to doctor were being returned on 10/03/2002, the inference may be that they were not being returned along with the document [Ex.263]; but the inference will not be that they had been returned on 02/03/2002 itself. It does not seem likely that Abhaysinh would preserve the document [Ex.263] which contained a direction to him to go and investigate, but would not preserve the documents which came in existence pursuant to the said direction given to him. It is on the basis of direction contained in Ex.263 that he goes to the hospital, communicates with the doctor, obtains endorsement of the doctor, records statement of Raees and then hands over simply the statement of Raees and the communication of doctor to the P.S.O. on 02/03/2002 while preserving with him the

document containing direction to him, is difficult to accept. As a matter of fact, without the document Ex.263 it would be difficult to understand what the documents Ex.262 and Ex.263 are. In what connection, the statement Ex.264 had been recorded could not be understood at all without the document [Ex.263] and therefore, he would only hand over Ex.262 and Ex.264 to the P.S.O., on 02/03/2002 and would retain with him Ex.263, cannot be accepted. In my opinion, in all probability, the statement of Raees was not in existence at all and all that Abhaysinh had done was to secure his thumb impression so that in case of his death, it could be used as a dying declaration. This is clear from his evidence whereby he expected to record a dying declaration. Thus, I do agree that the statement of Raees was probably not returned to PI Baria on 10/03/2002, but I refuse to draw an inference therefrom that it had already been returned on 02/03/2002.

This view is strengthened by the fact that the condition of Raees does not appear to be such that his statement could be recorded. At 2

O'Clock, Dr.Judal had declared him to be unfit. In his evidence, PI Baria [P.W.72] has also stated that on 02/03/2002, he could not record the statements of any of the injured as none of them were in a position to make a statement. PI Baria had categorically stated that he went to D/4 ward but none of the injured was in a condition to make any statement [page 2244 of the N.O.E.]. This is consistent with the evidence of Dr.Judal. Under these circumstances, for a short while, Raees became alright so that Abhaysinh could record his statement, is difficult to believe.

729. My conclusions, as a result of a careful consideration of the contentions and analysis of the evidence in that regard, are as follows:-

i] There is no substance in the contention that the statement [Ex.264] of Raees was recorded before recording the statement [Ex.136] of Zahira.

ii] The statement of Zahira had been recorded on 02/03/2002 itself and there is no substance in the contention that the statement of Zahira had

been recorded on 04/03/2002. The basis for this contention is only the receipt of the occurrence report by the Magistrate on 05/03/2002, and the evidence regarding the date of receipt is only Kanani's admission to that effect, which again is based on his admission made during previous trial. The admission during the previous trial was based not on Kanani's knowledge of the fact admitted, but on the basis of some document [not marked] shown to him while in the witness box.

iii] The contention that the prosecution was deliberately not bringing forward the statement of Raees as the F.I.R., is also without any substance.

iv] On the contrary, the statement [Ex.264] of Raees appears to be not a true or genuine record at all. It had probably not been recorded at all on 02/03/2002 and in any case, Raees was not in a condition to make a proper statement on 02/03/2002.

v] There was no intention on the part of the investigating agency to '*suppress*' the statement of Raees, in as much as, they have included the same in the chargesheet.

vi] Zahira having turned hostile, there was not

much to be bothered for the learned Advocates for the accused whether her statement was made first or statement of Raees was made first. This contention appears to have been taken and stretched too an extraordinary length because of the need felt to support the theory of Zahira not having complained at all, Zahira not having expressed any grievance about the trial at all and Zahira not having sought any retrial at all.

730. Before proceeding further, a contention raised by Shri Mangesh Pawar, the learned Advocate for accused nos.16, 17, 18, 19 and 21, about it not being the statement of Zahira, or that it not having been recorded at the time when PI Baria claims to have recorded it, may be examined.

731. The F.I.R. [Ex.136] mentions about the death of Baliram. According to Shri Pawar, the fact of death of Baliram was revealed only in the evening. That Baliram was described as 'unknown male' at the time of his admission in the hospital and he was identified as Baliram only after the inquest panchanama was drawn between 18.15 hours to 18.45 hours. Therefore, the FIR [Ex.136] must have been recorded after 18.45 hours. This contention is without merit. It is impossible to hold

that it is only when the inquest panchanama was drawn, the body was learnt to be of Baliram, or that the fact of the death of Baliram was not known to anyone before that. The evidence shows that Baliram died at 1400 hours. Zahira was in the S.S.G. Hospital at that time. The recording of the F.I.R. was going on at that time. When Baliram died, it was not only possible but quite likely for the others in the hospital to have come to know about his death. That till the inquest panchanama was drawn, his identity would not be established, is incorrect. The procedural formalities would naturally be required to be completed and possibly, till somebody would formally, under a panchanama, identify the body, the records of the hospital wherein Baliram was described as 'unknown' would not be changed; but that does not mean that Zahira was unaware of the death of Baliram before the inquest panchanama.

732. ***What cannot be lost sight of, is the fact that it was not necessary for the investigating agency to have falsely projected Zahira as the first informant***. The contention is that the FIR which gives the names of some of the accused as the offenders is concocted and is a creation of PI Baria. This contention is one of those, which, when tested by ordinary experience and intelligence appear so improbable that they are to be

forthwith rejected. If PI Baria wanted to do all this manipulation, why could he not insert the same matter in the statement [Ex.264] of Raees, is something about which no comments are offered by the learned Advocates for the accused. An examination of the evidence has revealed how the contention about Raees being the first informant and the prosecution dishonestly suppressing the real F.I.R. to make Zahira the first informant, is imaginary and baseless. In fact, the truth appears to be that a concocted and bogus statement of Raees was inserted in the charge sheet, which was definitely not done for falsely implicating the accused.

Whether there was one unlawful assembly or more? What was the object of such unlawful assembly or assemblies ?

I shall now consider some contentions advanced by Shri Jambaulikar, learned Advocate for accused nos.1 to 5, 10, 11 and 12.

733. It is submitted that the identity of the unlawful assembly as the same that was in the night and in the morning, is not established. According to him, since when the police came in the night the mob fled away and gathered again after the police went, there were two separate unlawful assemblies. It is submitted that the

'*object*' of the unlawful assembly has to be determined with respect to each such assembly that was formed during the period from the night to morning.

734. The contention of there being different assemblies in the night and in the morning, is advanced on the basis that '*there is no evidence to show that every member of the unlawful assembly was continuously present* therein from night till morning'. I am not impressed by this contention. Unlawful assembly is defined in Section 141 of the I.P.C. An assembly of five or more persons actuated by and entertaining one or more of the common objects specified by the five clauses of the said section is an unlawful assembly. If the relevant provisions are studied and the object behind the same is grasped, it is clear that the possibility of the composition of the unlawful assembly changing during the period its members commit offences, always exists. It cannot be assumed, while speaking of an unlawful assembly, that at no point of time, its composition would change; and that all the members forming it, would remain the same till it is finally dissolved. It cannot be suggested that even if a single person from an assembly of - say 1000 to 1200 persons,- changes, there comes into existence another unlawful assembly. The composition of the unlawful assembly might change, but still, the unlawful assembly

would be the same, capable of being identified as such. It is the continuity and identity of common object that would determine whether the unlawful assembly is the same or not, and not whether each and every person constituting it was same all the time. In any case, this is rather academic. Every member of an unlawful assembly would be guilty of offences committed in prosecution of the common object of the assembly only if, at the time of committing of those offences, he would be a member of the same. Thus, I fail to see how the change in the composition of the assembly would make any difference in the penal liability to be fastened on an individual accused, because, for fastening such liability on him, it must be shown that he was a member of the unlawful assembly at the time when the offence in question was committed.

735. In the instant case, there is evidence not only of the supporting witnesses but even of the hostile witnesses, including Smt.Jyotsnaben Bhatt [P.W.43] and Kanchan Mali [P.W.44] -, that the mob that assembled in the night never went away. That, it continued to remain there throughout the night till the incident itself terminated by the arrival of the police in the morning. In this case, the common object of the unlawful assembly is not in doubt or dispute at all. The object is made

clear by the slogans which they were giving and the acts which they committed. It is also clear from the motive that is behind the offences in question. There is an identity of the object of the unlawful assembly right from the night till the morning. It is not possible to hold that there were different assemblies in the night and in the morning, though it is perfectly possible that the composition of the assembly was not exactly the same and identical, throughout the period. In my opinion, even if there would be a number of changes in the composition, still, it is to be treated as a single unlawful assembly by reason of the continuity of its activities and identity of the object. Further, there might be temporary absence of some of it's members and in some cases, a particular member of the assembly might not be present at all in the morning. As aforesaid, it, however, is immaterial, in as much as, if an accused is to be held guilty for the offences that were committed in the morning, that he was present in the unlawful assembly at that time, is required to be established. If this is not established, then that accused who was present only in the night and had left the unlawful assembly in the night itself, would not be punishable for the offences committed by the members of the unlawful assembly in the morning. The moment a member disassociates from the membership of the unlawful assembly, his responsibility

or liability for the acts committed by the unlawful assembly thereafter comes to an end; and therefore, the anxiety or apprehension that an accused would be wrongly held liable for the acts done by the unlawful assembly in the morning, though he himself had left the unlawful assembly in the night itself is uncalled for. Whether a particular accused had left the membership of the unlawful assembly at a particular point, is however a question of fact to be decided, like any other matter, on the basis of evidence in that regard.

736. Interestingly, in this case, the members of the unlawful assembly have committed capital offences, both in the night as well as in the morning. Apart from the fact that Kausarali and Lulla appear to have been murdered in the night, the act of setting on fire a dwelling house occupied by several persons is indicative of an intention - or at least the knowledge - necessary to constitute the offence of murder, in case of death being caused, on account of the fire so set.

737. Another argument - somewhat connected with the earlier argument- is that the object of the unlawful assembly in the night might be only to set fire to the building and not to kill anyone. In support of this, a contention is advanced as 'why the members of unlawful

assembly did not go up and kill the inmates'. The argument is that if the object of the unlawful assembly was to kill, then nothing would have prevented them from going up and killing the inmates, to achieve or accomplish the object. This argument is without any force. An unlawful assembly, though does possess a common and unlawful object, is not necessarily governed by any fixed and planned programme. It does not necessarily have one Commander who takes the decisions, as in the case of a legal force such as police force. The object is common and it is to be accomplished, but the methods are, to a large extent, left to the members concerned, to be decided on the basis of what would happen on the spot. It is in evidence that it was not easy for a large number of persons to enter inside the Best Bakery building at one time. The passage for making entry, which was by the side of the main gate, was, admittedly, narrow. Though the rioters were in a big number, those who would enter from that passage, or any other door or window, certainly ran the risk of being attacked by the inmates. It would be therefore much easier for them to set the entire building on fire for the purpose of achieving the object. Again, it must be remembered that there was no specific object to kill any specific person or specific number of persons; and setting the house on fire was the easiest and most

convenient way of causing danger to the inmates with minimum danger to the rioters themselves. It would also additionally cause damage to the property itself and create more terrible impact or fear in the minds of all concerned. The argument that, 'that they only set the whole building on fire but did not go inside and kill the inmates, shows that the object of the unlawful assembly was not to kill', is ridiculous. It was a dwelling house and as the evidence shows, the members of the unlawful assembly were clearly aware that a number of persons had been trapped in the house. It is, in spite of this, that the whole house was set on fire. Keeping in mind the ingredients of the offence of murder, it cannot be said that the object of the unlawful assembly was not to take away the lives of any persons, but merely to set on fire the building. The weapons possessed by them are also indicative of the object.

738. It also can not be ignored that communal riots started as a reaction caused by the belief that *Kaar Sevaks* had been *burnt* to death by Muslims. The riots are said to be a retaliatory action and therefore, there is nothing surprising if method of burning is adopted for killing people.

739. Psychologists have indicated that to burn anyone to

death is an easy form of murder. It does not need a weapon and there is no evidence left behind. This is the easiest way to inflict pain and there is no physical contact between the assailant and the victim. The argument advanced by Shri Jambaulikar, is therefore, without any merit.

740. It is next contended the object was not, 'to kill Muslims' and that, this is clear from the evidence of Lal Mohammad [P.W.36]. It is contended that the evidence of Lal Mohammad [P.W.36] should be accepted in its entirety, the same being absolutely truthful. It is contended, that if the object was to kill Muslims, how Lal Mohammad [P.W.36] was spared ? I am not impressed by this argument either. It is clear from Lal Mohammad's [P.W.36] own evidence that he did not come in contact with the members of the unlawful assembly, at any rate, ***while*** the assembly was committing acts to accomplish it's objects. It is not that any individual member of the assembly would instantly kill any Muslim as soon as such Muslim would come in contact with him. It is only when the collective action of the assembly is taking place and where he is supported by numerous other persons, that he would be instigated to commit such acts. It is well recognized that when an individual is a part of the mob he loses his identity and takes on the identity of the

mob. This is termed as *de-individualization* by psychologists and once this sets in, any person, however mild or aggressive he may be, does what the mob does. This is often witnessed during riots. An individual comes up with the strongest possible expression on such occasions only while in the mob of rioters. As such, nothing turns on the fact that Dinesh, though came in contact with Lal Mohammad and others, did not kill them. Even otherwise, this would be relevant only for determination whether Dinesh - accused no.15 - was indeed a member of the unlawful assembly and this aspect will be considered at an appropriate place; but Lal Mohammad's [P.W.36] evidence cannot be interpreted in a manner so as to suggest that the object of the unlawful assembly was not 'to kill Muslims'. The absurdity of this contention can be made more clear by addressing to the question as to why were the Muslims, then, attacked ?

Some general arguments

741. It is next contended that the absconding accused Jayanti Gohil [original accused no.6] has been falsely implicated; and that the evidence shows that he was on duty at the material time. The contention is then developed that 'if Jayanti is falsely implicated, then what is the guarantee that others are not falsely

implicated'; and 'that, this casts a doubt on the prosecution case'. This argument has no force at all and is to be mentioned only because it is raised. First of all, there is nothing to indicate that Jayanti has been falsely implicated. There is no evidence which shows that Jayanti was on duty at the material time. No such evidence has been adduced by anyone. The basis of the alleged false implication of Jayanti is the statement of PI Kanani [P.W.74] to the effect that during the course of investigation, it was communicated to him that Jayanti was on duty at the material time. PI Kanani [P.W.74] has said that this - that Jayanti was on duty - was false. The source of the information to the effect that Jayanti was on duty, has not been examined as a witness, either by the prosecution or by the defence. It is surprising that in spite of this, such an argument should be advanced by Shri Jambaulikar.

742. It is also contended that DCP Piyush Patel [P.W.67] cannot be believed when he states that certain facts were stated to him on the spot by the three ladies - members of the family of Habibulla Shaikh. This contention is based on the claim that the facts - which he states, as were stated to him on the spot by those women - would require about half an hour's time to be narrated. I do not agree with this at all. What was narrated has been

clearly stated by him in his evidence and in my opinion, it would take only about 2 to 3 minutes to narrate. By no stretch of imagination, one would think that this narration would take half an hour's time. What is more interesting is that there is nothing to show that half an hour's time was not available to these women, or to DCP Piyush Patel [P.W.67]. This contention is therefore baseless and deserves to be rejected forthwith.

743. It is also contended that Zahira's statement - i.e. F.I.R. [Ex.136] - does not speak of having mentioned names of the culprits to DCP Piyush Patel [P.W.67] and PI Baria [P.W.72]. Based on this, it is contended that no such incident has actually taken place. There is no substance in this contention also. First of all, the statements were made by Zahira to DCP Piyush Patel [P.W.67] and PI Baria [P.W.72]. PI Baria himself recorded the F.I.R. That the statement was made by Zahira, was known to PI Baria; and that it is so known, was obviously known to Zahira. The idea behind such communication could be only to make other person aware of the fact communicated. When Zahira knew that PI Baria knew about it, there was absolutely no reason for her to mention again to PI Baria that *"I came to you and I told you ..... etc., etc."*. Secondly, 'giving of the names is very important', as is sought to be made out, is not

entirely correct. Zahira's statement was to be recorded. It *has been recorded* and in that, she has given the names. When there was to be a written record of what Zahira stated, the fact that a short time before, it was orally said by her, would be absolutely meaningless. It is clear that this statement of Zahira, made orally, has assumed importance *now* because Zahira turned hostile. At the time when the F.I.R. was registered, there was hardly any reason to give any importance to the fact that orally, Zahira had said that. The facts orally stated by Zahira are already recorded in the F.I.R. and ordinarily, one would not have even touched the aspect of her a little earlier, having narrated the facts. All this has arisen because of Zahira's denial of having lodged a report. Thus, the importance to the alleged oral statement is due to Zahira's denial of having lodged the F.I.R., which could not have been anticipated at that time so as to specifically record in the F.I.R. simultaneously with writing the said names therein, that *"I had given you the names before, at the spot, etc."*.

744. Another contention that is advanced is that the story of tying of the limbs by ropes is not true. This is based on the fact that no ropes were seized by the police during the investigation. The contention is that had those persons indeed been tied by the ropes, the

police would have certainly seized the ropes and the very fact that the ropes are not seized, shows that they were not tied. I find no substance in this contention. There is no challenge to the evidence of the supporting witnesses in that regard. There is no challenge to the evidence of PSI B.U.Rathod [P.W.63] who says that he and his staff untied the ropes. Moreover, a rope is seen lying on the ground in the video cassette [Ex.283]. When this was pointed out, what is contended is that sufficient number of ropes, as would be required for tying 9 persons, are not seen in the video cassette [Ex.283]. This is ridiculous. The entire scene of the offence, at one stretch, is not seen on the screen when the video cassette [Ex.283] is played. Moreover, if the police and witnesses have concocted the theory of tying by ropes, which could be the only other possibility, the police could have certainly supported such false claim by bringing ropes, which would not be difficult to procure. Further, the fact that an article was not seized, though relevant, means that it was not there, should not be advanced with respect to this case at least. It is because admittedly, the clothes of the victims - obviously stained with blood - were also not seized in this case, but one would hardly think of advancing an argument - and none is advanced - that they were not wearing any clothes at all.

745. Another contention advanced by Shri Jambaulikar is that the morning incident, as mentioned by the witnesses, cannot be believed as it is not likely that things have happened that way. The argument advanced by him is that the mob would not wait till all these witnesses would come down by the ladder and as soon as any person would come down, he would be attacked and killed. According to him, there was no reason for the mob to have waited to assault till all the inmates of the building got down from the terrace. There is no substance in this contention. The answer to the question posed by Shri Jambaulikar is easy. If one would be attacked as soon as he would come down, the others would not climb down at all. It was, therefore, natural that the mob would wait till all got down before attacking anyone. The psychology and the reactions of the mob cannot be put into any set formula or pattern; but apart from this, in the circumstances, it was only natural on the part of the mob to wait till all got down.

746. It is also contended that the theory of tying of the hands and legs should not be believed because it would be contrary to the psychology of the mob. According to Shri Jambaulikar, the mob would attack the victims immediately and would not waste time in tying hands and legs, etc.

This contention has also no substance. It is difficult to try to lay down what the mob would do, and any attempt in that regard, would not be proper. Even otherwise, from the point of view of broad probabilities also, this does not seem correct. The mob would naturally first make the victims feel helpless. Tying hands and legs is a way of humiliating, frightening and making them helpless.

747. All the contentions raised on behalf of the accused persons, save and except the contentions about reliability of the identification evidence, have been considered by me. The specific contentions regarding the evidence to connect the accused persons with the alleged offences shall be separately discussed. The above discussion leaves no manner of doubt that the Best Bakery building, *wakhar* of Lal Mohammad [P.W.36], house of Aslam [P.W.42], vehicles, etc., were indeed set on fire by a mob of rioters.

748. That the mob of rioters had surrounded the Best Bakery building and that the mob was throwing stones, bricks, bulbs, soda water bottles, petrol/kerosene filled bulbs/bottles, etc., towards the building, is also satisfactorily established.

749. The evidence shows that the burnt bodies of 3 women and 4 children, which were brought down from the first floor of the Best Bakery building after the arrival of the fire brigade, were sent to the S.S.G. Hospital. The memorandum of the post-mortem examinations on these, bodies make it clear that the said 7 persons had died an unnatural death as a result of the burn injuries. The burn injuries were sustained on account of the fire that had been set to the Best Bakery building.

750. That Nafitulla [P.W.31], Nasibulla [P.W.30], Taufel [P.W.26], Raees [P.W.27], Shehzad [P.W.28], Sailun [P.W.32], Baliram, Ramesh, Prakash, Firoz and Nasru were assaulted by means of weapons such as swords, sticks, rods, etc., in the morning, by a mob, or by some persons forming it, is also satisfactorily established. Though nobody has specifically stated about Firoz and Nasru being attacked, that they were on terrace in the night and got down along with other victims in the morning, is established. Their dead bodies were recovered on the next day from a nearby place. The nature of the injuries on their person and the fact that they had been tied by coir ropes, establishes that like others, they were also assaulted by the mob of rioters. The evidence shows that the injuries were such as had endangered the lives of Nafitulla, Nasibulla, Taufel, Raees, Shehzad and

Sailun. The injuries suffered by Baliram, Ramesh, Prakash, Firoz and Nasru actually proved to be fatal.

751. Yasmin's evidence shows that the mob of rioters had robbed the *ghee, maida,* sugar, etc., that was in the Best Bakery building. There is absolutely no reason to disbelieve it.

752. That Baliram, Ramesh, Prakash, Firoz and Nasru died unnatural deaths as a result of injuries sustained by them on account of the assault that took place in the morning, is clear from the very nature of injuries sustained by them and from the memorandums of the post-mortem examinations performed on their dead bodies. There can be no doubt that the assault on Baliram, Ramesh, Prakash, Firoz and Nasru was with the intention of killing them and at any rate, with the knowledge that their deaths would thereby be caused.

753. Hence, Point Nos.2 to 8 are answered accordingly.

As to Point No.9 :-

754. As to what exactly happened to Kausarali and Lulla is not clear. The dead bodies of none of them have been found. The version advanced by the eye witnesses in that

regard, therefore, needs to be examined.

755. There can be no doubt that both Kausarali and Lulla were present in the Best Bakery building when the riots started. There is also no doubt that none of them was seen thereafter by their relatives or any other witnesses. In the morning when the police came, Kausarali and Lulla were not available. Their dead bodies were also not found.

756. According to Taufel [P.W.26], the rioters had assaulted Kausarali and Lulla by swords, in the night itself. That both of them had fallen down. They were then lifted by Taufel and others and taken up on the first floor of the Best Bakery building. That Kausarali and Lulla had been made to sleep in one room on the first floor. According to Taufel, they were injured and bleeding profusely and might have been already dead when they were lifted and taken in the house. The attempt to discredit Taufel on these aspects has not succeeded, in my opinion. The omissions and contradictions in that regard, as have been brought on record, are insignificant and immaterial. The cross-examination of Taufel does indicate that he has not seen the rioters actually assaulting any of them, but he had seen the rioters talking to them and thereafter they having fallen down,

injured and bleeding.

757. Raees [P.W.27] also speaks of Kausarali and Lulla talking to the rioters and according to Raees, he saw that Kausarali and Lulla were dragged away and assaulted.

758. Even Shehzad [P.W.28] mentions about Kausarali and Lulla speaking to the rioters when the rioters came in the night. Shehzad also states that Kausarali and Lulla were assaulted by the rioters by swords; and that thereafter, he, Taufel and Baliram brought Kausarali and Lulla and made them sleep in the room. There is a variation in the version of Taufel and Shehzad regarding the persons who brought Kausarali and Lulla in the room. While according to Taufel [P.W.26], Kausarali and Lulla were taken to the first floor by him, Baliram and Nasru, according to Shehzad [P.W.28], they were taken by him, Taufel and Baliram. I am not inclined to give much importance to this variation. Some such variation is bound to exist when a number of victim witnesses are naratting about an incident involving a large number of happenings, large number of assailants and large number of victims. The possibility of Taufel making a mistake and giving the name of Nasru, instead of Shehzad, can not be ruled out. Except this variation, the story of Taufel and Shehzad is the same, on this aspect. Shehzad also

states that Kausarali and Lulla were bleeding. According to Shehzad, when he, Taufel, and Baliram took them to the first floor, the clothes of Taufel and the said other two were also stained with blood. The contradictions and omissions with respect to his version are of no consequence.

759. The version of Yasmin [P.W.29] on this, is also consistent with the version of Taufel [P.W.26], Raees [P.W.27] and Shehzad [P.W.28]. She claims to have seen Kausarali and Lulla being assaulted by swords. Yasmin has claimed that she saw the rioters dragging Kausarali and Lulla from the first floor when both of them were unconscious. According to her, their bodies were thrown in the fire. Yasmin categorically states that the bodies of Kausarali and Lulla were thrown in the fire that had been set to the wood kept on the ground floor of the building. She claims to have seen this while coming down from the staircase between the first floor and the terrace.

760. In the cross-examination of Yasmin, it was asked to her as to from where she had seen the bodies being thrown in the fire. It is because from the terrace, Yasmin would not be able to see the fire that had been caught on the ground floor of the building. Yasmin has replied

that they were dragged a little away from the structure. That there was some life left in Lulla; he was given blows with swords after which he succumbed to the injuries and thereafter, the bodies were thrown in the fire. The contention of the learned Advocates for the accused that the place where fire had taken place on the ground floor could not be seen from the terrace, is correct and should be accepted. However, it is difficult to hold that thereby, a person cannot give evidence of having seen the persons being thrown in the fire. If they had indeed been dragged a little away from the structure, it was possible to see the same from the terrace and when they would be thrown, later on, in the fire, the witness could very well perceive the same. It is true that their actual falling in the fire would not be seen by the witness from the terrace and to a certain extent, an inference enters in what seems to be a plain statement of facts. However, the correctness of such inference can, in certain cases, be undisputed.

761. Even the hostile witnesses admit that Kausarali was in the Best Bakery building when the riots started; and that his whereabouts, thereafter, are not known to them. Similarly, about Lulla, apart from the evidence of supporting occurrence witnesses, the evidence of Ashraf [P.W.33] and Aslam [P.W.42] establishes his presence in

the Best Bakery building at the material time.

762. A careful analysis of the evidence of these witnesses leaves no manner of doubt in my mind that not only Kausarali and Lulla were present in the Best Bakery building when the riots started, but that they also came in contact with the rioters, were assaulted and thereafter were brought by Taufel & others to the first floor room and made to sleep there. Whether Yasmin actually saw them being thrown in fire, is difficult to conclude. One thing is, however, certain that after the riots, Kausarali and Lulla were not found. When the police and fire brigade came there in the morning, they were not there and their dead bodies were also not found. Thereafter, they have not been seen by any of the witnesses, including the hostile witnesses, Kausarali's wife Smt.Sharjahan Shaikh [P.W.34], and Lulla's brothers - Ashraf [P.W.33] and Aslam [P.W.42].

763. On 22/03/2002, when PI Kanani [P.W.74] made a search for the remains of human bodies, if any, in the Best Bakery building, in the presence of the officers from the Forensic Science Laboratory, some human bones were found. The said bones were seized and taken charge of under a panchanama. The bones were, later on, sent for examination to the Head of the Department of Anatomy,

Medical College, Vadodara, and an opinion, *inter-alia*, to the effect that they were human bones; and that they were of more than one person, was given. The relevant evidence in this respect is of PI Kanani [P.W.74], Mukhtyar Shaikh [P.W.6] – a panch, Ashok Kumar Waghela [P.W.19] – Scientific Officer in the F.S.L., Dr.Saiyad [P.W.20] – Professor of Anatomy, Dr.Jagdish Soni [P.W.60] – Assistant Professor in the Department of Anatomy, and PSI Rupesh Dave [P.W.75]. This evidence which has been attacked as unreliable, needs to be examined.

764. There cannot be any doubt that PI Kanani had contacted authorities from the F.S.L. and had taken search of the bakery and the *wakhar* with their help to see whether any remains of human body could be found at this place. PSI Rupesh Dave [P.W.75], along with Panch Mukhtyar Shaikh [P.W.6] and the team of officers from the F.S.L., Vadodara, consisting of Ashok Kumar Waghela [P.W.19], on 22/03/2002, went to the Best Bakery building and *wakhar* and collected a number of samples for examination, cannot be doubted at all. The evidence of all these witnesses on this point is consistent and well corroborated by the documentary record, which cannot be doubted. For the present, it is not necessary to mention the details of the samples taken and only the evidence which speaks of having found some bones in the premises,

needs to be discussed.

765. Mukhtyar Shaikh [P.W.6 – a panch witness] has stated that from the backside of the building, some bones were found; and that there was one bone with teeth. He speaks about the bones being taken charge of. The bones [part of Art.R/14(colly)] which were produced before the Court, were shown to this witness and he has identified the bones as the same that were found on the spot.

766. Ashok Kumar Waghela [P.W.19] also states how the search for bones was made specifically and how, by the side of a step on the rear side, there was a heap of burnt articles. He states that in that heap, bone pieces and something like a denture was found. The bones forming part of Art.R/14(colly) were shown to him and he identified them to be the same bones which were collected on 22/03/2002.

767. PSI Rupesh Dave [P.W.75], the officer who drew the panchanama, also states that on the rear side of the *wakhar* where there were steps, a heap of burnt coal and wood was noticed. He states that the F.S.L. officers searched inside the heap and the jaw bone and the pieces of bones were found, which were kept in a plastic bag, which in turn were kept in a cardboard box; and that the

cardboard box was sealed by following the routine procedure. The bones forming part of Art.R/14(colly) were identified by PSI Dave as the same bones that were seized under the panchanama. The panchanama which has been duly proved has been tendered in evidence and has been marked as Ex.24.

768. Some arguments are advanced by the learned Advocates for the accused to the effect that the story of finding some burnt bones on 22/03/2002 is unbelievable. It is contended that earlier, a panchanama of the scene of offence was drawn; and that there is no mention of any heap in that panchanama. It is contended that the bones were planted and then were falsely shown to have been discovered. There are also some contentions advanced with respect to the manner in which the bones were packed.

769. What is at once noticed is that the evidence of Mukhtyar Shaikh [P.W.6] on the aspect of finding of the bones has not at all been challenged. There is no suggestion put to him that no bones were found; and that he was deposing falsely. His cross-examination deals with the manner of packing, etc., and whether or not there was a possibility of the bones having been replaced, but the cross-examination is not directed on

the aspect of his claim of having found the bonds. Even Ashok Kumar Waghela [P.W.19], who categorically mentioned about the bones being found in a heap of burnt articles, has not been challenged on this. There is also no challenge to the evidence of these two witnesses regarding the basis on which they have identified the bones [part of Art.R/14(colly)] as the same bones which were collected on that day. The basis of their belief as to the identity has not been asked to them in the cross-examination. In fact, the suggestion put to PSI Dave [P.W.75] in the cross-examination indicates that the case that is made out on behalf of the defence is that the heap was deliberately created and the bones were planted, and not that there there was no heap, or that no bones were found at all. After considering the evidence on record, I am not able to hold that the bones were planted; and that a heap was artificially created with the object that the bones should be shown as 'discovery'. There could be a number of reasons why a mention of the heap was not found in the panchanama of the scene of offence drawn earlier by PI Baria. The place of offence was not sealed. The heap was outside the premises. The locality is residential and it would be dangerous for PI Kanani to 'create' a heap of burnt articles and insert into it human bones because it could be noticed by somebody and there was no reason for PI Kanani to take

such a risk. Once the evidence that bones were indeed found at the relevant place is believed, or is unchallenged, this is only other theory, which cannot be accepted in my opinion.

770. The discrepancies about the manner of sealing or seizure of the bones are also not very relevant when the evidence of the witnesses as to the identity of the bones is not only not challenged, but even asking about the basis for identification has been avoided. There is no reason to disbelieve that the bones were taken charge of along with other articles, properly packed and sealed and were sent to the Head of the Department of Anatomy, Medical College, Vadodara.

771. The evidence of Dr.Saiyad [P.W.20] and the findings given by him on examination of bones are much criticized. The certificate given by Dr.Saiyad and Dr.Soni [P.W.60] has been produced and marked as Ex.71/A [it had been produced, marked and exhibited in the previous trial also]. The list/note made by Dr.Saiyad and Dr.Soni as to the contents of the box which had been received by them from the D.C.B. Police Station, Vadodara, for examination, has also been produced and marked as Ex.70.

772. The opinion of Dr.Saiyad and Dr.Soni is to the

effect that the incompletely burnt bones were of human origin, that all the bones were not of the same person; and that a few identified bones were belonging to a person aged above 18 years. These conclusions are duly recorded in the certificate [Ex.71/A].

773. There has been very lengthy cross-examination of Dr.Saiyad [P.W.20] arising out of a few interpolations and additions which were apparently made later on by him in the list/note [Ex.70]. In the certificate [Ex.71/A], a conclusion has been reached about a few identified bones belonging to a person aged above 18 years. It appears that in the list/note [Ex.70], the age was initially mentioned as '*beyond 24 years*', which was, later on, corrected and made as '*above 18 years*'. The allegation is that this has been deliberately done at the instance of PI Kanani, in as much as, Lulla, who was believed to have been burnt at the place where the bones were found, was about 17 to 18 years of age. The argument is that the description of the person as '*aged above 24 years*' would not have helped the prosecution and therefore, fraudulently, the said change has been effected while issung, or after issuing, the certificate. I do not find any substance in these vehement contentions. It does appear that the changes have been made subsequently, but there is no basis for claiming that they have been made

after the certificate was issued. The document marked as Ex.70 is basically a list/note made by Dr.Saiyad and Dr.Soni for their own convenience at the time of the examination of the bones. The result of their examination and the conclusion arrived at by them is not supposed to be contained in the list/notes [Ex.70], but in final certificate [Ex.71/A], which has been issued. The whole basis for the contention that a fraudulent change has been made in the list/notes [Ex.70] at the instance of PI Kanani, is that in the chargesheet, there exists a document which purports to be a true copy of the document marked as Ex.70 and in that document, the changes which are found in Ex.70, are not seen. That document has been produced and marked as Ex.72. Dr.Saiyad has explained this, by saying that after the necessary examination is carried out, notes are prepared; and that at that time, a xerox copy of the notes is taken out and kept along with the relevant articles so as to be able to be useful in case the original notes are lost or misplaced. Thus, it seems that a copy of Ex.70 was taken out before making the changes, which somehow came to be included in the chargesheet, instead of corrected document – viz. Ex.70. This aspect is blown out of proportion during the cross-examination, but I am not impressed by the contentions advanced on the basis of it, in as much as, that the corrections made are wrong, is

not at all shown or suggested. In fact, Dr.Soni has clearly referred to a particular page in the book '***Grey's Anatomy***' and said that in view of what is stated in the said book, the changes were made in the list/notes [Ex.70]. It is made clear by him that the opinion as to the age being '*above 18 years*' is given on the basis of the examination of the maxilla teeth socket. Now, no attempt has been made to show that this opinion is wrong. In other words, the entire attack that has been made on the opinion given by Dr.Saiyad is based on the changes made in the list/notes [Ex.70] without attempting, in any manner, to challenge the correctness of the opinion. There is absolutely no attempt – not even a suggestion – to show that the opinion as '*above 18 years*' could not have been given on the examination of the maxilla bone, as has been done.

774. The evidence of Dr.Soni [P.W.60] fully supports the version of Saiyad [P.W.20]. Dr.Soni has also stated that they referred to the book '***Grey's Anatomy***' to get the confirmed opinion about the range of the eruption of the third molar tooth in maxilla and then came to the conclusion that the proper opinion should be '*above 18 years*' instead of '*beyond 24 years*'. Dr.Soni's evidence confirms the fact that the changes were made at that time only and at any rate, within a short time thereafter. In

any case, there is nothing to indicate that they were made after the certificate [Ex.71/A] was issued. Dr.Saiyad has made it clear that on page 1718 of the 30th Edition of '***Grey's Anatomy***', it is mentioned that third molar tooth erupts during the age 18 years to 24 years. As already observed, there is absolutely nothing to challenge this and once that is so, the correction that has been made, is proper. At the most, it would mean that initially a wrong opinion was formed, but before issuing the certificate, it was got corrected by referring to '***Grey's Anatomy***'.

775. The cross-examination of Dr.Saiyad, in view of the changes between the list/notes [Ex.70] and what purports to be its copy, as filed in the chargesheet, seems to be totally uncalled for. A number of theories of conspiracy with PI Kanani, etc., were advanced based on this, but apart from the fact that the opinion which has been given is not shown, or even suggested, to be wrong, I am not impressed by these theories. There was hardly any reason for Dr.Saiyad and Dr.Soni to make changes after having issued the certificate. This is particularly so when the change is said to be correct. Moreover, the list/notes were not meant to be the final opinion expressed by these experts. It was for their record and what actually matters, is the ultimate certificate issued by them. It

is the certificate which is supposed to record their conclusion, and not the notes. Thus, not only the theory of Dr.Saiyad and Dr.Soni having tampered with the record and opinion to oblige PI Kanani, who wanted such a change, cannot be believed, but, on the contrary, it seems that a copy of the rough notes was improperly issued by one Dr.Sudhalkar, Associate Professor in the Department of Anatomy, a colleague of Dr.Saiyad and Dr.Soni. It is apparent from the documents [Ex.72 and Ex.72/A] that Dr.Sudhalkar certified a xerox copy of the list/notes [Ex.70] as the 'true copy' without reference to either Dr.Saiyad or Dr.Soni and handed over such certified copy to PI Kanani. PI Kanani included it in the chargesheet. Apparently, before making corrections in Ex.70, a xerox copy thereof had been taken out as per the procedure explained by Dr.Saiyad and on the basis of the said copy, another copy was taken out by Dr.Sudhalkar and certified as 'true'. Naturally, such copy does not contain the corrections that were later on carried out. As a matter of fact, it is not that there is anything questionable in what Dr.Saiyad and Dr.Soni did, in as much as they were entitled to make changes and correct the document which was nothing but their own rough notes, but actually, it is Dr.Sudhalkar's conduct in certifying a xerox copy of the rough notes made by Dr. Saiyad and Dr. Soni as 'true' without reference to them

that is questionable. Merely because such a copy was handed over to PI Kanani by him and included in the chargesheet by PI Kanani, such frivolous points could be taken up on behalf of the accused. Though the corrections were certainly made by Dr.Saiyad and Dr.Soni in the list/notes [Ex.70], the corrections are not shown to be wrong. In fact, opinion as '*beyond 24 years*' would have been wrong and it was rightly corrected.

776. Apart from this, the document (Ex.70) is prepared at a stage when the mental process of the experts was still going on for arriving at a conclusion in respect of the queries made, and as such has no value as an expression of the opinion of the said Doctors.

777. The suggestions that Dr.Saiyad had, after issuance of the certificate, made certain changes, are also incorrect, as established by the evidence of Dr.Soni.

778. In the ultimate analysis, therefore, as regards PI Kausarali and Lulla, the following factors can be said to be satisfactorily proved.

a) Kausarali and Lulla were very much present in the Best Bakery building when the riots started in the night on 01/03/2002.

b) That in the night itself, they had come in contact with the rioters and Kausarali had a talk with the rioters.

c) Kausarali and Lulla were assaulted by the rioters. They sustained injuries and were bleeding profusely.

d) They were lifted by Taufel, Shehzad, Baliram, brought on the first floor of the Best Bakery building and made to sleep in a room.

e) In the morning, when the police came, neither Kausarali and Lulla, nor their dead bodies were found.

f) Since then, Kausarali and Lulla have not been heard of by their relatives.

g) Incompletely burnt human bones of at least two different persons were found in the premises of the Best Bakery building on 22/03/2002.

779. Now, Yasmin [P.W.29] has claimed that she has seen the rioters dragging Kausarali and Lulla away and throwing them in the fire. There is also some other evidence indicating that the rioters might have dragged them away after they were made to sleep, but I proceed on

the basis that this – viz. that they were thrown by the rioters in the fire – is not satisfactorily established. However, the question is what conclusion, other than they both were burnt and killed or killed and later burnt during the incident, can be drawn from the facts which are proved and which are enumerated above.

780. The question is rather delicate. There was a time when the Courts used to insist on the evidence of the dead body, or *'corpus delecti'* in cases of murder and no conviction for murder would be recorded unless the dead body is found. In several old authoritative texts, it has been considered as a rule that no finding in respect of murder can be given unless the body of the deceased is found. However, this rule is not without qualification. It has been recognized that circumstances may be sufficiently strong to show the fact of murder though the body has never been found. It cannot be said that under no circumstances, a charge of murder can be established without the dead body being found.

781. In the present case, there can be no rational explanation of the facts which are proved, other than that Kausarali and Lulla were killed in the incident. The finding of burnt human bones at the relevant place indicates that at least two persons or dead bodies had

been burnt. Kausarali and Lulla could not have left the Best Bakery building in the night, and when it was surrounded by the rioters. They had already been very badly injured, as established by satisfactory evidence. Thus, even if there exists a doubt as to whether Yasmin had actually seen them being thrown in the fire, the fact remains that no other conclusion in that regard can be drawn if the facts duly proved and enumerated above are to be interpreted. Though what exactly happened to Kausarali and Lulla and the manner in which they were actually killed is not clear, the only inference that can be drawn from the proved facts is that they were killed during the riots at that particular night and they were burnt alive or dead. There are no other reasonable possibilities.

782. Refusing to come to this conclusion would not be justified only because their dead bodies were not found. As already observed, it is not a legal pre-requisite for coming to the conclusion about they having been killed. Once there is no doubt whatsoever that they were present in the Best Bakery building, that they met the rioters, that they were assaulted and were badly injured, that they were brought and kept in the room on the first floor of the Best Bakery building; and that thereafter, neither they, nor their dead bodies were found, but later on,

from that place, burnt human bones of at least two persons were found, I am unable to come to a conclusion that they might not have died and might be surviving somewhere or that they might have died due to something else. In my opinion, these factors are sufficient to justify the conclusion arrived at by me. This conclusion is further strengthened by the fact that neither Kausarali, nor Lulla, have been heard of by their own relatives, since 02/03/2002.

783. It may be kept in mind that the law creates a presumption of death in case of a person who has not been heard of for 7 years, by those who would naturally have heard of him if he had been alive. Thus, without there being any history of assault, attack, etc., a presumption regarding death is drawn only from the fact that the person is not heard of for 7 years by those who would have naturally heard of him and the burden of showing such person to be alive, is thrown on the one who asserts it. In the instant case, there is a background of riots, history of assault and having sustained injuries, and thereafter the persons or their dead bodies being missing in the morning. The evidence has brought on record, existence of the circumstances, which make it impossible to think that in an injured condition Kausar and Lulla would leave the premises and go elsewhere on their own.

Whether rioters would allow them to go is also a question. In this background, if they are not heard of by their close relatives for a period of more than two and half years, as is clear from the evidence of Smt.Sharjahan [P.W.34], Ashraf [P.W.33] and Aslam [P.W.42] the only inescapable conclusion is that they have died; and that too an unnatural death in the riots.

784. Can it be said that the fact of death of Kausarali and Lulla is proved by the standard that is required in a criminal trial ? It is well settled that the degree of proof that is required in a criminal trial is higher than a mere prepondence of probabilities. The phrase '***beyond reasonable doubt***' is invariably used in relation to the standard of proof that is expected in a criminal trial. The phrase '***beyond reasonable doubt***' is a time honoured phrase and though it may be difficult to explain its meaning precisely, it is easier to understand what it conveys. The following observations of Lord Denning *in Miller V. Minister of Pensions, [1947] 2 All E.R. 372, at p.373-374,* which have been referred to by the Supreme Court of India are worth reproducing in this context.

> *".....Proof beyond a reasonable doubt does not mean proof beyond the shadow of a*

doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice."

Lord Denning further made observations indicating that *remote possibilities, which can be dismissed with the sentence '<u>of course it is possible but not in the least probable</u>' would not be sufficient to create a reasonable doubt, when, otherwise, the evidence is strong*.

It can be said that the possibility, if any, of Kausarali and/or Lulla being alive, or having died a natural death, is too fanciful and too remote to be seriously considered. At any rate, it can be dismissed as '***not in the least probable***'.

785. There is no doubt in my mind that Kausarali and Lulla were put in the fire – either alive or after having been killed – by the mob of rioters and in either event, they have died an unnatural and homicidal death, either due to the fire, or otherwise.

Hence, Point No.9 is answered accordingly.

<u>As to Point Nos.10 and 11</u> :-

786. The mob of persons who had assembled at the material time near the Best Bakery building and who did the aforesaid acts in the night on 01/03/2002 and/or in the morning of 02/03/2002, was clearly an unlawful assembly. The mob was of several persons, stated to be of about 1000 to 1200. It is clear that the said assembly was entertaining more than one of the common objects specified in section 141 of the I.P.C.

787. The various acts committed by the mob which was surrounding the Best Bakery, giving slogans, pelting stones, bottles and burning matters, etc., were obviously not committed at the whims at the individual members composing the unlawful assembly. The evidence, as discussed earlier leaves no manner of doubt that all the aforesaid acts and setting the buildings on fire, robbing of the *ghee, maida*, sugar etc., and other articles in the bakery, assaulting the inmates with weapons, causing hurt to them etc. were clearly in prosecution of the common object of the said unlawful assembly. What was the object has been clearly proved by the evidence.

Hence, Point Nos.10 and 11 are answered accordingly.

As to Point Nos.12 and 13:

788. These two points being connected, the reasons for

the determination thereof,may be discussed together. That the accused persons were the members of the unlawful assembly is sought to be established mainly on the basis of their identification as such.There are a number of challenges to the identification evidence, some of which have been dealt with earlier. The contention that it was impossible for the occurrence witnesses to have seen the mob of rioters or the persons forming it, due to smoke, darkness and topography etc. has already been dealt with and has been found to be without substance. I shall now consider the other contentions raised by the learned Advocates for the accused with regard to the unacceptability of the evidence of identification.

789. It is contended that the investigating agency failed to ascertain the identity of the accused persons as the culprits, during investigation. This is not accepted as correct by PI Baria and PI Kanani who both have been extensively cross-examined on this aspect. It is contended that since full names of the offenders could not be given by the occurrence witnesses, it was not possible for the investigating agency to fix the identity of the culprits on the basis of the names, as revealed to them. PI Baria has accepted some of the suggestions given to him during cross-examination about the names being incomplete, but has added there were other factors

establishing the identity. He has given some instances in that regard, but it is not necessary to discuss that evidence. This is particularly so, because PI Baria has, actually, not apprehended any of the accused.

790. PI Kanani has been questioned, to show that neither any physical description of the offenders nor of the clothes worn by them, could be gathered by him from the statements recorded during investigation. It was also suggested to PI Kanani that the names of the accused as obtained by him, from the occurrence witnesses, were quite common in Gujarat; and that the names were insufficient to fix the identity. Though the contention about the fixation of identity of the accused as the culprits during the investigation stage is not very methodically advanced, from the cross-examination of PI Baria and PI Kanani and from the arguments, it appears that it has two shades. The first is about the satisfaction of the identity of a particular accused as the culprit reached by the Investigating Officer and the other is the absence of the confirmation of the identity of the accused from the occurrence witnesses during the investigation stage.

791. An attempt has been made to confuse the satisfaction of the Investigating Officer about the identity of an

accused as the offender, with the identification of the accused, as such, made by the occurrence witnesses during investigation stage. It may be observed that these two are two different aspects, though, in some case they may overlap. PI Kanani has been questioned as to whether he could explain as to why he did not feel it necessary to record further statement of Taufel [P.W.26] and other supporting occurrence witnesses for the purpose of knowing the full names of the accused. PI Kanani has answered as follows.

> *"Whatever names had been mentioned by these witnesses, on the basis of that, I was able to establish the identity of the said persons. I could establish their identity and as such, I did not feel it necessary."*

The questioning to PI Kanani on this aspect gives an impression that the Advocates for the accused did not want the Court to ascertain the sufficiency or otherwise, of the identification evidence, but wanted an admission from PI Kanani that the eye witnesses had not established the identity of the accused. The least that can be said about this, is that the questioning is rather improper. When such admission did not come from PI Kanani who was emphatic about the identity having been established, it

was reminded to him that the decision whether the accused are guilty or not, is not left to the prosecution and it is the Court which decides such questions. This proposition is correct, but in that case, there was no point in attempting to elicit an admission – based on his opinion - from PI Kanani about the insufficiency of identification evidence. This has been mentioned in view of the unfair criticism of Kanani and his evidence, and to show that it is the questioning that is unfair and not 'attitude of PI Kanani', as reflected from the answers.

792. Moreover, the emphasis on this aspect is totally misplaced. A more fundamental and basic question needs to be dealt with in view of the emphasis on fixation of identity of the culprits during investigation and that is '*how far the question whether the identity of the offender was properly established during the investigation stage is relevant, when his identity is satisfactorily established during the trial*'. The actual evidence regarding identification is that which is given by a witness in the Court. If that evidence is acceptable, the question whether the identity of the accused had been satisfactorily established at the investigation stage would be immaterial, save and except, in so far as, it may be relevant for judging the reliability of the identification made in the Court. If

the identity of the accused is satisfactorily established during the investigation stage, it may, in some cases serve as corroboration to the identification in Court, but by itself, it would not be relevant at all. The confirmation of the identity of the culprits by the Investigating Officer at the time of the arrest would undoubtedly be necessary, but the Investigating Officer can not be restricted to have such confirmation of identity from a particular source or in a particular manner. His confirmation of the identity is for his own satisfaction, and not for the satisfaction of the Court during the trial. His satisfaction about the identity would be relevant for the purpose of arrest and till that stage. The identity during the trial is to be established by proper evidence.

793. In view of the very lengthy cross-examination on this issue, the legal position must be discussed here in my opinion. If the victims or the witnesses would name certain person or persons as accused, undoubtedly, the Investigating Officer, while arresting them, is required to confirm their identity as the same persons against whom allegation has been levelled. However, this satisfaction is to be reached by the Investigating Officer. He can arrive at it by any mode which he thinks satisfactory. This is clear from the fact that even

where the names are not given, or even where the culprit is stated to be unknown to the victims, the Investigating Officer has to ascertain the identity of an accused as the culprit before sending him for trial. Obviously, in such cases, confirmation of identity cannot be done from the victims. The source on which his belief would be based, has nothing to do with the admissibility, as a piece of evidence, of that source. The Investigating Officer may reach the requisite satisfaction from a source other than the victims and the witnesses even where they have named the offenders. For instance, if 'A' complains that 'B' assaulted him, nothing prevents the Investigating Officer while arresting 'B' to get it confirmed from 'C' or 'D' instead of 'A' that he is that 'B'. Once the case comes to the stage of trial, the identity of 'B' as the person who assaulted 'A' is to be established by legally admissible evidence.

794. Thus, apart from the fact whether the Investigating Officer had got the identity of the culprits established during the investigation, either before or after their arrest is not by itself, relevant, there is nothing to indicate that PI Kanani apprehended the accused without being satisfied about their identity or without ascertaining it.

795. The question that next arises for consideration is whether the evidence of identification of the accused persons, as is available in the case, is satisfactory.

796. The contention of impossibility of the eye witnesses having seen the mob or some persons in the mob is advanced also on the ground *that in the given circumstances, they would not have attempted to see as to who were there in the mob*. It is submitted that the mob was of 1000 to 1200 furious persons with weapons like swords and giving slogans such as 'burn bakery', 'kill Muslims', etc. It is not in dispute that stones, bricks, kerosene/petrol bottles, etc. were being thrown on the Best Bakery building and even towards the terrace. It is contended that under the circumstances, the frightened eye witnesses, in the background of the riots and the circumstances of fire, heat, flames, would not have risked themselves by looking at the road and thereby exposing themselves to the danger of becoming targets.

797. I am not impressed by this submission. Firstly, as already observed, because of the balusters, it was not necessary at all to peep over the railing to see as to who were the persons in the mob. One could easily see the same through the gaps between the balusters. Further, though the witnesses would undoubtedly be

frightened in the circumstances that have been fully established by the evidence, it is not possible to accept that such frightened persons would not try to see as to what was happening. In fact, it would be a normal reaction of the witnesses to see as to what was happening, when the stones, bricks, etc., were being thrown, slogans were being given, fire was being set. It would not be a normal, or at any rate a common reaction of a frightened human being, not to try to ascertain as to from where, how serious and of what nature, the danger exists. When the mob would be collected and would be giving slogans, it would be quite natural for the witnesses to first try to see as to what was happening and in that process, obviously to see who were the persons who were forming the mob. It is only after knowing what they were doing, the witnesses would know to what extent they were in danger. The support to this theory – viz. of the witnesses being frightened and therefore simply avoiding or refusing to see anything – is sought to be obtained from the hostile witnesses who are keen on destroying the whole prosecution case. The tainted evidence of the hostile witnesses cannot be brought in aid to establish a particular conduct or reaction on the part of the supporting eye witnesses. The witnesses Taufel [P.W.26], Raees [P.W.27], Shehzad [P.W.28], Smt.Yasmin [P.W.29] and Sailun [P.W.32] have

not been asked any questions in cross-examination to show that they could not have tried or did not try to see what was going on.

798. Though the aspect of witnesses being frightened has been mainly advanced with respect to the supposed impossibility of their having *attempted to see* what was happening and who were the persons forming the mob, that in such a frightened state of mind, *they would not have been able to see and remember the persons in the mob*, is also advanced. Thus, based on the aspect of fear, two-fold arguments are advanced. The first which has been dealt with earlier is that due to fear, the witnesses would not have attempted to see what was happening. The second is about the effect of fear on their perception. In this regard, the following observations :-

> *"The emotional balance of the victim or eye-witness is so disturbed by his extraordinary experience that his powers of perception become distorted and his identification is frequently most untrustworthy*.'

of Professor Borchard, quoted by the Supreme Court of India in ***Hari Nath and another V/s. State of U.P., A.I.R. 1988, SC 345***, have been emphasized. However, the submission that because the witnesses were under fear at

the time of the incident, it would prevent them from observing what was going on around them and forming a proper impression of the same in their minds, is not scientifically accepted. That fear will have such an effect on the witnesses, is of layman's view, as observed by the Allahabad High Court in ***Jwala Mohan and others V/s. the State, A.I.R. 1963, Allahabad, 161***. While dealing with the view that the identification witnesses would be nervous at the time of the incident and therefore the identification made by them would be unreliable, Their Lordships quoted the following as the view of Psychologists :-

> *"On the contrary, fear generally has a large emotional factor and as a result, the attention is sharpened, the mental faculties are concentrated, and better memory on material points should result. Intense feeling of any kind is apt to key up the powers of the brain and sharpen perception. When we feel a thing strongly, we are sure to retain the recollection of it. It is more firmly impressed upon us than the humdrum affairs of our ordinary life,"* [see 'Psychology and the Law' by Dwight G. McCarty, 1960,

page 198.] [Emphasis supplied]

G.F.Arnold, in his '*Psychology of Legal Evidence*', has considered the question of effect of fear on memory. It would be advantageous to take a note of the following comments of the learned Author :-

> *"There is a mistaken impression that fear prevents attention to what is going on and therefore hinders memory, and it has been argued before the writer more than once that a narrative or an identification is not reliable because the witness being frightened at the time, could not have noticed or recollected what she states. This is a frequent incident of a dacoity or robbery case. It is well, therefore, to state exactly what the effect of fear is. It may be that the fear is so great as to totally paralyze the mind, as e.g. when the serpent fascinates its prey, and in such cases, the argument would have foundation; but this is rarely so, and usually a person under its influence observes*

better and remembers clearly."

799. The learned Author further went on to quote Darwin, as follows :-

> *"'Fear', says Darwin,"is often preceded by astonishment, and is so far akin to it that both lead to the sense of sight and hearing being instantly aroused. It lends us to attend minutely to everything around us because we are then specially interested in them, as they are likely to intimately concern us."*
>
> [Quoted from Wigmore's '*Principles of Judicial Proof*', (published by Boston Little, Brown, and Company 1913)].

In fact, the same observations of Professor Borchard [*supra*] were quoted before the Supreme Court of India and the Supreme Court had occasion to deal with the same in ***Daya Sing V/s. State of Haryana AIR 2001, SUPREME COURT, 1188***. The Supreme Court of India observed as follows :-

> *"Theoretically in some case what has been noted by the learned author may be true. For that purpose, the evidence of the*

> *witness is required to be appreciated with extra care and caution."*
>
> [para 14].

The Supreme Court of India further cautioned that the matter is to be decided on an appreciation of the evidence; and that it is no use to imagine and magnify theoretical possibilities with regard to the state of mind of the witnesses and with regard to their powers of memorizing the identity of the assailants.

800. Whether the aforesaid observations of Professor Borchard would apply to the identification of known persons and/or where the incident has lasted for hours, giving repeated opportunities of viewing the offenders, is extremely doubtful. They appear to have been made in the context of identification of persons not previously known, and/or in respect of incidents which take place in a very short time. At any rate, the force of these observations will not be the same in all cases irrespective of the aspects as to previous knowledge, duration of incident, manner or opportunity to observe etc. Thus, there cannot be a general rejection of the evidence of eye witnesses on the ground that due to fear, they might not have perceived what was happening, properly. Moreover, the view of experts, as quoted

earlier, does not support the theory at all. G.F.Arnold and Darwin quoted above, suggest to the contrary.

801. Thus, the contention about the impossibility of the eye witnesses having seen the culprits on any of the grounds that are advanced is without substance. There was every opportunity for the eye witnesses to see the mob and there was every possibility of their having seen persons from the mob during the long period for which the incident lasted.

802. It is next contended that the identification of an accused for the first time before the Court is a very weak piece of evidence and cannot be accepted, unless it is supported by a test identification parade held previously. It is contended that since in this case, no test identification parade was held, the evidence of identification is totally valueless and cannot be acted upon.

803. A number of decisions of the Hon'ble Supreme Court of India and of the Hon'ble High Courts have been relied upon by the defence to challenge the value of the identification evidence. I shall be discussing only some of these authoritative pronouncements, as, in my opinion, it is not necessary to discuss each and every Judgement

cited, though I have taken into consideration the principles enunciated in all the authoritative pronouncements.

804. The reliance of the defence on most of the authorities in connection with the value of the identification evidence not preceded by a test identification parade is misplaced. It is clear that substantive evidence as regards the identification would only be the identification of an accused as the culprit, made by a witness in the Court. It is true that such evidence is considered as 'weak piece of evidence' unless supported by the evidence of a previous test identification parade, but this concept of 'weakness' arises where the offender or the culprit is not previously known to the identifying witnesses. All the authorities which speak of the necessity of holding a test identification parade and the weakness of the identification done in the Court for the first time, relate to cases where the offender or the culprit would not be known to the witnesses prior to the incident. The observations from the very Judgement relied upon by the learned Advocates for the accused themselves, establish this.

i) In ***Bollavaram Pedda Narsi Reddy and ors. V/s. State of Andhra Pradesh, (1991) 3 Supreme Court Cases 434,*** on

which reliance has been placed by the defence, the Supreme Court was dealing with the question of identification of accused persons not previously known to the witnesses. This is clear from the following observations :-

> *"In a case where the witness is a stranger to the accused and he identifies the accused person before the Court for the first time, the Court will not* ***ordinarily*** *accept that identification as conclusive".* [Emphasis supplied] [para.8]

The Supreme Court further observed :

> *"In the present case, the appellants are admittedly persons with whom the two witnesses had no previous acquaintance".* [para.9]

It was further observed :

> *"The occurrence happened on a dark night. When the crime was committed during the hours of darkness and* ***the assailants are utter strangers*** *to the witnesses, the identification of the accused persons assumes great importance."* [Emphasis supplied] [para.9]

805. The observations reproduced above, leave no manner of doubt that they cannot be have any application to a case where the culprits would be known to the identifying witnesses previously.

ii). The decision of the Supreme Court in ***Kanan and others v/s State of Kerala, (1979) 3 Supreme Court Cases 319***, is also relied upon by the learned Advocates for the accused.

806. The following observations from the reported Judgement :

> *"It is well settled that where a witness identifies an accused who is not known to him in the Court for the first time, his evidence is absolutely valueless unless there has been a previous T.I. parade to test his powers of observation."* [Para 1].

demonstrate that they relate to the identification of an accused not known to the witnesses from before.

807. Thus, it is very clear that the failure to hold a test identification parade ***may*** prove fatal only in cases where the offenders would not be known previously to the

witnesses or victims. Even in such cases, no proposition of universal application that the evidence of identification of an accused as the culprit for the first time in the Court ***has to be rejected*** in all cases, can be laid down. There is no rule of law, or even of prudence, to that effect. The rule deducible from the authoritative pronouncements of the Apex Court – which is based on logic, common sense and prudence – is that such piece of evidence is a weak piece of evidence and *may be* rejected; and that it is required to be accepted with great caution. If there would be circumstances which lend assurance even to such identification, then notwithstanding that no test identification parade was held and that the offender was not known to the identifying witness/witnesses since previously, the evidence *can be* accepted and even a conviction can be based on such evidence. In any case, it is not possible to deduce any principle from any of the judicial pronouncements relied upon by Shri Adhik Shirodkar, learned Senior Advocate, Shri Jambaulikar, learned Advocate for accused nos.1 to 5, 10 11 and 12, and other learned Advocates for the accused that this 'weakness' attached to the identification evidence exists even in cases where the offenders are known to the identifying witnesses. On the contrary, the very observations made therein show that where the culprit is a person

previously known to the witness, the necessity of holding a test identification parade does not arise at all; and as such, the identification of the culprit made by the witness for the first time in Court of law cannot be discarded or regarded as 'weak' on the ground that no test identification parade was held.

808. In ***Jadunath Singh and another V/s. The State of U.P., 1971 CRI.L.J.305,*** the issue that was before the Court was much more complicated, but the observations of the Lahore High Court in ***Sajjan Singh V/s. Emperor, AIR 1945 Lah 48*** to the effect,

> *"If an accused person is already well known to the witnesses, an identification parade would be of course, be only a waste of time."*

were approved.

809. In ***Mehtab Singh and others V/s. The State of Madhya Pradesh, 1975 CRI.L.J.290***, while dealing with an argument that there was no proper identification [of the appellant nos.2 and 6 before the Supreme Court] at an identification parade; and that the appellants were therefore entitled to be acquitted, the Supreme Court observed as follows.

> *"But this argument is .... without*

force and cannot be accepted. The necessity for holding an identification parade can arise only where the accused are not previously known to the witnesses." [para 3].

810. In ***Surendra Nath V/s. State of U.P. A.I.R. 1998 SC 193,*** all the relevant aspects touching the identification evidence were discussed. The Supreme Court of India referred to several of its decisions on this aspect. In that case, the appellant had claimed that the witnesses were not known to him. His application for directing the test identification parade was dismissed by the Chief Metropolitan Magistrate, which was challenged in the Court of Sessions, Kanpur. The Sessions Court directed the appellant to be put up for identification, but still, the identification parade was not held. The Supreme Court, after referring to its previous pronouncements in which it was laid down that identification of an accused who his already known to the identifier is futile, came to the conclusion that failure to hold the test identification parade even after a demand by the accused is not always fatal; and that it was only one of the relevant factors to be taken into consideration along with the other evidence on record. It was observed that

if the claim of the ocular witnesses that they knew the accused already is found to be true, the failure to hold the test identification parade is inconsequential. The legal position was further made clear by the Supreme Court in ***Dana Yadav V/s. State of Bihar A.I.R. 2002 SC 3325***. After an extensive analysis of the law on the subject, the Supreme Court recorded its conclusions in para 38 of the reported Judgment. The conclusions do not leave any manner of doubt that there is no question of holding test identification parade if the accused is known to the prosecution witnesses. Further, even in cases where the accused had demanded an identification parade to be held and where a parade was not held in spite of such demand, that would not be fatal, if ultimately it is revealed that the accused was known to the witnesses from before. What needs to be highlighted is that in spite of the claim of the accused that he is not known to the witnesses and in spite of the failure to hold a test identification parade even after such a claim, it may not prove fatal; and whether the accused was known to the witnesses since previously, would be a question to be decided by the Court on the basis of the evidence that may be adduced during trial.

811. So far as the present case is concerned, according to the identifying witnesses, the accused who have been

identified by them were known to them since previously. The witnesses who have identified the accused persons have stated about such accused being known to them by their face and appearance, where they are not known by name. No test identification parade was demanded by the accused during investigation. It is true that only some of the accused are known to some of the witnesses by names, but every identified accused is stated to be known by face and/or appearance by the witness identifying him.

812. Thus, the crucial question is whether the accused – or at least those who are identified by the witnesses – were known to the concerned witnesses since prior to the incident. The witnesses have said so. According to the witnesses, they knew accused persons identified by them because the accused are from the same locality. I shall therefore consider whether the accused are proved to be from the same locality as of the witnesses, or a nearby locality.

Whether the accused are from the locality ? - [Yes.]

813. It may be observed that, apparently, there was no dispute on this issue earlier. It is only when the fact that not holding of a test identification parade, would

not be relevant in this case, by reason of the accused identified by the witnesses being known to them since previously, was discussed in the course of the arguments, that the stand that they are not from the locality, was taken.

814. As already discussed, the witnesses who have identified the accused persons have said that those accused were known to them, since previously. The fact that they were known previously, has come out in a natural manner from the identifying witnesses. In this context, the arguments that it is only a 'bare oral word'; and that it is 'a belated oral word' of the identifying witnesses, cannot be accepted. It was never a case of the identifying witnesses that the offenders were all unknown to them. Rather, the investigating agency's case is that the accused are from the same locality, as that of the witnesses and victims. The statement regarding previous knowledge, as made by a witness, cannot be discarded as 'mere oral word', etc., in as much as, there is nothing else, which he is required to show. It was open for the accused to question the witness as to in what way they knew the concerned accused since previously. In fact, Yasmin has been asked about it and she has answered the same. If a man knows another since previously, he is only supposed

to and expected to say that. It cannot be suggested that he should be armed with evidence - rather documentary evidence – to prove that he knows him; and that too when there is no reason for him to expect any challenge from the accused on this.

815. Apart from this, there is clear and positive evidence of Lal Mohammad [P.W.36] who says that all the accused are from the same locality where his '*wakhar*' and the Best Bakery were situated. Lal Mohammad has categorically stated that he knows all the accused; and that all are from the '*mohalla*'. There is absolutely no challenge to this evidence. On the contrary, that Lal Mohammad's evidence should be accepted fully is what is contended on behalf of the accused.

816. Veersingh Zala [P.W.45] has also admitted that the accused in this case are from his locality and nearby locality, though unlike Lal Mohammad, he did not know anyone. There is no challenge to this evidence.

817. The evidence of Smt.Khyati Pandya [D.W.4] also speaks of the accused being persons from the same locality where Best Bakery was situated. In fact, Smt.Khyati Pandya gives that as a reason for feeling curious, about how Yasmin [P.W.29] could go and stay in

the Best Bakery building. When the accused were from the same locality and when they had been acquitted, how Yasmin, a victim of such terrible incident, could go and stay there, was the aspect which aroused her interest and therefore she instructed Ajay Patel [D.W.5] to record Yasmin's interview. No clarification as to how she had knowledge of the fact of accused being the residents of the same locality has been sought on behalf of the accused; but I still consider that in all probability, Khyati Pandya has no personal knowledge regarding it. Her evidence may be only indicative of her belief that they are the residents of the same locality, rather than knowledge.What is significant is that the accused did not challenge this evidence, or did not attempt to show that she is wrong. The basis of the belief, the defence has not dared to seek clarification regarding. This belief together with the tacit admission on the part of the accused supports the unchallenged evidence of Lal Mohammad [P.W.36], should it require any support.

818. PI Kanani's [P.W.74] evidence also clearly shows that the accused are the residents of the same locality. PI Kanani has spoken about the houses of the accused being in the Hanuman Tekdi locality. On what basis PI Kanani said so,is a matter not thought fit for a probe by the accused. This speaks for itself. In the course of

investigation, PI Kanani, as the Investigating Officer, naturally came across the respective residences of the accused persons. The trend of the cross-examination in this regard is to the effect that the sources or the persons from whom PI Kanani ascertained the fact - viz. that the accused were having their houses in the same locality - have not been examined before the Court. There is no substance in this contention. Though initially this information, or knowledge, may be derived by the Investigating Officer from other sources, as soon as he derives it, it becomes his knowledge capable of being deposed as a fact, by him. Where a person resides is not a matter which the Investigating Officer cannot, in the course of investigation, ascertain. It is not like the facts of the incident of the crime which the Investigating Officer learns from witnesses, but which can never become his own knowledge of the incident capable of being stated like a fact. It is a matter which the Investigating Officer is competent to depose as a statement of fact and as evidence. In what manner PI Kanani ascertained the addresses or houses of the accused is not sought to be got from him by questioning him on that, in the cross-examination.

819. That PI Kanani or his subordinates visited the houses of the accused while searching for them, is not in

dispute.In a different context- viz. to explain the surrendering themselves by the accused persons, this fact was brought on record in the cross-examination of PI Kanani [page 3407 of the Notes of Evidence]. Thus, when the fact that the houses of the accused persons were visited by the investigating agency while the search for them was in progress is not in dispute, there is hardly any reason to doubt the claim of PI Kanani that he found out the houses of the accused; and that the houses are situated in the same locality.

820. The addresses of the accused, as given by them during their original trial and also to this Court when their plea was recorded, clearly show that they are the residents of Hanuman Tekdi and/or Daboi Road locality only. The only exception being accused no.14 - Jagdish Rajput - who, when his plea in this Court was recorded, gave a different address. The addresses of the accused as residents of Hanuman Tekdi, Daboi Road, have never been disputed by the accused persons.

821. Interestingly, even in the cross-examination of PI Kanani, it was specifically put to him that because of the insufficiency of the information regarding the identity of the culprits, he merely arrested the persons from the locality [on page 3393 of the Notes of

Evidence]. Thus, this suggestion which gives a reason for the arrest and implication of the accused is a clear admission of the accused persons being from the locality. In fact, that is, precisely, suggested to be the reason for their arrest and implication.

822. Yasmin's previous statement, that her mother-in-law and her sister-in-law had pressurized her to give the names of the persons from the '*faliya*'/ locality, has been brought on record by the defence as their suggestion for the false implication of the accused. Now, in this, an admission that the accused are from the locality, is implicit.

823. Even at the conclusion of the trial and after taking a stand disputing the accused to be the residents of the same locality, a tacit admission that they are actually from the same locality, has come from the defence. It is in the context of Yasmin's evidence. It may be recalled that Yasmin's evidence on identification was sought to be challenged on the ground that admittedly, after the previous trial, Yasmin went on to reside in the Best Bakery premises; and that the accused having been acquitted, were moving in that locality. It was positively suggested to Yasmin that it is at that time she came to know the accused. That she knew the accused,

was sufficiently and satisfactorily established and Yasmin's evidence in that regard could not be doubted. An argument has been advanced that all the accused, after their acquittal, were moving freely and the possibility of Yasmin having come to know them during this period could not be ruled out. However, the possibility of coming across would be only when they would be the residents of the same locality as is clear of Yasmin's evidence. Such general acquaintance and knowing about their details would be possible if they would be from the same locality. Thus, leaving aside the question as to *when* Yasmin came to know the accused identified by her, the suggestions and the contentions discussed above indicate that the accused - at least those who have been identified by her - are the residents of the same locality.

824. The evidence of D.C.P. Patel and PI Baria clearly shows that it was told to them on the spot itself that the assailants - or at least some of them - were from the Hanuman Tekdi locality only. That they were known, was told to them and in fact, their names were also given. These statements made by D.C.P Patel and PI Baria are clearly admissible in evidence under Section 6 of the Evidence Act. The evidence of D.C.P. Patel and PI Baria in that regard is acceptable and is further confirmed by

a further fact deposed to by them - viz. at that time itself, search for accused in the Hanuman Tekdi locality was made. Thus, this also indicates that at least a number of assailants/offenders were from the Hanuman Tekdi locality only.

825. It may be of interest to observe that during the previous trial, the stand of the accused themselves was that they were residents of the same locality. In the cross-examination of Smt.Jyotsnaben Bhatt [P.W.43 in this trial and P.W.29 in the previous trial] during the previous trial, it was brought on record in the cross-examination that the accused before the Court were the persons from her '*mohalla*'/ locality. A positive case was built in the previous trial that the accused had saved Muslim families residing in the area. The deposition of Jyotsnaben Bhatt in the previous trial has been marked as Ex.158 by consent; but even without exhibiting the same, being a part of record, this Court is competent to look into that deposition, not for establishing the facts stated therein or for using the same as evidence in this trial, but for knowing, as a fact, what it contains.

826. Kanchan Mali [P.W.44 in this trial and P.W.28 in the previous trial] also deposed during the first trial that

the accused before the Court were from his '*mohalla*'. Of course, he did say that they had done the work of saving the Muslims at the time of the incident. What is significant is that this was elicited from him in the cross-examination. The question is not of establishing the truth of that version, but the question is of understanding that the accused never made any dispute regarding the fact of their being from the same '*mohalla*', - rather, they invited such evidence.

827. In fact, this much material is sufficient to come to a conclusion about the accused persons being indeed from the same locality. One can safely conclude on this basis that the denial of this aspect is a clear afterthought occasioned by the realization that this would afford strength to the evidence regarding their identification as the culprits. However, one more circumstance indicating this may be mentioned here. While replying to a question and indicating that she could not state who were throwing the bottles on the terrace, Saherunnisa [P.W.40] said '*persons from outside had **also** come [“bahar ke **bhi** aaye the”]*' [Emphasis supplied] [page 1007 of Notes of Evidence]. It is interesting to note that Saherunnisa was asked by Smt.Rao, the learned Spl.P.P., as to whether if certain persons are shown to her, would she be able to show who were her neighbours and who were

outsiders. Saherunnisa replied, after taking a long time gap, that since she had not seen them, how could she say that they were there, and this resulted in the next question as to about whom she was saying, to which Saherunnisa replied that she was being questioned about the neighbours; and that she was talking about the neighbours. In other words, What Saherunnisa conveyed is that she had not seen the accused at the time of the riots, but by implication, admitted that they - or at least some of them - were the neighbours.

828. There can therefore be no doubt whatsoever that the accused persons are from the same locality. There is also no doubt that apart from the evidence in that regard, this is indicated by the own admission of the accused persons, the only exception being accused no.14 whose address is given as of a different area or locality.

829. Once it is satisfactorily established that the accused are from the same locality, nothing more is required to accept the statements of the witnesses that they knew them unless it is shown positively that the witnesses are lying in that regard. In fact, when they are the residents of the same locality, there would be every possibility of they being previously known to them.

Such presumptions of previous acquaintance or prior knowledge are quite often drawn by the Courts of law from the evidence of the accused and witnesses residing in nearby localities. The observations made by the Supreme Court of India in ***Harinath V/s. State of U.P. (1988) 1 SCC, 14***, show that an inference of prior knowledge on the ground of the accused and the witnesses being residents of villages in close vicinity and being students of the same institution was drawn in that case. The Supreme Court also referred to its own observation in ***Bali Aher V/s. State of Bihar, AIR 1983, SC 289***, wherein, from the fact that the appellant before the Supreme Court was belonging to the neighbouring village at a distance of less than a mile, an inference that the identifying witnesses knew appellant Bali Aher from before, was drawn. It is to be remembered that the context in which the observations were made, was quite different and there, the inference of prior knowledge was drawn in spite of the fact that the claim of the witnesses was otherwise. In other words, even when there would be no such claim of witnesses, prior acquaintance, nevertheless, may be inferred from the fact that the accused and the witnesses are the residents of the same locality or a nearby locality. Here, there is a positive claim of the witnesses of such knowledge and the fact of they being residents of the same locality is only a

factor which strengthens the claim.

830. Thus, there is absolutely no reason to disbelieve the witnesses, when they say that the accused identified by them were known to them since before; and that they used to see them in the '*mohalla*'. No fault with the evidence of identification on the ground that no test identification parade was held, or that the identity of the accused persons was not got confirmed from the identifying witnesses during the investigation, can therefore be found.

831. The only question that now requires consideration is whether the evidence of identification should be disbelieved on the ground that either the names or the details or particulars of the accused identified by the witnesses were not mentioned by them to the police. It is true that failure to mention the names of the culprits where they were known, or to give their relevant details and/or particulars, would be an omission to state a material and significant fact. Whether the effect of not naming the culprits or not giving relevant details or information to the police would result in rejection of the evidence of identification made by such witnesses later in the Court is a matter that would depend on a number of factors. This would involve consideration of

the explanation, if any, in that regard by the witness. This would also involve consideration of the manner in which and the circumstances in which the statements were recorded. Above all, it would require consideration of the authenticity and reliability of the record made by the police itself. It has been earlier remarked by me that the authenticity and accuracy of the police record of the statements under Section 161 of the Code in this case is absolutely unreliable. At this stage, this may be throughly discussed.

Is the record of statements under Section 161 of the Code, reliable ? - [No]

832. In reality, there ought not to be any dispute on this. The learned Spl.P.P. says that due to the number of cases of serious offences that were being registered at the material time and the serious law and order problems which the police had been facing, it was not possible for the police to make detailed inquiries with the witnesses and try to elicit detailed information from them. Further, according to her, considering the mental and physical condition of the injured witnesses it was impossible to expect that they would give minute details of the incident. Thus, according to her, neither a proper probe was possible nor was it possible to maintain an accurate record of what the witnesses said. The learned Advocates for the accused have also criticized

the record as unreliable. According to them, some of the statements of the witnesses are false, fabricated or concocted. It is contended that such statements are a creation of PI Baria [P.W.72]. Thus, though the reasons for the unreliability of the record as advanced by the parties defer and though the inferences which they expect the Court to draw from such unreliability are different, about the fact of the unreliability of the record, they are in agreement.

833. After carefully considering the entire evidence in that regard, I am of the opinion that the authenticity and accuracy of the statements recorded by Baria can not be relied upon. The statements of the occurrence witnesses have been recorded by Baria in Gujarati language. All these witnesses are Hindi speaking. They have given their evidence in Hindi. Baria, on the other hand, expressed his inability to depose in Hindi or English and has given his evidence in Gujarati. Baria has mentioned the procedure followed by him while recording the statements of the witnesses as follows.

834. PI Baria would first record the date and then the name, address etc. as given by the witness. It is thereafter, that the narration of the witness would be recorded as '*on being asked in person*', '*I give in*

writing that....'. After the narration would be over, Baria would conclude the statement by recording '*Etli mari hakikat chhe',* or words to the effect that 'these are the facts'. Ordinarily, whatever the witness would narrate, Baria would record, but whenever it would be necessary to put a question, he would put it. He never added anything to the narration and never omitted anything from the narration. The date of recording was put on the statement, but the time of recording was not put. **Now, PI Baria does not say that the statements would be read over by him to the witnesses.** The statements do not contain a note or endorsement thereon to that effect. In other words, neither the record of the statements itself, nor Baria's oral evidence shows that the statements were read over to the concerned persons after they were recorded. Rather, it establishes that they were not read over to the concerned witnesses. The alleged discrepancies, contradictions or omissions in the evidence are to be appreciated by keeping this in mind. This is apart from the fact, as observed earlier, that most of the contradictions and omissions that have been brought on record are insignificant and immaterial. The only significant and material omission would be to state the names of certain accused persons as being present in the mob, in case of those witnesses who claim to have known them from before.

835. This was regarding the possible inaccuracy of the record on the basis of difference in language and failure to read over. However, what appears to me is that the record has not been honestly and sincerely made, as is clear from the following.

A] In the recorded statements of all the occurrence witnesses, there is a mention of one 'Social Worker Thakkar' as being present in the mob during riots. This has been brought on record by the learned Advocates for the accused. 'Social Worker Thakkar' had died much before the incident. There is no dispute about this. Now, this has been brought on record by the defence to show how untruthful all the witnesses are, and how there was a conspiracy of all of them to name a person falsely which is exposed because that person is proved to have died earlier. It is also vehemently contended by Shri Shirodkar that being a social worker, he was a leader of the Hindu community and therefore, he was sought to be falsely implicated by all the occurrence witnesses. The claim of all the witnesses having conspired to falsely implicate 'Social Worker Thakkar', is ridiculous, as has been discussed earlier. It may be added that the

statements of the occurrence witnesses were recorded on different dates. The statements of Sailun [P.W.32] and Shehzad [P.W.28] were recorded on 06/03/2002 while the statements of Raees [P.W.27], Taufel [P.W.26], Nafitulla [P.W.31], Nasibulla [P.W.30], Yasmin [P.W.29], Sehrunnisa [P.W.40] and Sahera [P.W.35] were recorded on 04/03/2002. Except the women, all these witnesses, were very severely and badly injured. The injuries had endangered their lives. Under these circumstances, that they had conspired to falsely implicate 'Social Worker Thakkar' [who was already dead] falsely and that too when all of them were very badly injured, is impossible to believe or accept. In the F.I.R. there is a mention of '^Å¸¡¸^Å÷„ “^^Å£' [Social Worker Thakkar]. It is clear from PI Kanani's evidence that it was a mistake of the writer – i.e. Baria – to have recorded accordingly. Having put the name of 'Social Worker Thakkar' in the F.I.R. by mistake, the same mistake has been made in all the statements. This indicates that in reality no statements were properly recorded. The facts already known or ascertained from one witness were put in the record of another's statement. In the serious law and order problem, which the

police were facing at that time, this was very convenient for Baria to do. It is, otherwise, impossible to explain this common mistake in the statements of all the occurrence witnesses.

B] There is also another clear indication of the statements not being truthful. The evidence shows that the name of the wife of Aslam [P.W.42] who died in the incident was actually **Shabnambibi**. The name of the wife of Firoz Aslam Shaikh who also died was **Ruksana**. The evidence in this regard, is not in dispute. In fact, PI Kanani made the necessary corrections in the notes of the post-mortem examinations with respect to these persons. In the F.I.R., however, the name of Aslam's wife is given as 'Zainabbibi' and the name of wife of Firoz is given as 'Shabnambibi'. This is an obvious mistake. It is quite possible to believe that in the situation that existed at that time when Zahira and others were in a shock, such a mistake could occur in the F.I.R. The mistake could be either of Zahira or of the person who recorded the F.I.R. - i.e. the writer and/or PI Baria. What is interesting is that this mistake in the names has been made by all the occurrence witnesses, if their statements recorded by PI

Baria are to be believed to be an accurate record of what they stated to him. In other words, for believing the record of the statements of the occurrence witnesses made by Baria to be accurate, one has to believe that all these persons – though their statements were recorded at different times and in some cases on different dates – made the same mistake - i.e. in giving the name of the wife of Aslam and of giving the same wrong name. Similarly, they also made a mistake in giving the name of the wife of Firoz; and that too, by giving the same mistaken name – i.e. Shabnambibi. That 10 persons would independently and wrongly name 'Shabnambibi' as 'Zainabbibi' and 'Ruksana' as 'Shabnambibi', is nothing but an absolute impossibility. This shows that the statements of the occurrence witnesses were not properly – if at all – recorded.

C] It is contended by the learned Advocates for the Accused that the statements are so identical, that there is a not even a difference of coma; and that therefore this shows that there are not genuine. I am in agreement with the learned Advocates. It is extremely doubtful whether the statements of the various witnesses

are a record of what was stated by them. In the statement of Saherabanu [P.W.35] she has mentioned about the limbs of '*both her brothers*' being tied by the mob. In Saherunnisa's statement also, she speaks of the mob tying down the limbs of '*both her brothers*'. Saherabanu's mentioning about the brothers was proper, but Saherunnisa's was certainly wrong and she would never call her sons as her brothers. This shows that what was recorded in one statement has been mechanically copied out. Though a reference to these statements was made by the Advocates for the accused themselves to point out that they can not be relied upon as a genuine, true or authentic record, a possible objection that it is impermissible for the Court to read the statements in view of the bar created by Section 162 of the Code has been considered by me. This comparison of record of the statements does not amount to making the use of the statements. It is not that the facts recorded in the statements are being referred to or relied upon. Looking at them, for ascertaining the correctness of the claim of they being manipulated or concocted, raised on behalf of accused, would not attract the prohibition against their use laid down by

Section 162 of the Code.

D] In the F.I.R., there is a mention that Yasmin had gone to her parents place at Chhota Udepur. This is supposedly said by Zahira and accordingly recorded by PI Baria. However, since Yasmin was actually present, it is highly unlikely that Zahira would state so. There appears to be an obvious mistake caused due to the situation, in which not only the victims, but the police were also tense. However, Baria had himself come in contact with Yasmin. Having seen Yasmin at the scene of the offence, it was impossible for PI Baria to have recorded that Yasmin had gone to Chhota Udepur, had he calmly and sincerely recorded the statements. He would have at once questioned Zahira and Yasmin on this, so as to ascertain the facts.

e] It has been seen earlier during the discussion of the evidence of Shehzad [P.W.28] that, that he stated before the police about falling unconscious on being hit by a stone is brought on record to contradict him. It has also been discussed that it is not possible to believe that Shehzad indeed made that statement particularly when he denied having made it. How it is incorrect factually has also been

> discussed. The point which is to be made here is somewhat different. The question is, on the face of the injuries sustained by Shehzad, how could Baria believe and accept that he was hit by a stone on his head without questioning Shehzad further. Shehzad's statement was recorded while he was admitted in the ward. Baria made no attempts to ascertain from the doctor as to whether Shehzad was in a fit condition to make a statement. This shows that Baria did not even bother to see what were the injuries sustained by Shehzad.

This strengthens my opinion that the record of the statements under Section 161 of the Code, as made by Baria, cannot be relied upon.

836. When Sailun and Shehzad themselves state not having said anything to the police, that certain matters are actually found, in what purports to be a record of their statements, is to be viewed in this background. That Sailun's statement is concocted, is contended by the learned Advocates for the accused themselves. I agree with them, in as much as such possibility seems to be very true and real to me. In fact, I doubt whether PI Baria was really interested in efficiently investigating

into the matter. The attitude of PI Baria, while giving evidence, strengthens this doubt in my mind.

837. Irrespective of whether the investigation was deliberately perfunctory, or that because of the difficulties of the situation, the I.O. could not do it properly, the fact remains that the record of the statements of witnesses, as made by PI Baria, cannot at all be called as 'authentic', or 'reliable' in either case. Obviously, not much value, under the circumstances, should be given to the 'contradictions' and 'omissions' established on the basis of such record.

838. In ***Baladin and others V/s. State of U.P., A.I.R. 1956 SC 181***, the Supreme Court of India has dealt with this aspect. In that case, the Hon'ble Supreme Court came to the conclusion that the police officers concerned with the investigation of the case, did not fully realize the gravity of the situation and did not take prompt steps to collect evidence. The Hon'ble Supreme Court observed that,

> *"The remissness on the part of the police officers has had a very adverse effect on the prosecution case and has added to the difficulties of the court*

> *in finding out who the real culprits were*". [para 7].

The Supreme Court of India referred to the observations of the Sessions Court whereby it was observed that the contradictions in the statements of the concerned eye witnesses, as compared with the statements recorded by the I.O., should not be allowed to affect the credibility of those witnesses because there were clear indications that he did not faithfully record the statements of those witnesses. In appeal, the High Court also held that the investigation suffered from lack of thoroughness and quickness, with the result that statements of witnesses were recorded in the 'most haphazard manner' and many matters of importance and significance to the case were omitted. However, the High Court had acquitted the accused who were appellants before it, whose names did not find a place in the record made by that police officer. Their Lordships of the Supreme Court of India did not approve this and observed that the High Court had fallen into an error in doing so. The Supreme Court observed :-

> ".....*it (High Court) rejected reliable testimony with reference to that very record which it had condemned as unreliable*'. [para 11].

839. After observing that the record made by an Investigating Officer has to be considered by the Court only with a view to weigh the evidence actually adduced in Court, the Supreme Court said as under :-

> '*If the police record becomes suspect or unreliable..... on the ground that it was deliberately perfunctory or dishonest, it looses much of its value and the Court in judging the case of a particular accused has to weigh the evidence given against him in Court keeping in view the fact that earlier statements of witnesses, as recorded by the police is tainted record and has not as great a value as it otherwise would have in weighing of the material on the record as against each individual accused*." [Para 11].

The observations of the Supreme Court of India in the aforesaid reported decision leave no manner of doubt that not much importance can be given to the so called '*contradictions*' and '*omissions*' where the authenticity or reliability of the police record is itself in doubt. These observations cannot better apply to any other case than the present one. The aforesaid discussion leaves no

manner of doubt about the unreliability of the record made by PI Baria.

840. What needs to be emphasized is the fact that the name of a culprit though known, was not given to the police by the witness can not lead to the automatic rejection of the evidence of the witness. As already observed, it is nothing more than the omission to state a material fact, the effect of which will vary from case to case.

841. In ***Dana Yadav's*** case [*supra*] wherein the Supreme Court of India had occasion to discuss this aspect it was observed by Their Lordships that '*there could not be an inflexible rule that if a witness did not name an accused before the police, his evidence identifying the accused for the first time in Court can not be relied upon*'. [Para-9]. Some instances where failure to name an accused in the statement made before the police, though known, would not result in drawing an adverse inference against the prosecution were given in the judgment by way of illustrations and it was clarified that they were not exhaustive. There may be several reasons for a witness not to name the culprit or even to state that the culprit was known to him and if the reasons are found acceptable, the evidence of the witness can not be doubted, only due

to such failure. A perusal of the reported judgment in the ***Dana Yadav's*** case leaves no manner of doubt that such omission on the part of the witness would only require a deeper and closer scrutiny of the evidence and does not warrant its outright rejection. In the said case, the Supreme Court of India did not accept the testimony with respect to the identification of the appellant before the Supreme Court of India, because there was no evidence in that case, that the appellant was known to the identifying witnesses from before.

842. In ***Prem Versus State of Maharashtra 1993 CRI. L.J. 1608,*** a Division Bench of the Bombay High Court had occasion to discuss the effect of the victim not naming the assailant before the police, though previously known. Their Lordships observed that the victim had suffered a brutal assault and survived owing to sheer luck. Their Lordhips accepted the explanation of the victim in that regard - viz. 'that due to fear he had not disclosed the names of the accused'. Thus, fear also can be recognized as one of the factors which would prevent the victim from naming the assailants before the police. In the instant case, Taufel, Raees, Shehzad and Sailun all had been very badly injured and the condition of all of them was serious. How tense the situation was, is clear from Baria's evidence who was apprehending some attack even

during the funeral rites of the deceased. If this was the situation, the victims must have been under tremendous fear while in the hospital also. There is nothing to indicate that any police protection was provided to them in the hospital. Under these circumstances, if the victims have not named some of the assailants, though known to them, the same would not be sufficient to discard their testimony.

843. It is also contended that, according to the victims/witnesses the offenders were '*unknown*'. The support to this claim is sought by pointing out that the victims had described the offenders as a '*mob of Hindus*' or '*mob of persons'*; and that even in the hospital the history which they gave to the doctors was of '*assault by mob*' only. First of all, the history as 'assault by mob' or 'assault by *lakdi'*, as is found in hospital records, was not based on the version of the concerned injured witnesses. According to Dr.Meena Robin [P.W.46], the history in respect of all the injured, including himself, was given by Raees [P.W.27] only. That this is not believable in view of the failure of Raees to name his own colleagues and the evidence about his condition not being good, has already been discussed. Further, the history given by him as 'assault by *lakdi'*, is also incorrect in view of the incised wounds on his body.

Thus, the least that can be said is that by whom exactly and under what circumstances the history was given, is not clear. Looking to the situation, it is obvious that it was recorded hurridly in the midst of a crowd and confusion and it is impossible to hold that it was obtained from the victims themselves, or at any rate, as a result of a proper and satisfactory probe. However, even if the unreliability of the hospital record and the police record in this context is ignored, it can not be accepted that '*mob of Hindu persons*' or ‘a *mob’* or '*public*' would mean that the assailants were '*unknown*'. ***A fundamental question needs to be addressd to; and that is, whether the history as 'assault by a mob' or 'assault by public' is in any way, contradictory to and/or inconsistent with the claim of the victims that they knew some of the persons in the mob.***

844. Not only I do not agree with the contention raised, but after a careful consideration of all the relevant aspects, I am of the opinion that '***assault by mob***' or '***assault by public***' is a proper description of the happenings. The question is how the incident was perceived by the victims at the material time. The victims *had been* attacked by Hindus or a Hindu mob. From their point of view, there was no other interpretation of the incident. As such, even if the names of some of

the offenders who were known to the victims, are not found in their statements, it can not discredit the concerned witnesses. I find that the basic supposition about the behaviour or reaction or perception of the witnesses regarding the incident, is wrongly presumed when one expects that they should have mentioned specifically inspite of the situation prevailing at that time, that a few of the offenders were known to them. If a thought is given to how the victims would express as to what had happened, the narration as '***assault by mob***' or '***assault by public***' or '***assault by Hindu mob***' etc. appears to be giving a rather accurate version of the incident. This would be more natural than stating as '***assault by Jitu and about 1000 others***' or '***Jitu, Sanju, Jayanti and about 1000 others***' etc. etc. The attack was indeed by a Hindu mob with no particular enmity towards any particular victim. The actions of the individual accused were only a part of the actions of the mob and naturally were perceived as actions of the mob by the victims and witnesses. In my opinion, under these circumstances, the history of the incident as '***assault by mob***' or '***assault by public***' is proper and that is how it was perceived by the victims and witnesses. Whether anybody from the mob was known to the witnesses was a matter which could be revealed by the witnesses only on specific questioning. In the light of the evidence, as to

the condition of the injured, the tense atmosphere, the heavy burden on the police, it is impossible to hold that any attempt to elicit this specific information against the offenders was made, or the injured witnesses were in a position at the material time to give such details.

845. It is contended that the offenders were not named by the witnesses, inspite of having been questioned about it. To support this contention, much emphasis is placed by the Advocates for the accused on the evidence of PI Baria. In the cross-examination Baria has agreed with the suggestions given to him that while recording the statements 'the police do ask about the name of the culprit, his address etc.', that 'the police do ask the witness to give full name of the offender', that 'the police invariably ask the witness to give full names, that they invariably try to ascertain the detailed address of the offender' etc. etc. All these suggestions which show that PI Baria always investigates in an efficient manner, have been accepted by him. PI Baria has agreed that if in any statement under section 161 of the Code such information viz:- name, full name, address and description etc. of the offender is not found, that would mean that the inquiries in that regard were made, but no information regarding these aspects were given by the witnesses. I am not inclined to accept the evidence of

PI Baria on this aspect. He has naturally accepted the suggestions put to him because that would show that he usually investigates every case efficiently; and that in the instant case also, he investigated efficiently. These statements being self serving, it is very convenient for him to accept the same as true. However, from the various weaknesses apparent in the record made by him, it is clear that the statements have not at all been properly recorded by him. Further, in the situation that was prevailing at the material time, it was impossible for PI Baria to have coolly and calmly elicited such details from the victims who were badly injured and under fear. Moreover, no statement contains a negative to the effect that '*I do not know the name*', '*I do not know the address*', '*I can not give the description*' etc. etc.; and if Baria's claim that he never omitted or added anything from the narration of the witness is accepted, then how and why the negative statements made by the witness are not recorded, is unanswerable.

846. As a result of the aforesaid discussion, I have no hesitation to conclude that the evidence of the supporting eye witnesses regarding the identification can not be discredited on the ground that they had not named, or had not given the description of the accused

identified by them to the police, though they were previously known.

847. Why then, the evidence of these witnesses, should not be believed as regards the identification of the accused as made by them, particularly when, a discussion of their evidence shows that there is nothing contradictory, incredible, improbable or inconsistent in it? A number of contentions have been raised as regards the general unreliability of the supporting occurrence witnesses, which may be examined here.

848. It has been emphasized that the accused are poor victims of a well planned conspiracy. It was submitted that the supporting eye witnesses have been tutored by Smt.Teesta Setalvad. Secondly, it was submitted that due to the fear of the Supreme Court of India and of the persons who secured an order from the Supreme Court to have a retrial, the witnesses are keen on ensuring that the accused are convicted, and are giving evidence in furtherance of that object. It is submitted that for the same reason, even the police witnesses are making improvements in their evidence by stating facts not deposed to by them in the previous trial. I find no substance in these contentions.

849. The contention that the witnesses had been tutored by Smt.Teesta Setalvad is based only on the undisputed fact that Raees and Shehzad were in contact with her and had spoken to her about the case. The interest of Smt.Teesta Setalvad and her organization in the present retrial is obvious and no attempt has been made by the concerned organization to deny that. It also appears that Raees and Shehzad were contacted by them to ensure that they appear as witnesses before this Court These witnesses have specifically denied Smt.Teesta Setalvad having told them as to what evidence was to be given in the case. I have considered the matter. Mere discussion about the case would not necessarily indicate 'tutoring'. It is not an accepted proposition that the witnesses are never to be contacted by anyone, or spoken to about the matter regarding which they are to depose. A number of things can be told to the witnesses, such as, not to be nervous, carefully listen to the questions put to them, state the facts before the Court without fear; and I do not think that this can be considered as objectionable, morally or legally. Tutoring a witness is quite different from guiding him as to his behaviour, as it should be in the witness box. In this case, the injured witnesses were obviously in such a state of mind that without the active support of someone, they might not have come before this Court, to give evidence at all. If

such support, encouragement and even advice is provided to them, it cannot be called as 'tutoring'. Since the witnesses were in contact with Smt.Teesta Setalvad and were speaking to her about the case, the possibility of they having been tutored by her is certainly required to be examined, but simply because of that, an inference that they were tutored, cannot, automatically, be drawn.

850. After carefully considering the matter, it does not appear to me that in the instant case, witnesses had been tutored.

851. First of all, from the testimony of the occurrence witnesses, they do not appear to have been tutored. The signs of having been tutored were not found while analyzing their evidence. While discussing the evidence of these witnesses, it has been noted that they appeared to be truthful. They have avoided attributing false overt acts to the accused identified by them which would have been quite easy for them. A number of instances are found in the evidence of these witnesses where they could have implicated more accused than identified by them or where they could have attributed more serious acts to the accused, identified by them which has not been done. Secondly, they could be tutored only by a person who knew the facts. It is difficult for a person who was not

present at the time of the incident to tutor an occurrence witness and if at all this can be done, it would be based on the records of the case, which does not seem to have happened in the instant case. Even some grave incriminating matters, though found in the police record of the statements of these witnesses, have not been stated by them in their evidence, sometimes even after confronting them with such record. Thirdly, in this case, the happenings of the incident and the manner in which it took place, is not in dispute at all. So the aspect of tutoring would be confined to the identification. It seems quite unlikely that Smt.Teesta Setalvad would be able to tutor to identify a particular person as the culprit. It is not easy to tutor one to identify another not previously known to the one or even to the person tutoring. Tutoring of this type would require the person tutoring the concerned accused and the concerned witnesses to be together for a reasonable time or on one or more occasions. Moreover, the tutoring in such cases would be in consonance with the police record or the prosecution case, which has not happened in this case. 'Painter' and 'Pratap' whose names figured in the F.I.R., and who according to the prosecution case are accused no.5 and accused no. 10 respectively, have not been identified by any of these witnesses. Probably being aware of this weakness in the contention of the

defence, a feeble attempt was made to show how it would be possible by suggesting to PI Kanani that he had shown enlarged photographs of the accused persons to the supporting occurrence witnesses with the help of Smt. Teesta Setalvad and one Raees Khan, which has been denied by him. The witnesses themselves were not suggested that they were shown any photographs of the accused persons and were tutored to identify them. That this is clearly an afterthought of the defence is also clear from the fact that when Taufel and Raees were examined, the learned Advocates for the accused had made a request that after identification of a particular accused by pointing out, the name of such an accused may not be uttered loudly. It is obvious that this precaution which the learned Advocates for the accused wanted to be taken in the process of recording of evidence, was not consistent with the theory of the witnesses having been shown enlarged photographs of the accused. Further, the witnesses have not identified the same accused. There has been not even one wrong identification, where the accused were identified by naming and pointing out. While appreciating the evidence, the manner in which it is given, the manner in which the varying suggestions are given in the cross-examination, are often of significance. It was put to PI Kanani that he had done the tutoring with the help of Smt.Teesta Setalvad, which

has been not only denied, but ridiculed by PI Kanani, by stating that he was not even on talking terms with Smt.Teesta Setalvad. PI Kanani stated that it was because she had made allegations against the investigating agency. This statement of PI Kanani has to be accepted as true. Even Zahira does not say that any photographs of the accused were actually shown to her by Smt.Teesta Setalvad. All that she says is that Smt.Teesta Setalvad *was to procure* the photographs. Thus, till Zahira left for Vadodara, no photographs of the accused are shown to be available to Smt.Teesta Setalvad. Under the circumstances, it cannot be accepted that any photographs of the accused were shown to the occurrence witnesses by Smt.Teesta Setalvad, or by PI Kanani, who was not in touch at all, with any of them. It may be recalled that the accused were never made to sit in the Court-hall according to the serial numbers given to them in the chargesheet, or in any other fixed order. Their names were never loudly being called out in the Court. It is, under these circumstances, that the identification in the Court has taken place. In some cases, while identifying a few out of the 17 accused, the names have also been given by the identifying witnesses. There has been no wrong identification by any of the identifying witness in such cases. The identification has taken place under the observation of the Court

enabling the Court to view the actions of the identifying witnesses. It does not seem to me that there is any substance in the contention of tutoring.

852. In the context of witnesses having been tutored, an argument advanced by Shri V.D. Bichu, the learned Advocate for the accused needs to be dealt with. [page 19-20 of the arguments filed by him at Ex.522/A]. It is contended that since the order for holding a retrial and that too, out of State of Gujarat was secured from the Supreme Court of India by the N.G.O. - Citizens for Justice and Piece – for obvious reasons, it become a matter of prestige for them. It is contended that it was therefore 'only human to expect that efforts would be made towards their further success, which could be achieved by securing conviction of atleast a few of the accused persons'; and that therefore, the witnesses were bound to be tutored. It is dangerous to accept such propositions. On the basis of the same arguments, it can be said that it also became a matter of prestige for those by making allegations against whom and because of whose blameworthy conduct, a retrial was ordered out of State of Gujarat, to show that there was nothing wrong whatsoever, in the previous trial. The said N.G.O. had made allegations against the State machinery itself, which were believed to be true atleast substantially by

the Supreme Court of India while ordering a retrial out of the State. Can it, on the same logic, be said that it was only human to expect that efforts would be made for the failure of the N.G.O., which could be achieved by making the witnesses turn hostile again? This, if accepted, would change the entire perspective in which the evidence is required to be appreciated. The manifest antipathy shown by the hostile witnesses to the entire prosecution case, can not be the result of a mere desire to ensure the acquittal of the accused. In this context, the contention advanced by Shri Shirodkar to the effect that the accused have not influenced the hostile witnesses, and that the accused are poor persons having no influence, needs to be taken into consideration. While this appears to be true, judging by the social and financial status of the accused persons, the fact remains that there are others who are powerful enough to extend great financial support and legal services to the hostile witnesses. However, the evidence can neither be appreciated on the basis that the said N.G.O. is likely to have a motive which would induce them to tutor the witnesses, nor on the basis that the State authorities or the State Government have a motive to show that there was nothing wrong in the previous trial, or that the witnesses had not turned hostile due to any lapses on the part of the State machinery which would induce them to

make the witneses turn hostile again. Even if the alleged bad motives of the N.G.O. as attempted to be attributed to it by the Advocates for the accused are accepted for the sake of arguments, there would be no interest for them to secure conviction of the accused. Rather their interest would be to show that Zahira and others are being manipulated. Though it might have become a matter of prestige for the said N.G.O. to show that they had fought for truth, or, at any rate, what was believed by them to be the truth, it would not mean that they would tutor witnesses to falsely identify a few accused for securing a few convictions.

853. It is pointed out by Shri Mangesh Pawar, the learned Advocate for the accused that the accused no.15 - Dinesh Rajbhar- had lodged a written complaint in this Court, against Smt. Teesta Setalvad for having threatened him in front of a police constable by saying '***tujhe main dekh loongi, aaur sabko chhodoongi nahin***'. On this, it is contended that this shows the extent of interestedness of Smt. Teesta Setalvad and the grudge which she bore against the accused persons. When the Court asked whether the accused wanted any action to be taken or any inquiry to be made into the complaint, it was stated that no action was intended to be taken and the matter was only to be kept on record. A mere putting an allegation

on record; without expressing a desire to establish the truth of it, at least *prima-facie,* will not enable this Court to draw any inference regarding the happening of the alleged incident or at any rate, the exact manner in which it happened.

854. That the witnesses are scared of the Supreme Court of India and of the persons who got the order of retrial [meaning Smt.Teesta Setalvad and her organization], is also without any substance. It may be observed that there are a number of witnesses who turned hostile even during the retrial. What is really significant is that a number of witnesses were not ready to support the prosecution even to the extent they had done in the previous trial. Smt.Jyotsnaben Bhatt [P.W.43], Kanchan Mali [P.W.44], Avdhut Nagarkar [P.W.23] and even Zahira and her family were not ready to admit even the matters which had been admitted by them in the previous trial. In my opinion, not only the contention is without any substance, I find that the hostile witnesses were more determined not to speak the truth during the retrial.

855. During the cross-examination of PI Kanani, it was brought on record that he has stated some facts which he had not stated in the previous trial and this is stated to be a result of the desire to secure a conviction due

to the fear of the Supreme Court of India. It was suggested to him that whatever additional evidence, - i.e.- evidence not given in the Court at Vadodara, but given here – he gave, was false. PI Kanani while denying this categorically, stated that it was supported by the case diary. I do not find that the 'additional evidence' as has been referred to by the cross-examiner is about any new facts. Rather than calling it as 'additional evidence', it can be properly termed as 'detailed evidence'. Moreover, PI Kanani has given a reason as to why he had given detailed evidence which may be best mentioned in the very words used by PI Kanani.

> *"Considering the circumstances prevailing at that time, whatever possible was done and our best was done in the investigation. Inspite of this, the investigation carried out in this matter came to be criticized in the trial court as well as in the High Court of Gujarat. The complainant party also criticized police. In this background, I thought it necessary that the detailed evidence regarding the investigation should be given here."*

856. According to me, this explanation given by PI Kanani is rational, logical and I believe the same as true. PI

Kanani has stated that whatever 'additional evidence' has been given by him, is based on the record and is supported by entries in the case diary. Even otherwise, no attempt has been made to show or challenge that the so called 'additional evidence' is not true. The inference that it is not true is expected to be drawn only from the fact that he did not give such a detailed account of the investigation in the first trial. This can not be accepted for a moment, in the light of the explanation given by PI Kanani. If for whatever reason, the matter is looked at with more seriousness, then it can not be called as unfair. If the fear of the Supreme Court of India makes an Investigating Officer to give up a casual approach and be serious about the prosecution, the accused can not be said to have been prejudiced thereby. On the contrary, that is how the approach of an Investigating Officer should always be and a sense of responsibility should always be present in his mind so as to prevent him from acting in an indifferent manner. Since the 'additional evidence' as given by PI Kanani is found to be true, there is no substance in the contention advanced by the learned Advocates for the accused.

857. Further, the very suggestion that because of the fear of the Supreme Court of India, false evidence with the intention of securing conviction has been given is

absurd. The Supreme Court of India had not found the accused guilty which is obvious from the fact that they were not convicted by the Supreme Court of India. The very fact that a retrial was ordered indicates that the Supreme Court of India felt the necessity of adjudication of the guilt or otherwise of the accused persons. The Supreme Court of India's order could not be interpreted as an order whereby the Supreme Court of India expected a conviction to be returned. This is apart from the fact that during the retrial several witnesses, by giving false evidence recklessly, have indicated that atleast they had not any fear of the law.

858. It is also contended that in view of the defective and insincere investigation the version of the prosecution has become doubtful and ought not to be believed. The criticism of the investigation being defective, as made by the Advocates for the accused, is undoubtedly correct. PI Baria [P.W.72] did not carry out the investigation properly and did not take even some elementary and routine steps. Even the investigation carried out by PI Kanani [P.W.74] can not be said to be very proper, but the reason given by PI Kanani in that regard is that the lack of co-operation from the persons in the locality and this appears to be true. It appears that he was unable to get sufficient information in spite

of making efforts and he could arrest only a few of the offenders. It is a fact that PI Kanani did not get the identity of any of the accused confirmed from the occurrence witnesses during the course of investigation. Though this is not fatal, since all the accused were not named in the F.I.R. or in the statements of occurrence witnesses, it was desirable to get the identity of those who were not named, confirmed from the occurrence witnesses. The question however, is firstly whether this defective investigation was deliberate and secondly, whether it was for falsely implicating the accused. As regards PI Baria, atleast a doubt arises that the investigation was deliberately defective, but lacunae therein were certainly not kept for implicating the accused. The grievances of the Advocates for the accused that the investigation was deliberately done in a defective manner, so as to implicate the accused, has no substance. The wild allegations of manipulation of the F.I.R. etc. have no substance, as discussed earlier. The easiest way of manipulating the record for implicating the accused would have been to record false statements of the occurrence witnesses. This has not been done. It has been brought on record that no new names -i.e.- not given in the F.I.R. [Ex.136] of any culprits or additional information about them could be gathered by PI Kanani from the statements of the occurrence witnesses

recorded by PI Baria. The record of the statements under section 161 of the code, is in all probability manipulated. Certainly however no manipulation has been done for implicating the accused. The possibly falsely recorded statements merely repeat the already available information, and thus the manipulation of false record was not made for giving more and more names of the culprits or for giving a more violent and active role to those already named. No manipulations have been done with regard to the articles sent for examination to the Forensic Science Laboratory, for attempting to show the connection of these articles with the offences in question, which was certainly not ***that*** difficult. If PI Baria and PI Kanani could go to the extent of making false entries about the lodging of F.I.R., planting human bones and recording imaginary statements of the occurrence witnesses, why could they not record atleast supplementary statements of the occurrence witnesses showing that the identity of the accused persons was confirmed during the investigation, is impossible to understand. This leaves no manner of doubt that whether deliberate or not, the lapses and lacunae in the investigation certainly have not prejudiced the accused. If the lapses or lacunae were deliberate, they were not designed to implicate the accused. If these lapses have resulted in the loss of valuable evidence, the accused

naturally stand benefited by it. It is not even suggested how proper investigation could have exonerated the accused. As it is, the case stands on the evidence of the identifying witnesses and no proper efforts to collect any other evidence were made during the investigation. This is not in dispute, but the claim is that this was done to implicate the accused, which is totally unacceptable.

859. In a number of authoritative pronouncements, the Supreme Court of India has laid down that the defect, if any, in the investigation can not automatically result in the acquittal of the accused. What is required to be considered is whether because of the defect, the accused was prejudiced which may happen in several cases. For instance, in a given case, if the accused claims that he is not known to the witnesses and demands a test identification parade which is not held and the witnesses identify the accused before the Court during the trial, the accused can very well complain of prejudice. The accused can contend in such cases that, had test identification parade been held, the falsity of the claim of the witnesses would have been established. No such thing has happened in this case. The steps which ought to have been taken during investigation and were actually not taken, would not have helped the accused in any way.

How they would have helped the accused, is not even attempted to be suggested. Efficient investigation might have resulted in the arrest of many more culprits, and/or would have furnished more material to establish the involvement of the accused. The cases where the culprits are one or two, efficient investigation can show that somebody else other than the one named or originally suspected - can also be equally or even more suspected; and when such steps are not taken, prejudice can be complained of. Failure to verify an ***alibi*** can also give rise to a legitimate grievance of prejudice. In a case of this type, efficient investigation can reveal the involvement of some others but how it will help those already implicated because of that, is difficult to understand. There is absolutely nothing in this case, to indicate that by defective investigation the accused have been prejudiced.

Thus, my conclusions are as follows:

860. There is no substance in the contention that the supporting occurrence witnesses have been tutored. There is also no substance in the contention that due to fear of the Supreme Court of India, the witnesses are deposing falsely during the retrial in order to ensure that the accused are convicted. On the contrary, a number of

witnesses turned hostile during the retrial also and have shown more antipathy to the prosecution case than was shown by them earlier. The contentions about statements under section 161 of the Code not being accurate or true and being manipulated appears to be true, but the evidence indicates that the manipulated version was not more adverse to the accused or that the manipulation is not indicative of a design to implicate the accused. The contention that the investigation was not efficiently done; and that it is defective, is also correct, but the defective investigation, nevertheless, has not affected the accused in any way. Because of the defects, the evidence of occurrence witnesses, including the evidence of identification of some of the accused by them, can not be discarded. There is nothing improbable, unbelievable or unreasonable in the identification evidence.

861. Thus, the general contentions about tutoring, about interest of the N.G.O., about fear of the Supreme Court of India, defective investigation, do not impress me and do not make me doubt the reliability of the evidence of the supporting occurrence witnesses regarding the identity. Moreover, while appreciating the evidence involving the accused, the entire circumstances established by the evidence ought to be kept in mind. In this case, there is circumstantial guarantee to support

the theory of the persons from the locality being involved in the incident. Smt. Rao, the learned Spl.P.P. is right in saying that looking to the happenings, it is not possible to believe that among the mob of rioters local residents were not present and had not taken any active part therein. In this context, the silence and the attitude not to disclose anything of the witnesses in the locality is significant. The accused who are residents of the same or nearby locality have chosen to express a total ignorance of the happenings including the existence of the Best Bakery itself, which is obviously false. They have denied not only the knowledge of the incident, but also of one another, other witnesses from locality, the locations etc. Thus, there exists no explanation of the prosecution evidence. There is also substance in the contention of the learned Spl. P.P. that had the offenders or atleast a number of them not known to the victims they would not have got down from the terrace in the morning. The palpably false defence of the accused certainly can not take place of proof, and even if held as not a factor strengthening the prosecution case, the resultant absence of any explanation offered by them of the evidence against them certainly does not weaken the prosecution version.

Discussion of sufficiency or otherwise of the evidence

against each accused.

862. Having come to the conclusion that there is nothing inherently wrong, weak or improper in the identification evidence, the evidence against each accused may now be examined to come to a conclusion about his involvement or otherwise in the alleged offences.

863. In this case, it was not granted by the learned Advocates for the accused that the prosecution had even a shadow of a leg to stand upon and even trivial points were argued with the same intensity as given to the vital issues. Many contentions which were over emphasized, have been found to be baseless. Trivial issues were blown out of proportion. Inconsistent and varying stands have been taken. Everything was emphasized as indicative of a conspiracy to falsely implicate the accused, and everything having been emphasized, nothing has really been emphasized. The Court however, can not lose sight of the real issues which require deeper examination. An objective analysis of the evidence disregarding the weaknesses and falsity of certain contentions raised by the defence is absolutely essential. It is therefore necessary to examine the evidence against each accused separately and to see whether it is of such a degree so as to unhesitatingly come to a conclusion of the

involvement of that particular accused in the alleged offences. It is rarely that the Court comes to the conclusion of a witness being 'wholly reliable' so as to unhesitatingly accept and believe everything that he says. The question of reliability does not depend only on the attitude of the witness, or his desire to tell the truth, but also on the accuracy of his perception and his memory.

864. It is settled legal principle that the charge of an offence must be proved beyond reasonable doubt. The degree of assurance that is required before a criminal Court can convict an offender is much higher than a mere preponderance of probabilities.

865. Appreciation of evidence in riot cases presents some peculiar difficulties, primarily because of the large number of victims and the large number of offenders. A reference to some of the authoritative pronouncements of the Apex Court dealing with this aspect of the matter would prove useful and provide guidelines in the matter of appreciation of evidence in such cases.

866. In ***Masalti and others V/s. State of Uttar Pradesh AIR 1965 Supreme Court 202,*** the appellants before the Supreme Court had been convicted by the trial Court,

inter-alia, of offences punishable under section 302 of the I.P.C. r/w. Section 149 of the I.P.C. and the High Court had upheld the conviction. In dealing with the oral evidence, the High Court had taken into account the fact that the witnesses belonged to a particular faction and therefore, must be regarded as partisan. The High Court confirmed the conviction of only those accused persons against whom 4 or more witnesses had given a consistent account. Before the Supreme Court of India, it was contended that the test applied by the High Court for convicting the appellants was mechanical. The Supreme Court of India has observed that while it was true that the quality of the evidence is what matters and not the number of witnesses who gave the evidence, still sometimes, it is useful to adopt the test like the one which the High Court had adopted. The Supreme Court of India has observed as follows:

> *"......Where a criminal court has to deal with evidence pertaining to the commission of an offence involving a large number of offenders and a large number of victims, it is usual to adopt the test that the conviction could be sustained only if it is supported by two or three or more witnesses who give a consistent account of the incident. In a sense, the test may be described as mechanical; but it is*

difficult to see how it can be treated as irrational or unreasonable".

867. In ***Chandra Shekhar Bind and others V/s. State of Bihar, AIR 2001 SUPREME COURT 4024***, the decision of the Supreme Court of India in *Masalti*'s case was referred to and it was held that *that there is no rule of evidence that no conviction can be based unless a certain minimum number of witnesses have identified a particular accused as a member of the unlawful assembly;* and that *though even the testimony of one single witness, if wholly reliable, is sufficient to establish the identification of an accused as a member of an unlawful assembly,* still *when the size of the unlawful assembly is quite large and many persons would have witnessed the incident, it would be a prudent exercise to insist on at least two reliable witnesses to vouchsafe the identification of an accused as a participant in the rioting.* Thus, though there is no rule of law, that the testimony of a single witness would be insufficient to convict an accused on the basis that he was a member of an unlawful assembly, still, as a rule of prudence and not of law, the Court may, in appropriate cases, insist on evidence of identification by at least two witnesses. From the observations made by the Supreme Court of India, it is clear that it would be rather unsafe to rely on the testimony of a single

witness in most of the riot cases, unless either the witness is considered as 'wholly reliable', or unless his evidence is corroborated by some other independent evidence.

868. Keeping all these relevant aspects in mind, I now proceed to discuss the evidence against each accused to come to a conclusion as to whether the charge against him is proved or not.

Accused no.1 - Raju Dhamirbhai Baria

869. Accused no.1 - Raju Dhamirbhai Baria - has been identified by three witnesses - Shehzad [P.W.28], Yasmin [P.W.29] and Sailun [P.W.32]. Shehzad [P.W.28] has pointed him out in the Court and identified accused no.1 as one of the rioters. He has stated about he being from the same '*mohalla*'.

870. Shehzad has not given the name of accused no.1, nor has he attributed any specific role to him. The role attributed to him is the same which Shehzad has attributed to all the seven accused identified by him, without naming.

871. Sailun [P.W.32] has also pointed him out as '*a*

person who was present in the morning [among the rioters]', without, however, attributing any specific role to him.

872. Yasmin [P.W.29] has, however, identified him by giving his name as Raju. He was pointed out by Yasmin in Court. The role attributed to accused no.1 - Raju - by Yasmin is that he was involved in the act of catching hands of the men when they were being assaulted - i.e. she has spoken about his involvement in the incident that took place in the morning. Yasmin undoubtedly knows accused no.1 well. She has stated that he is related to accused no.16 - Shanabhai. According to Yasmin, accused no.1 - Raju - used to visit Shanabhai's house. It is satisfactorily proved that Shanabhai's house is just behind Best Bakery. That he is related to accused no.16 - Shanabhai - and used to visit his house, is not disputed. In his examination under Section 313 of the Code, accused no.1 has admitted this.

873. There can be no doubt that the accused no.1 is a resident of the same locality and known to Sailun [P.W.32] and Shehzad [P.W.28] since previously. The evidence of Yasmin, which cannot be doubted as regards her knowledge of this accused since prior to the incident, can be safely accepted as regards the

involvement of this accused. Similarly, Shehzad's [P.W.28] evidence about having seen accused no.1 in the mob of rioters also cannot be doubted at all. The evidence of these two witnesses can be safely accepted even if Sailun's evidence is not taken into consideration, as the evidence is supported by circumstances which lend assurance to the theory of accused no.1 being in the mob which committed the offences in question. It is not possible to hold that Yasmin and Shehzad are both falsely pointing out the accused no.1 and implicating him falsely simply because they know him. Once it is established and accepted that accused no.1 is a resident of the same locality, well known to Yasmin and known to Shehzad also, the only question that remains is of the witnesses falsely implicating him. The question of their making any mistake in that regard does not arise. It is not possible to hold that he is deliberately and falsely implicated by Yasmin and Shehzad.

874. The evidence however reveals the involvement of this accused only in the morning incident. The unlawful assembly continued its activities for a very long period ranging from about 8.30 p.m. to 9.00 p.m. in the night till about 10.45 a.m. on the next day. Though it is quite possible that the accused no.1 was the member of

the unlawful assembly since night, in view of the fact that even a single witness has not spoken about his presence in the night, I think it safe to proceed only on the basis that he was a member of the unlawful assembly in the morning and hold him liable only for the offences committed in the morning.

Accused no.2 - Mahendra @ Langado S/o Vishwasrao Jadhav

875. Coming to accused no.2 - Mahendra @ Langado S/o Vishwasrao Jadhav -, he has been identified by Shehzad [P.W.28] by pointing out. Shehzad has not been able to identify him by his name. Shehzad has identified 5 accused persons by name and 7 more without being able to give their names. Accused no.2 - Mahendra Jadhav - is one of those 7. No specific role has been attributed to him by Shehzad and what is stated is that all the 7 accused identified by him, though without naming, were having '*danda*' or swords with them and all were shouting '*musalmanoko mari nakho*'. Sailun has also pointed him out as one of the persons present in the mob of rioters. Though Shehzad and Sailun, as already discussed, cannot be considered as an untruthful witnesses or liars, the fact remains that it is not safe to hold accused no.2 guilty only on the basis of such general allegations.

876. The accused no.2 has been arrested on the basis that he is Mahendra *Langado*. There has been some endeavour on the part of the learned Advocates for the accused to show that he is not actually '*Langado*' - 'i.e. lame' - and as discussed earlier, I do not find any substance in the said contention. The fact however remains that except identification by Shehzad and Sailun, by pointing out, which is of a too general nature, as discussed above, there is no other material against him to show his involvement in the alleged offence. In my opinion, it would be hazardous to base a conviction only on the evidence of Shehzad and Sailun, as it is.

Accused no.3 - Harish @ Tino Virendragir Gosai

877. Coming to the accused no.3 - Harish @ Tino Virendragir Gosai -, he has been identified by Yasmin [P.W.29]. Yasmin has given his name and other details. According to Yasmin, he is the brother of accused no.4 - Pankaj Gosai - and stays in the lane in front of the Best Bakery building. Yasmin has attributed a specific role to him. It is that he, along with Rinku [absconding accused] and Pankaj [accused no.4], were setting fire to the wood inside the bakery. Thus, apparently, Yasmin had noticed him only in the night. Except of Yasmin, there is no other evidence of any nature against him. Though

the fact that Yasmin indeed knows him cannot at all be doubted, taking into consideration all the relevant aspects of the matter, it would not be safe to base a conviction on the solitary and uncorroborated testimony of a single witness who cannot be called as 'wholly reliable'. Moreover, whatever the witness might say, there would be a clear distinction in the weight to be given to the identification evidence relating to the incident in the night and relating to the incident in the morning. In the morning, the offenders had come face to face in front of the witnesses providing a much better opportunity to the witnesses to observe them.

It would be appropriate, in my opinion, that the accused no.3 is given benefit of doubt and acquitted.

Accused no.4 - Pankaj Virendragir Gosai

878. Coming to accused no.4 - Pankaj Virendragir Gosai -, he has been identified by Raees Khan [P.W.27], Shehzad [P.W.28], Smt.Yasmin [P.W.29] and Sailun [P.W.32]. Sailun [P.W.32] has pointed him out as the one being present in the morning in the mob of rioters. Raees Khan [P.W.27] has identified him, without naming him, as the person who was there. Though Raees has not attributed any specific role to the accused no.4, it is clear from

his evidence that he has identified all concerned as the persons who were involved in the morning incident. Shehzad [P.W.28] has also identified accused no.4 by pointing out towards him. The role attributed to him by Shehzad is the same that he has attributed to the 7 accused identified by him without being able to name them [out of the total 12 accused identified by him]; and that the role is that they were either having '*danda*' or sword with them and were shouting '*musalmanoko mari nakho*". Yasmin [P.W.29] has also identified accused no.4 by pointing him out in the Court and by giving his name as 'Pankaj Gosai'. Yasmin has said that he, along with others named by her, was setting fire to the wood inside the bakery. In the cross-examination, Yasmin has stated that she knew Pankaj [accused no.4] since the time of her marriage; and that he stays in the lane in front of her house. Yasmin has also stated that he is the brother of Haresh Gosai [accused no.3] over which there is no dispute and both these accused, in their examination under Section 313 of the Code, have admitted their relationship. Thus, the knowledge of Yasmin about this accused cannot be doubted. That he is from the same locality, is also clear. A specific role has been attributed to him by Yasmin. In my opinion, the presence of this accused in the mob of rioters is very satisfactorily established. The evidence of Raees

[P.W.27], which is convincing, indicates his presence during the morning incident. It can be safely concluded, in my opinion, that that accused no.4 was indeed present among the mob of rioters and was a member of the unlawful assembly when it committed various offences during the period from the night of 01/03/2002 till the time the police arrived in the morning of 02/03/2002.

Accused no.5 - Yogesh @ Painter Laxmansinh Varma

879. The case of accused no.5 - Yogesh @ Painter Laxmansinh Varma -, is rather peculiar. He has not been identified by any of the witnesses by pointing him out. He is supposed to be 'Painter' and has been arrested on that basis. One 'Painter' has been named in the F.I.R. and as discussed earlier, in this case, certain statements in the F.I.R. are admissible in evidence under Section 6 of the Evidence Act. That among the mob of rioters there was one 'Painter', is therefore substantive evidence. Moreover, D.C.P. Piyush Patel [P.W.67] and PI Baria [P.W.72] have also stated about the 3 women, or one of them, giving names of certain offenders to them on the spot itself and among those names, the name of 'Painter' is disclosed. Thus, there is evidence to indicate that one 'Painter' was playing a leading role in the mob.

880. Yasmin [P.W.29] has not been able to identify Painter though she has attributed various overt acts to Painter. Of course, that she involves 'Painter' but cannot identify him in Court, cannot be held against Yasmin as it is quite possible that due to the time gap, she is not able to recognize Painter now. In fact, in all probability, she had identified him in Court, but was not sure of the identification and therefore did not say so. This is clear from the fact that while giving evidence and after saying that she was not able to identify Painter, she stated that 'at that time, he had no beard'. Accused no.5 before the Court was having beard at that time. However, Smt.Rao, the learned Spl.P.P., did not require Yasmin to carry the matter further and therefore, there is nothing to hold that the 'Painter' spoken about by the witness and mentioned in the F.I.R., is the same 'Painter' - i.e. accused no.5. Yasmin has even indicated that Painter was residing in the line of their house in front of the shop of ***Sindhi***, which shows Yasmin's knowledge of this particular person 'Painter'. The denial on the part of the hostile witnesses of their being aware of any 'Painter', is obviously false but in spite of coming to such a conclusion, there appears to be no substantive evidence to indicate that the accused no.5 is the same person who is referred to as the 'Painter', or that the accused no.5

was among the mob of rioters. No evidence *aliunde* has been adduced to show that the accused no.5 resides, or was at the material time, residing, in front of *Sindhi*'s shop. Undoubtedly, PI Kanani has arrested the accused no.5 on the basis that he is the one who is referred to as 'Painter' and though PI Kanani clearly says so, the source from which PI Kanani came to the conclusion, has not been examined. In my opinion, though there exists a strong suspicion against the accused no.5, it is not possible to hold that his involvement in the offences is established in the absence of anybody pointing out towards him in the Court as a person who was present in the mob of rioters. The accused no.5, therefore, should be acquitted.

Accused no.10 - Pratapsinh Ravjibhai Solanki

881. Coming to accused no.10-Pratapsinh Ravjibhai Solanki -,he has not been identified by anyone except Sailun.As discussed earlier, the identification of the accused by Sailun –except of accused no.11,accused no.15 and to a certain extent accused no.20,-is not convincing. No reference to the name ‘Pratap’has been made by any of the witnesses. Nobody has stated that a person by name Pratap was among the mob of rioters. The other evidence against Pratap is of the recovery of one iron pipe

[Art.R/22] pursuant to the information given by him while he was in police custody. The iron pipe however could not be connected with the alleged offences. No stains of blood or any other incriminating materials, indicating the connection of the said iron pipe, with the alleged offences were found thereon in spite of examination of the same by the Chemical Analyzer. The pipe has been recovered from the residence of accused no.10 - Pratapsinh Solanki - on 04/04/2002 under panchanama [Ex.90]. The panch witness Kamlesh Darji [P.W.24] has neither identified accused no.10 as the accused at whose instance the pipe was recovered, nor was he able to state what was the weapon that was recovered from his house. It is only after the pipe [Art.R/22] was shown, that he said that he remembered that it was the same weapon. Though there exists evidence of PI Kanani [P.W.74] to indicate who was the accused who was concerned with the recovery of the said iron pipe, since the weapon is not shown to have been connected with the alleged offences in any manner, the accused no.10 cannot be connected with the offences in question.The identification of this accused by Sailun alone, without naming and attributing a specific role to him and the recovery of iron pipe [Art.R/22] at his instance and under a panchanama, even if held to be satisfactorily proved, is not sufficient to hold that he was among the mob of rioters; and that he

was a member of the unlawful assembly which committed the offences in question.

Accused no.11 - Sanjay @ Bhopo Ratilal Thakkar

882. As regards accused no.11 - Sanjay @ Bhopo Ratilal Thakkar -, the evidence against him is overwhelming. The accused no.11 has been identified by Taufel [P.W.26], Shehzad [P.W.28], Smt.Yasmin [P.W.29] and Sailun [P.W.32]. All these witnesses have attributed specific roles to him.

883. Taufel [P.W.26] has identified him, without naming him, saying that he was the person who was making the victims get down from the terrace in the morning; and that he had, after the victims got down, tied their hands and legs.

884. Shehzad [P.W.28] has identified him by name as 'Sanju'. Shehzad has also stated that Sanju had tied his hands. According to Shehzad, accused no.11 took away the amount of Rs.5,000/- [Rupees five thousand only] which was with him. Shehzad has stated that he knew Sanju since prior to the incident and gave the reason for knowing him as, 'because he is a big man' and stays opposite Shraddha Bakery. The evidence of identification

of this accused by Shehzad is very natural and convincing.

885. Yasmin [P.W.29] has also identified accused no.11 by pointed him out and giving his name as 'Sanjay Thakkar'. According to Yasmin, she knew accused no.11 since the time of her marriage. She has stated that she and her husband used to pass through the road and her husband used to waive hand to him. Thus, he is quite well known to Yasmin since prior to the incident. Yasmin has stated that she had seen Sanjay Thakkar in the night also; and that he was, along with Jayanti Chaiwala and Painter, leading the mob and telling them to set fire by pointing out the locations.

886. Sailun [P.W.32] also has clearly identified Sanjay. As discussed earlier, Sailun's evidence as regards Sanju accused no.11] and Dinesh [accused no.15] and to a certain extent Suresh Vasava @ Lalo [accused no.20], is on a different footing than his evidence in respect of other accused. Sailun was very categorical about the role played by Sanju and Dinesh. From out of many accused, Sailun, in spite of his mental faculties being below average, identified accused no.11 - Sanju - and accused no.15 - Dinesh - by their names. He has attributed the role of assaulting by sword to both of

them and has stated that Sanju had taken the money of his brother. I do not think that there is any reason to doubt the evidence of Sailun so far as it relates to accused no.11 - Sanju - and accused no.15 - Dinesh. The acts of these two accused, as committed by them during the incident, appear to have left a lasting impression in the mind of Sailun.

887. The evidence of these witnesses leaves no manner of doubt that the accused no.11 was actively involved in the alleged offences; and that he was leading the mob in the night; and that he did play an active role in the morning incident also. Moreover, there is other material also against him.

888. Zahira [P.W.41] and others had given the name of one 'Thakkar' among the names of some of the offenders to D.C.P. Piyush Patel [P.W.67] and PI Baria [P.W.72]. The contention that was advanced in this regard was that the name was not of 'Sanjay Thakkar', but of 'Social Worker Thakkar', who was already dead. All that can be said, is, that in the facts and circumstances, there can be no doubt that 'Thakkar' referred to by Zahira and others in their statements immediately made to D.C.P. Patel and PI Baria on the spot itself, whose mention has been made in the F.I.R. also, is none else, but the accused no.11

only.

889. There is also evidence that accused no.11 was absconding. It is in evidence that his house was searched by PI Kanani [P.W.74] on 12/03/2002. At least, at that point of time, it ought to have been clear to the accused no.11 that he was wanted by the police. There is no reason to doubt the evidence that the house search was taken in the presence of the brother of accused no.11. In spite of this, the accused no.11 was not available to the police till 01/04/2002, on which date, he came, along with six others, and surrendered himself before the D.C.B. Police Station. Thus, that he was absconding, is also a circumstance against the accused no.11 and adds to the weight of evidence against him.

890. Moreover, 2 weapons - viz. an iron rod [Art.R/17] and sword [Art.R/18] - were recovered under a panchanama, pursuant to the disclosure statement made by accused no.11 on 04/04/2002. The panch Devendra Thakor [P.W.22] has stated about the accused stating in his presence that he would show the concealed weapons, the police writing it down and then the police party and panchas going to Ansuya Nagar. He then speaks of the accused taking out a sword and iron rod from the bushes on an open spot. He has identified '*salli*' [Art/R/17] as the same that was

recovered on that day, though has expressed his inability to identify the sword. Interestingly, he has identified his signature on the paper slip which was covering the handle of the sword. Though he has not been able to identify the accused, in view of PI Kanani's evidence, this is hardly of any consequence. PI Kanani's evidence, read with the evidence of Devendra Thakor [P.W.22], leaves no manner of doubt that it was the accused no.11 only at whose instance the recovery of an iron rod and sword was witnessed by P.W.22. The evidence of the alleged recovery at the instance of the accused no.11 is sought to be challenged, but the evidence cannot be discarded as false. Though, the weapons have not been connected with the alleged offences in any manner, the very conduct of the accused in pointing out the weapons would be a corroborative piece of evidence, in the facts and circumstances. In any case, the evidence of identification against accused no.11 is indeed overwhelming, reliable and clinching. The accused no.11 is clearly proved to be the member of the unlawful assembly in the night, as well as in the morning, having performed overt acts and having played a leading role in the mob.

Accused no.12 - Bahadursinh @ Jitu Chandrasinh Chauhan

891. So far as accused no.12 - Bahadursinh @ Jitu Chandrasinh Chauhan - is concerned, he has been identified by Taufel [P.W.26], Shehzad [P.W.28], Smt.Yasmin [P.W.29] and Sailun [P.W.32].

892. Taufel [P.W.26] has not identified him by giving name, but has identified him by pointing out to him as the person who was present in the night among the mob of rioters. According to Taufel [P.W.26], he had seen accused no.11 coming running towards the bakery by holding a '*mashal*' and sword in his hand. It may be recalled that later on, Taufel has claimed that he knew the names of 4 of the accused identified by him and the names given by him were Dinesh, Shana, Ravi and Jitu. This accused is identified by other witnesses as Jitu. Taufel, however, was not made to identify the 4 accused who he stated, were known to him by name even after the disclosure, that he knew 4 accused by names, was made. Thus, even if the identification is treated as identification without giving name, it is stil convincing.

893. Shehzad [P.W.28] has also identified the accused no.12 by pointing out towards him and saying that he is Jitu. He knew accused no.12 - Jitu - since prior to the riots. According to Shehzad [P.W.28], accused no.12 was

present in the riots having sword with him; and that he was present in the night and in the morning also. The fact of prior acquaintance of the accused no.12, and that too as Jitu, as deposed by Shehzad, is not at all shaken in the cross-examination of Shehzad. Consequently, this evidence of Shehzad can safely be accepted against the accused no.12.

894. Yasmin [P.W.29] has also spoken about Jitu and the role played by Jitu, though she was not able to identify the accused no.12 as Jitu. This cannot be held against Yasmin, in as much as, her explanation with regard to not being able to identify some of the rioters to the effect that the appearance of some of them had changed, is acceptable. It is a fact that by the passage of time, appearance of persons changes and it is possible that due to the time gap, a witness might not be able to identify a particular accused, though known to him previously and about whose involvement he speaks.

895. Sailun [P.W.32] has also spoken about Jitu being one of the rioters. He has attributed certain roles to Jitu also. However, though he pointed out Jitu in the Court as one of the persons present in the mob of rioters in the morning, he could not point him out specifically as ‘Jitu’. It is therefore rather unsafe to rely on the

evidence of Sailun, but even if his evidence is ignored,there is sufficient evidence against the accused no.12. That he is Jitu and known as such, cannot at all be doubted. Much cross-examination of PI Kanani [P.W.74] has been done on the aspect of identity of accused no.12 as Jitu. However, that cross-examination has not yielded anything favourable to the defence. The question is not whether Jitu is a full name or a pet name, but the question is whether the person is, in fact, known or identified as such. The evidence of PI Kanani undoubtedly shows that the accused no.12 came to be arrested on the basis that he is Jitu and no challenge to that aspect was given by the accused no.12 at any time till he was specifically questioned in the examination under Section 313 of the Code about he being known as Jitu. The name of accused no.12 is Bahadursinh Chandrasinh Chauhan and had he not been known as Jitu, he would have certainly protested against such arrest which was made on that basis only.Thus, there could be no doubt that the accused no.12 is also known as Jitu. In any case, as discussed earlier, the real question will be of the identification made by the witnesses by pointing out towards him and that has been properly done in this case. Even so, the fact that he is known as Jitu, is also satisfactorily established.

896. Against him, there is also other evidence in the nature of his name being mentioned by Zahira and others to D.C.P. Piyush Patel [P.W.67] and PI Baria [P.W.72] on the spot itself. The 'Jitu' referred to by them, under the circumstances, could be no one else and obviously the reference is to the accused no.12 only. There is no material to show that there exists any other Jitu in the locality of Hanuman Tekdi. Moreover, while searching for the 'Jitu' as referred to by Zahira and others, PI Kanani made his search at Pandit Chawli, Gajrawadi, which was the previous residence of the accused no.12. That it was his old residence, has been accepted as true by the accused no.12 in his examination under Section 313 of the Code. The statements made by Zahira and others to D.C.P. Patel and PI Baria on the spot are substantive evidence under Section 6 of the Evidence Act. Further, in the F.I.R. also, the name of one Jitu is mentioned as one of the rioters and in the facts and circumstances, it is clear that it refers to accused no.12 Jitu only. This statement in the F.I.R. is also admissible as the substantive evidence under Section 6 of the Evidence Act. These statements, by themselves, would not establish the identity of the accused no.12 as the same Jitu, but certainly they serve as corroboration to the other evidence against him. What is more remarkable is that during cross-examination, apparently, a chance was taken

by Shri Adhik Shirodkar, the learned Senior Advocate, and the attention of Shehzad [P.W.28] was specifically drawn to accused no.12 and Shehzad was asked as to what was the name of that accused. Shehzad however again identified accused no.12 as Jitu and also said that he knew him as Jitu since prior to the riots. This confirmed the identity of accused no.12 as Jitu further. Further, Yasmin [P.W.29], though was unable to identify him as Jitu, her evidence as to the involvement of one Jitu, certainly can be taken into account against this accused, once it is established that he is Jitu.

897. Apart therefrom, there is evidence of recovery of a '*gupti*' [Art.R/19] at the instance of this accused and pursuant to a disclosure statement made by him and recorded under a panchanama [Ex.83]. However, as the said '*gupti*' has not been shown to be connected with the alleged offences in any manner,even if much importance is not given to this aspect,the evidence of identification of this accused is, nevertheless sufficient,satisfactory and can be safely accepted. There can be no doubt that this accused was a member of the unlawful assembly, both in the night as well as in the morning, and had played active role during the incident.

Accused no.13 - Yasin Alibhai Khokhar

898. As regards accused no.13 - Yasin Alibhai Khokhar -, he has been identified by Yasmin [P.W.29] by giving his name and other details. He is also identified by Sailun [P.W.32], without, of course, giving his name and simply by pointing out towards him as the person who was present among the mob of rioters in the morning. Yasmin has not given any role to Yasin. Yasmin states that she knows him since the time of her marriage, that he is a Muslim and was staying in front of the Best Bakery building. Yasmin also knows that he has married to a Hindu lady. Yasmin however does not attribute any role whatever to him. As discussed earlier, Sailun's evidence with respect to the accused other than Sanju, Dinesh and to a certain extent, Suresh Vasava @ Lalo, is not safe to be acted upon without corroboration.

899. It is seen that the role attributed to Yasin as per the prosecution case is that the goods that were looted from the bakery premises, were put in his truck by the rioters and were taken away. There has been no evidence showing that it had indeed happened. Yasin is a Muslim and the motive that was available to the other accused, was certainly not available to him. He himself being a Muslim, it is difficult to accept that he was a member of an unlawful assembly, the common object of which was to assault, to attack and to kill Muslims and to damage and

destroy their properties. He stays in the same area and assuming that he was indeed present during the riots, it would not make him a member of the unlawful assembly unless some evidence to indicate that – in the nature of an overt act or otherwise – exists. There is no such evidence in this case. On the contrary, even if it is assumed that the goods robbed from the bakery were kept in his truck and taken elsewhere, still, it is difficult to hold that he shared the common object of the unlawful assembly. Considering the situation then existing, as can be gathered from the evidence, it is obvious that among the huge mob of Hindu persons, accused no.13 hardly had any choice to say 'No' to what the mob desired him to do. In the peculiar facts and circumstances; and that no overt act has been attributed to Yasin, it is not possible that he, even if present in the unlawful assembly, was a member thereof.

Accused no.14 - Jagdish Chunilal Rajput

900. As regards accused no.14 - Jagdish Chunilal Rajput - , he has been pointed out by Shehzad [P.W.28] as one of the persons present in the mob of rioters, without being able to name him. He has been pointed out by Sailun also, as a person present in the mob of rioters, in the morning, without naming him. He has been identified by

giving his name by Yasmin [P.W.29]. According to Yasmin, she knew accused no.14 - Jagdish - since the time of death of her father-in-law. According to her, at that time, the family wanted to remove the cable T.V. connection; and that at that time, Jagdish had come to their house. Yasmin has attributed a specific role to Jagdish saying that he was threatening to rape the women. Yasmin has said that Jagdish and Jitu [accused no.12], together with Mafat and Munno [both absconding accused], were saying that they would rape the women one by one. That Yasmin knows Jagdish cannot be doubted as she has been able to identify him properly out of so many accused. She has also given a reason for knowing him. There is no reason to doubt therefore that Yasmin knew Jagdish since prior to the incident. This evidence of Yasmin is very severely challenged on the ground that she has not named accused Jagdish in her statement recorded during investigation. According to Yasmin, she did name him before the police, though the name is not found in the record thereof made by Baria. As observed earlier, non-mentioning of the names of the accused is not fatal in this case; and that the police record itself is of a doubtful value. It is true that even D.C.P. Patel and PI Baria had not mentioned about the women having complained about the threats of rape. However, as already discussed in the context of Yasmin's evidence, I do not doubt the

version of Yasmin as regards the threats of rape. It has been discussed earlier that the evidence indicates that, that the women were being dragged towards the bushes/'*jungle*' by the mob of rioters. What is significant is that B.U.Rathod [P.W.63], in his evidence, has stated that when he reached the spot, 3 women came from the bushes towards him and narrated the incident. Once the fact that the women came from the 'bushes' is established, the question is when the men were lying injured, why and how the women went towards the bushes/'*jungle*'. What was the occasion for them to go there leaving the men in an injured condition, requires an answer, which could be supplied only by theory of the women having been dragged towards the bushes/'*jungle*'. Once it is held that the incident of women being dragged towards the bushes/'*jungle*' had indeed happened, there seems to be no reason to disbelieve Yasmin on the aspect of some of the rioters having threatened the women of raping them. The failure to mention it to the police, or rather its absence in Yasmin's statement recorded by the police, is not of much consequence in my opinion. No rape had actually been committed. A ghastly incident shattering their entire personality had taken place. Their near and dear ones were under the shadow of death. Under those circumstances, if the women would not specifically mention regarding the threat of rape, there

is nothing surprising or unbelievable. Once it is accepted that Yasmin indeed knows Jagdish, there seems to be hardly any reason to believe that she would make this type of false allegation against Jagdish. There would be no specific reason for her to implicate Jagdish in this manner. The presence of Jagdish in the mob; and that he played an active role an a member of the unlawful assembly, can be safely inferred from this evidence.

901. However, the evidence shows his presence as a member in the unlawful assembly only in the morning. Though it is possible that he was a member of the unlawful assembly right since the night, the evidence in that regard is not so convincing. I therefore think it fit to grant the benefit of reasonable doubt which appears about his presence and membership of the unlawful assembly in the night and do not hold him guilty in respect of the offences committed in the night.

Accused no.15 - Dinesh Phulchand Rajbhar

902. Coming to accused no.15 - Dinesh Phulchand Rajbhar - , he has been identified by all the supporting witnesses - i.e. Taufel [P.W.26], Raees [P.W.27], Shehzad [P.W.28], Smt.Yasmin [P.W.29] and Sailun [P.W.32].

903. Taufel [P.W.26] has pointed him out without naming

him. According to Taufel, accused no.15 was holding a sword and '*mashal*' and was shouting and giving slogans.

904. Raees [P.W.27] has also identified accused no.15 by pointing out towards him. He has also mentioned about a sword being with him and has stated that he was assaulting.

905. Shehzad [P.W.28] has also identified him by pointing him out and by giving his name also. Shehzad has categorically stated that accused no.15 assaulted him by a sword. That Shehzad knows Dinesh well, cannot be doubted at all. Shehzad has stated that Dinesh's father owns a bakery and known to Shehzad. Shehzad has stated that the new name of the bakery of Dinesh's father is Mamata Bakery.

906. Yasmin [P.W.29] has also identified Dinesh by pointing out towards him and by giving his name. Yasmin knows Dinesh since the time of her marriage. She also knows his full name as Dinesh Rajbhar. According to her, since Dinesh also has his bakery, he used to come to the Best Bakery in connection with the bakery business.

907. Sailun [P.W.32] has also identified Dinesh by giving his name. Sailun has also stated that he knew

Dinesh since prior to the riots; and that Dinesh used to be at Mamata Bakery. The role attributed to Dinesh by Sailun is that he was assaulting by sword after the hands of the victims were tied. The evidence of these witnesses has not been shaken at all in the cross-examination. Thus, all these witnesses have identified Dinesh and have attributed him an active and similar role.

908. It is contended by Shri V.D.Bichu, the learned Advocate for accused no.15, that Dinesh has been falsely implicated. Shri Bichu has pointed out that he was not named, not only by these supporting witnesses, but also by the 4 of the 5 hostile witnesses in their statements recorded during investigation. It is contended that the information of his involvement was revealed about a month after the incident. These submissions of Shri Bichu require serious consideration.

909. That the supporting witnesses had not named him, is not important in my opinion. Undoubtedly, the *'omission'* to name a known person in the statement recorded during the investigation, would be an omission on a material and significant point due to which the testimony of the witness in the Court can very well be doubted. However, in this case, this is a general feature of the statements

of these 5 supporting witnesses. The effect of the *omissions* has already been discussed at length and considering the condition of the victims, not much importance to non mentioning of the names can be given. Moreover, it has already been elaborately discussed that the entire police record of the statement is suspect in this case and the unreliability thereof, which has been emphatically put forth by the learned Advocates for the accused only, is established. Yasmin, though not injured, was also in such a state of mind that the omission on her part is also not significant even if PI Baria is to be believed that Yasmin did not name 'Dinesh' [accused no.15]. However, in the absence of his name in the record of the statements under Section 161 of the Code till a late stage, the evidence against him certainly requires to be carefully considered.

910. After a careful consideration of all the relevant aspects of the matter, I am not able to hold that the evidence given by these witnesses against Dinesh, which is consistent and unshaken in the cross-examination, should be doubted only because the name of Dinesh is not found in the record of the statements of these witnesses made by them before the police. Sailun [P.W.32] and Shehzad [P.W.28] have stated that they did not give the names of anyone to the police and considering the

condition in which they were at the material time, not much importance to that can be given. Raees [P.W.27] did not know the name at all and his failure to mention the name Dinesh to the police is of no consequence. Taufel [P.W.26] later on claimed that he knew Dinesh by name, but had not given his name in the examination-in-chief due to fear. That fear can have such an effect, has been discussed earlier. When he was afraid of giving his name in the Court, it would be too much to expect that he would necessarily give the name of Dinesh to the police when his statement was recorded, had he seen Dinesh. At any rate, considering the entire facts, coupled with the absolute unreliability of the police record in that regard, not much turns on failure to find the name of Dinesh in the statement under Section 161 of the Code. It is significant that all have identified him and Shehzad [P.W.28], Sailun [P.W.32] and Yasmin [P.W.29] undoubtedly, knew him by name. Though the case arose out of communal violence and though there is substance in the contention of Shri Bichu that in order to implicate anyone falsely, the witnesses need not have enmity with such accused, but there may be general tendency to implicate falsely to settle the score, the manner in which the evidence has been given against accused no.15 and considering the entire evidence of the supporting eye witnesses, I do not think that Dinesh has been falsely

implicated. In spite of clear, unambiguous and consistent version of the witnesses, if the evidence against Dinesh is to be discarded only on the ground that it is a case of communal violence, which might provide a motive for false implication, and on the ground that the police record does not show that the witnesses disclosed the name of Dinesh as culprit in their statements made to the police, it would create supremacy of police record - so to say - over the evidence before the Court. It is as if a pre-trial statement would be decisive and conclusive rather than the evidence before the Court; and that too when the accuracy of the pre-trial statement by the pre-trial record is clearly and certainly doubtful. The effect of omission to name a culprit before the police will vary from case to case and for appreciating the real significance of that, the entire evidence in the case and of the relevant circumstances should be taken into consideration. The manner in which the evidence has been given, the stand of the accused, are all relevant factors which aid the assessment of the evidence. Once it is held that Dinesh was certainly known to the identifying witnesses since prior to the incident, the only possibility which remains is of they all falsely identifying and implicating him as one of the culprits. Judging by the evidence of the witnesses, it is not possible for me to accept that the witnesses have done

so.

911. As such, the evidence of these witnesses can be safely accepted to hold that Dinesh was very much present in the mob of rioters and has taken an active part in the incident. The evidence of Lal Mohammad [P.W.36], even if accepted, does not rule out the possibility of Dinesh having been present in the mob of rioters. At the most, it would show that at a particular point of time, Dinesh was not present in the unlawful assembly. The evidence indicates presence of Dinesh in the mob of rioters in the night, as well as in the morning.

912. After carefully considering the evidence against the Accused no.15 – Dinesh Rajbhar, I am of the opinion that his presence in the unlawful assembly, as a member thereof in the night, as well as in the morning is satisfactorily established. As such he is guilty in respect of offences that took place in the night as well as in the morning. The evidence shows that he was armed with a deadly weapon and is guilty of rioting being armed with a deadly weapon. That the weapon is not actually recovered from him, is immaterial in the circumstances and considering his delayed arrest. No charge in respect of offence punishable under Sections 144 and 148 of the I.P.C. was framed against him. However, the accused had

proper notice of the evidence with respect to the facts constituting the said offences. He has had the opportunity to cross-examine material witnesses. No prejudice would be caused to him by convicting him in respect of offences punishable under Sections 144 and 148 of the I.P.C. also without there being any specific charge for those offences.

Accused No.16 -Shanabhai Chimanbhai Baria

913. As regards Accused No.16 - Shanabhai Chimanbhai Baria, he has been identified by all the supporting witnesses viz:- Taufel [P.W.26], Raees [P.W.27], Shehzad [P.W.28], Yasmin [P.W.29] and Sailun [P.W.32]. Taufel has identified him by pointing out towards him and has attributed to him the role of making the victims get down from the terrace, tying their hands and legs and thereafter assaulting them. Later on, Taufel [P.W.26] mentioned that he knew the names of 4 of the 7 accused identified by him in the Court and one of the 4 names which he gave, is 'Shana. However, the Special Public Prosecutor did not require the witness to point out as to who were the persons named by him from amongst the accused before the Court. I have discussed the effect of this. The identification of this accused by Taufel [P.W.26], can not be weakened by that reason. Though the identification may be treated as not made by giving name,

still the reliability of the identification can not be doubted in as much as, that Shana resides just behind the Best Bakery; and that the claim of the witnesses including that of Taufel [P.W.26] that they knew him since prior to the incident, can not be doubted, at all. Raees [P.W.27] has also identified Shana and has stated that he was having a sword in his hand. Shehzad [P.W.28] has identified this accused by pointing out and by giving his name as 'Shana'. Shehzad[P.W.28] also states that Shana was having a sword with him at the time of the riots. Shehzad [P.W.28] states that the house of Shana is just by the side of the Best Bakery. Yasmin [P.W.29] has also implicated Shana by pointing out towards him and by giving his name. According to Yasmin, she knew Shana since the time of her marriage; and that he stays behind their house. Yasmin states that, she and others used to see him every day. This is quite natural and ought to be believed. Yasmin has given some further information about Shana which is to the effect that he is related to Accused No.1 -Rajubhai Baria- and this relationship is not in dispute, at all. Sailun [P.W.32] has also identified Accused No.16 -Shana- as the persons present in the morning among the mob of rioters. Even if the evidence of Sailun [P.W.32] is excluded from consideration, keeping in mind my observations about his evidence so far as it relates to the accused other than

accused no.11, accused no.15 and accused no.20, still, there is clear and satisfactory evidence against Shana. That information about Shana's involvement was available to the investigating agency by 13/03/2002; and that he is wanted in this case, was circulated to all the Police Stations in Vadodara City as is clear from the evidence of PI Kanani [P.W.74] corroborated by the document [Ex.396], is a circumstance which lends support to the evidence against him. PI Kanani[P.W.74] has stated that Shana was not available at his residence. He was arrested on 15/04/2002 when he surrendered himself coming to the Police Station. There is sufficient evidence to indicate that he was absconding. Though absconding by itself would not be a strong circumstance against the accused, it certainly adds strength to the evidence of his identification which itself is clear, satisfactory and can be safely accepted. There can, therefore, be no doubt about the involvement of Shana in the alleged offences.

914. However, the evidence of his being a member of the unlawful assembly in the night also, is not very clear. In the facts and circumstances, I proceed on the basis that his presence in the unlawful assembly, as a member thereof in the night, is not satisfactorily established and do not hold him guilty in respect of offences that

took place in the night. The evidence shows that he was armed with a deadly weapon and is guilty of rioting being armed with a deadly weapon. That the weapon is not actually recovered from him, is immaterial in the circumstances and considering his delayed arrest due to the fact that he was absconding. No charge in respect of offence punishable under Sections 144 and 148 of the I.P.C. was framed against him. However, the accused had proper notice of the evidence with respect to the facts constituting the said offences. He has had the opportunity to cross-examine material witnesses. No prejudice would be caused to him by convicting him in respect of offences punishable under Sections 144 and 148 of the I.P.C. also without there being any specific charge for those offences.

Accused No.17 -Shailesh Anupbhai Tadvi

915. As regards Accused No.17 -Shailesh Anupbhai Tadvi- he has not been identified by any of the occurrence witnesses. There is also no other evidence against him. There is therefore, no evidence to show his involvement in the alleged offence.

Accused No.18 -Shailesh Anupbhai Tadvi

916. As regards the accused No.18 -Shailesh Tadvi- he is

identified by Raees Khan [P.W.27], Shehzad [P.W.28], Yasmin [P.W.29] and Sailun [P.W.32]. Raees [P.W.27] has identified him by pointing out towards him and has attributed to him the role of having tied hands and legs of the victims in the morning. Shehzad has identified him without being able to name him, but by pointing out towards him. The role which Shehzad attributes to him is that he was armed with weapon – '*danda*' or sword and was shouting '*musalmanoko mari nakho*'. Yasmin has identified this accused by giving his name as Shailesh. According to Yasmin, he was catching the hands of the men when they were assaulted during the incident that took place in the morning. Yasmin has stated that she knows Shailesh since the time of her marriage; and that he used to come to the house of one Bhatt which was in front of the Best Bakery building. In his examination under section 313 of the Code, Shailesh had denied this aspect and has claimed that police had told Yasmin his name and had pointed him out to her; and that, that is why she identified him in the Court. This can not be accepted. Even if the evidence of Sailun is not taken into consideration against this accused, the evidence of his identification can safely be accepted.

917. As such, the involvement of this accused in the alleged offence is satisfactorily established, in my

opinion.

918. There is no specific evidence against him showing that he was a member of the unlawful assembly in the night also. I therefore, think it fit to give him benefit of doubt in that regard and hold him guilty only on the basis that he was a member of the unlawful assembly in the morning.

Accused No.19 -Kamlesh Bhikhabhai Tadvi.

919. The accused No.19 - Kamlesh Tadvi - has been identified by Taufel [P.W.26], Shehzad [P.W.28] and Sailun [P.W.32]. Taufel [P.W.26] has identified him without giving his name as the person who was seen by Taufel in the morning. The role attributed to him is that he was standing near the bakery. Shehzad has also identified him without naming him. It may be recalled that Shehzad has identified 5 accused by giving their names and 7 others without naming them. This accused is one of those 7. The identification by Shehzad without naming this accused gives a general role to him. Shehzad's evidence with respect to those 7 accused is definitely on a different footing than that against the 5 who are named and identified by him. Similarly, Sailun [P.W.32] also has simply identified this accused –

without attributing any specific role to him – as a person who was present in the mob of rioters in the morning. Apart from the evidence of identification, there is circumstantial evidence against the accused in the nature of recovery of a stick, pursuant to the disclosure statement made by this accused while he was in police custody. According to PI Kanani [P.W.74], after the arrest of the accused on 17/04/2002, he was interrogated; and that during the course of his interrogation on 19/04/2002, the accused offerred to disclose certain information, pursuant to which the police party and the panchas went to a plot of land, as led by the accused, at Hanuman Tekdi; and that, from the passage between construction work and the fencing of '*babool*' trees, the accused took out a stick [**Article R/26]** and produced the same. The information disclosed by the accused was recorded under a panchnama [X-148] and the said stick was seized under a panchnama. However, no panch witness has been examined and the evidence in support of this recovery is only of PI Kanani. Without going into the question as to whether this evidence of recovery of the stick [Article R/26] at the instance of the accused can be relied upon or not in the absence of the examination of panch witness, it may be observed, that the stick has not been shown to be connected with the alleged offence, in any manner. No stains of blood

or any other incriminating evidence was found on the examination of the stick by naked eyes as done by PI Kanani on the spot and/or by its examination in the Forensic Science Laboratory. Admittedly, this accused was in custody since 21/03/2002, in some other case in respect of offenes under section 435 and 188 of the IPC. An application was made by PI Kanani on 17/04/2002 to the Judicial Magistrate, 1st Class, for handing over the custody of the accused, pursuant to which the accused was handed over to PI Kanani and came to be arrested, in this case, on the very day i.e. on 17/04/2002. Apparently, the information regarding the involvement of this accused was not known to the investigating agency at early stages of the investigation. Considering the totality of the circumstances and the too general role attributed to him by the identifying witnesses, the involvement of this accused in the alleged offences can, reasonably be doubted. He undoubtedly belongs to the same locality and admits it to be so.

920. The degree of satisfaction that would be required for holding him guilty of the offences in question cannot be arrived at, from the evidence against him.

Accused No. 20 -Suresh @ Lalo Devjibhai Vasava.

921. He has been identified by Taufel [P.W.26], Raees [P.W.27], Shehzad [P.W.28] and Sailun [P.W.32]. According to Taufel, this accused was seen by him in the night; and that he was coming running towards the bakery holding '*mashal*' and sword. Raees [P.W.27] has also stated about having seen this accused with a sword in his hand. Shehzad [P.W.28] has actually not given the name of this accused, before this Court. He has however, stated that he knew his name though he did not remember it, when he gave evidence before the Court. That Shehzad knows his name should be believed, in my opinion. Shehzad's evidence indicates that this accused was having a sword with him at the time of riots. Sailun [P.W.32] has pointed out to this accused and has given his name as 'Lala'. According to Sailun, he used to come to the bakery and that is why Sailun knew him. Sailun has also stated that he used to see this accused when Sailun used to go out for a casual walk. That the accused is from the same locality is satisfactorily established and therefore the claim of the witnesses that they knew him since prior to the incident, can not be doubted. A specific role has been attributed to him by Taufel [P.W.26] Raees [P.W.27] and Shehzad [P.W.28]. What is significant is that according to PI Kanani, he is also known as 'Lalo'. As a matter of fact, he has been arrested on the basis that he is the accused Lalo who has been named in the FIR and

whose name was mentioned by Zahira and other women to D.C.P. Patel and PI Baria on the spot itself. Undoubtedly, as Zahira and others from her family turned hostile, whether 'Lalo' referred to by them in the F.I.R. and in the information given by them to the police is the same as accused No.20, has not been established. It is however a fact, that he has been arrested on the basis that he is 'Lalo'. He has never disputed this position till he was specifically questioned regarding that during his examination under section 313 of the Code. In this context, Sailun has referred to him as 'Lala', is significant. It is true that there is a difference between 'Lalo' and 'Lala', but considering that Sailun is Hindi speaking, this difference is not very significant. The fact that he has been arrested on the basis that he is 'Lalo'; and that the accused never disputed that he is known as 'Lalo' also, till the fact was specifically put to him, is significant. This, though by itself, would not be sufficient to establish his identity, adds strength to the evidence of the identifying witnesses as to the identification done by them and of their claim of the accused having seen by them in the mob of rioters, playing an active role therein. The evidence against the accused No.20, which shows that he was a member of the unlawful assembly in the night as well as in the morning, can be safely accepted.

Accused No. 21 -Ravi Rajaram Chauhan-

922. As regards the accused No.21 - Ravi Rajaram Chauhan - the evidence against him consists of his identification by Taufel [P.W.26], Shehzad [P.W.28], Yasmin [P.W.29] and Sailun [P.W.32]. Sailun's identification of the others other than Sanju [P.W.11], Dinesh [P.W.15] and Lalo is not of much value. Taufel has pointed out accused No.21 without giving his name initially, but has later on, mentioned that among the accused identified by him there is one Ravi whose name he knows. Obviously, Ravi among the accused identified by him, was only this accused, but as discussed earlier in case of other accused, the Special Public Prosecutor did not require Taufel to point out who that Ravi was. The effect of this failure would be that the identification is not strengthened.The denial of the accused persons including this one - of they being from the same locality is false and therefore the claim of Taufel that he knew him prior to the incident can not be doubted.However, the role attributed to him by Taufel to him is only that he was making Taufel and others get down from the terrace in the morning. He has been identified by Shehzad by giving a general role to him as has been given by him to the 7 accused identified by him without naming them. Yasmin has also

identified the accused No.21 as 'Ravi' and there can be no doubt that she indeed knew him since prior to the incident.She has said that Ravi was on friendly terms with her husband and they used to talk to each other. Shehzad also stated that Ravi used to be called as 'Marathi' which is quite likely he happens to be a Maharashtrian, as stated by his Advocates. What role Yasmin gives him is rather interesting. According to Yasmin, at the time of incident she was wearing a gold chain; and that the accused snatched that chain. No other act during the riots has been attributed by Yasmin to him.In my opinion, the character of the act of snatching chain from her neck was materially different from the acts which rioters were generally performing. What he did before or after the hain was snatched,is not stated.Yasmin does not attribute to him any other act or acts which the rioters were performing. Yasmin claims to have stated to the police about this accused, but according to PI Baria, Yasmin did not state before him that Ravi had snatched the chain which she was wearing. Though PI Baria's evidence about what witnesses stated before him is not reliable, the fact remains that Yasmin's statement is uncorroborated.

923. The information regarding the involvement of this accused appears to have reached the police very late and

the source of the information has not been brought on record. Considering this in the light of the nature of identification evidence against him, it is difficult to have satisfaction about the involvement of this accused in the alleged offences. No chain has been recovered from him during investigation and whether any efforts to recover it were made, is not clear.

924. There is also evidence of recovery of the stick [Article R/20] against this accused. This accused was arrested on 21/05/2002. According to PI Kanani, during his investigation on 22/05/2002, he disclosed certain information which was recorded under a panchnama, pursuant to which the police party and the panchas recovered a stick [Article R/20] from the hollow place at the lower portion of a '*babool*' tree outside the rear portion of the house of the accused. A number of contentions have been raised by the learned Advocates for the accused regarding the unreliability of this evidence with which, I do not agree. The panch witnesses to the panchnama [Ex.85] Avdhoot Nagarkar [P.W.23] and Abdul Samin Abdul Gani Mansuri [P.W.37] have been examined and though Avdhoot Nagarkar has turned hostile, the other panch Abdul Samin Abdul Gani Mansuri has supported the prosecution. As in the view that I am taking, not much depends on the acceptability of this evidence, I propose

to discuss the evidence only briefly. Avdhoot Nagarkar [P.W.23] appears to be an untruthful witness and is clearly determined to assist the accused. He invented the story of not having witnessed anything and said only having made **a** signature on a paper, but when it was revealed that there were 3 signatures of his, tried to deny that the other 2 signatures were his. Later on, he admitted the second signature also as his. He even claimed not to have seen the accused No.21 – Ravi - which does not seem likely, as when this witness was examined in the Court at Vadodara, there is every likelihood of his having seen the accused No.21 - Ravi. In fact, his deposition recorded in that Court clearly shows that it was specifically put to him that the accused No.21 – Ravi - who was present before the Court, was present in the police station. This suggestion was denied as false by this witness before that Court, but this fact indicates that he had seen the accused No.21 before that Court. In spite of this, in a dramatic way and to emphasize his point, he made a false statement of not having seen the accused No.21 at any time before. The evidence of Abdul Samin Gani Mansuri [P.W.37] supports the prosecution. He could not however identify the accused. In his cross-examination nothing which would discredit his version has been brought on record. He was ultimately confronted with his evidence given in the previous trial and was made to

admit, that, before that Court he had stated that he had not seen anything; and that only his signatures were taken at 2 places on the panchnama. In the re-examination he was asked the reason for the inconsistency between his version in that Court and in this Court to which he has replied that 'there the victims of the incident themselves had not supported the prosecution case and therefore, he gave false evidence in the Court at Vadodara'. In the re-examination, he agreed that he deliberately gave false evidence in the Court at Vadodara, but volunteered to add as follows: '**I have to stay at Vadodara'.** The witness has made a statement against his own interest and is incriminatory in nature Such statement being against his interest, ought to be believed. The version of this witness as given by him in this Court appears to be truthful and correct and it can not be discredited by reason of it being inconsistent with what he stated in the Court at Vadodara. On the contrary, he was clearly under fear and his explanation that he had to stay at Vadodara is indicative of the factor that being a case of communal riots he apprehended that by giving evidence implicating the accused he would invite wrath of many, making it impossible for him to stay in Vadodara.

925. Though the evidence of recovery of the stick

[Art.R/20] at the instance of the accused can be safely accepted, it does not have much value to advance the case against the accused. This weapon is not shown to be connected with the alleged offences. Admittedly, no stains of blood could be seen on the weapon and none were found even in its examination in the forensic Science Laboratory. The offence had taken place on 01/03/2002, The recovery though effected immediately after the arrest of the accused No.21, was effected - much late from the date of offence - on 22/05/2002. As huge mob was involved in the alleged offences and there were number of persons from the locality who were involved in the offences, the recovery of the stick in question, on 22/05/2002, can have some other explanations also. In the facts of the case, I am not inclined to take into consideration the recovery of a stick at his instance as a circumstance against the accused, adding weight to the evidence of identification that exists against him.

926. In the peculiar circumstances, and considering the role attributed to him, coupled with the fact that the information of his involvement was obviously reached much later to the investigating agency – with the source not made known to the Court,- I think the possibility of this accused being guilty is no more than the possibility of he being innocent.

927. In order to ascertain what offences have been committed by the accused who are found to have been the members of the unlawful assembly, it needs to be examined as to what offences were committed by the members of the unlawful assembly. In view of the earlier discussion, the accused persons who have been held to be the members of the unlawful assembly at the time when those offences were committed, would be guilty in respect of those offences by virtue of the provisions of Section 149 of the I.P.C. The members of the unlawful assembly have committed [apart from being members thereof] an offence of rioting, punishable under Section 147 of the I.P.C. The members of the unlawful assembly had set the handcarts, motorbike, rickshaw tempos, etc., on fire and had also set on fire the Best Bakery building, the '*wakhar*' of Lal Mohammad [P.W.36], house of Aslam, etc., and thereby committed offences punishable under Sections 435 and 436 of the I.P.C.

928. The evidence shows that the members of the unlawful assembly robbed *maida, ghee,* sugar, etc., which was in the bakery. This amounts to dacoity as all the ingredients of dacoity are present and established by the evidence.

929. Though there is no direct evidence about the members of the unlawful assembly committing criminal trespass, the robbing of the *maida, ghee,* sugar, etc., could not have been done without making an entry inside the house. Further, though the manner in which the '*wakhar*' of Lal Mohammad was set on fire, is not clear, obviously, by making an entry inside, fire was set.

930. Also, there is evidence that the rioters had dragged Kausarali and Lulla from the first floor. Thus, the members of the unlawful assembly had committed criminal trespass by entering inside the Best Bakery building and the '*wakhar*' of Lal Mohammad and it is clear that the said criminal trespass, which amounts to house trespass, was committed in order to committing a number of offences, including an offence punishable with death. Setting fire to the wood below the Best Bakery building is an act which, in the event of deaths having been caused on that account [as have been caused actually], would amount to an offence of murder. The members of the unlawful assembly therefore committed offences punishable under Sections 449, 450 and 451 of the I.P.C.

931. Also, the members of the unlawful assembly had assaulted the victims by dangerous weapons and caused grievous hurt to the vicims. The members of the unlawful

assembly had also caused hurt to the victims by burns. Thus, the offences punishable under Sections 326 of the I.P.C. and 324 of the I.P.C. were committed by the members of the unlawful assembly.

932. Prakash, Baliram and Ramesh, as also Firoz and Nasru, who were assaulted in the morning, died due to the injuries inflicted on them by the members of the unlawful assembly and thus in the morning also, the offence of murder was committed.

933. Lastly, the members of the unlawful assembly committed an offence punishable under Section 188 of the I.P.C. It is clear that the fact that curfew was in force, was known to the members of the unlawful assembly and in any case, there is positive evidence of Bhimsinh Solanki [P.W.66] that announcement that curfew had been imposed, was being made by him while patrolling. Some of the accused have also committed offences punishable under Sections 144 of the I.P.C. and 148 of the I.P.C.

934. In my opinion, on the facts proved, the offence punishable under Section 342 of the I.P.C. cannot be said to have been committed. The inmates of the Best Bakery building, in effect, had been prevented from coming out of the building. Such effect was however only incidental,

resulting from the fire that was set and the presence of the rioters outside the building.

935. As a result of the aforesaid discussion, it is clear that the accused whose presence in the unlawful assembly in the morning, as a member thereof is proved, are liable for the offences committed by the members of the unlawful assembly in the morning. The accused whose presence, as members, in the unlawful assembly in the night is proved, are liable for the offences committed by the members of the unlawful assembly in the night. Needless to say that those who are proved to be the members of the unlawful assembly in the night as well as in the morning, are liable for the offences committed both in the night as well as in the morning.

Hence, Point Nos. 12 and 13 are answered accordingly.

As to point No.14:

936. At this stage, I have heard the accused on the question of sentence. Shri Ashik Shirodkar, the learned Senior Advocate, on behalf of the accused, states that he has no submission to make on the question of sentence; and that the matter is left to the Court.

937. Heard Smt.Manjula Rao, the learned Special Public Prosecutor for the State of Gujarat. She has submitted that an appropriate sentence be awarded by keeping in mind the seriousness of the offences and the number of deaths caused.

938. Though this indeed is one of the aspects of the matter, it cannot be ignored that the accused are being convicted by virtue of the provisions of section 149 of the Code. The exact role played by each accused in the entire incident is not specifically proved. Though there is no rule that the death sentence can not be awarded where the conviction of an offence punishable under section 302 of the IPC, is recorded with the aid of section 149 of the IPC, considering all the relevant aspects of the matter, I am of the opinion that the extreme penalty of death is not called for in this case.

939. Much damage was caused to the property. Much destruction of the property was done. As such, I think it proper to impose appropriate sentences of fine also, in addition to the substantive sentences. It would also be appropriate to award compensation to be paid to the victims, keeping in mind the provisions of section 357 of the Code.

940. Taking into consideration all the relevant aspects of the matter, in my opinion, the following sentences will meet the ends of justice.

In the result, the following order is passed.

O R D E R

1. All the accused are acquitted of the charge of an offence punishable under section 342 of the IPC read with section 149 of the IPC.

2. Accused Nos. 2, 3, 5, 10, 13, 17, 19 and 21 are acquitted of the charge of offences punishable under Section 143 of the I.P.C., Section 147 of the I.P.C., Section 324 of the I.P.C. read with Section 149 of the I.P.C., Section 326 of the I.P.C. read with Section 149 of the I.P.C., Section 302 of the I.P.C. read with Section 149 of the I.P.C., Section 435 of the I.P.C. read with Section 149 of the I.P.C., Section 436 of the I.P.C. read with Section 149 of the I.P.C., Section 395 of the I.P.C., Section 448 of the I.P.C. read with Section 149 of the I.P.C., Section 449 of the I.P.C. read with Section 149 of the I.P.C., Section 450 of the I.P.C. read with Section 149 of the I.P.C. and Section 451 of the I.P.C. read with Section 149 of the I.P.C.

3. Accused nos.2, 3, 5, 10, 13, 17 and 19 be set at liberty forthwith, unless required to be detained in some other case.

4. The bail bond of accused no.21 stands discharged.

5. Accused No.1 - Rajubhai Dhamirbhai Baria, accused no.14 - Jagdish Chunilal Rajput, accused no.16 - Shanabhai Chimanbhai Baria and accused no.18 - Shailesh Anupbhai Tadvi are acquitted of the charge of offences punishable under Section 395 of the I.P.C., Section 435 of I.P.C. r/w Section 149 of the I.P.C., Section 436 of the I.P.C. read with Section 149 of the I.P.C., Section 448 of the I.P.C. read with Section 149 of the I.P.C., Section 449 of the I.P.C. read with Section 149 of the I.P.C., Section 450 of the I.P.C. read with Section 149 of the I.P.C., Section 451 of the I.P.C. read with Section 149 of the I.P.C.

6. Accused No.1 - Rajubhai Dhamirbhai Baria, Accused No.4 - Pankaj Virendragir Gosai, Accused No.11 - Sanjay @ Bhopo Ratilal Thakkar, Accused No.12 - Bahadursinh @ Jitu Chandrasinh Chauhan, Accused No.14 - Jagdish Chunilal Rajput, Accused No.15 - Dinesh Phulchand Rajbhar, Accused No.16 - Shanabhai Chimanbhai Baria,

Accused No.18 - Shailesh Anupbhai Tadvi, and Accused No.20 - Suresh @ Lalo Devjibhai Vasava are convicted of an offence punishable under section 143 of the I.P.C. and each of them is sentenced to suffer rigorous imprisonment for 6 [six] months, and also to pay a fine of Rs.500/- [Rupees five hundred only] each, in default, to suffer further rigorous imprisonment for 15 [fifteen] days.

7. They are also convicted of an offence punishable under Section 147 of the I.P.C. and each of them is sentenced to suffer rigorous imprisonment for 2 [two] years, and also to pay a fine of Rs.1,000/- [Rupees one thousand only] each, in default, to suffer further rigorous imprisonment for 1 [one] month.

8. They are also convicted of an offence punishable under Section 324 of the I.P.C. read with Section 149 of the I.P.C. and each of them is sentenced to suffer rigorous imprisonment for 3 [three] years, and also to pay a fine of Rs.1000/- [Rupees One thousand only] each, in default, to suffer further rigorous imprisonment for 1 [one] month.

9. They are also convicted of an offence punishable under Section 326 of the I.P.C. read with Section 149 of the I.P.C. and each of them is sentenced to suffer

imprisonment for life and also to pay a fine of Rs.5000/- [Rupees five thousand only] each, in default, to suffer further rigorous imprisonment for 5 [five] months.

10. They are also convicted of an offence punishable under Section 302 of the I.P.C. read with Section 149 of the I.P.C. and each of them is sentenced to suffer imprisonment for life and also to pay a fine of Rs.5,000/- [Rupees five thousand only] each, in default, to suffer further rigorous imprisonment for 5 [five] months.

11. They are also convicted of an offence punishable under Section 188 of the I.P.C. and each of them is sentenced to suffer simple imprisonment for a period of 1 [one] month.

12. Accused No.4 - Pankaj Virendragir Gosai, Accused No.11 - Sanjay @ Bhopo Ratilal Thakkar, Accused No.12 - Bahadursinh @ Jitu Chandrasinh Chauhan, Accused No.15 - Dinesh Phulchand Rajbhar, and Accused No.20 - Suresh @ Lalo Devjibhai Vasava are convicted of an offence punishable under Section 435 of the I.P.C. read with Section 149 of the I.P.C. and each of them is sentenced to suffer rigorous imprisonment for 7 [seven] years, and

also to pay a fine of Rs.5,000/- [Rupees five thousand only] each, in default, to suffer further rigorous imprisonment for 5 [five] months.

13. They are also convicted of an offence punishable under Section 436 of the I.P.C. read with Section 149 of the I.P.C. and each of them is sentenced to suffer imprisonment for life, and also to pay a fine of Rs.10,000/- [Rupees ten thousand only] each, in default, to suffer further rigorous imprisonment for 10 [ten] months.

14. They are also convicted of an offence punishable under Section 395 of the I.P.C. and each of them is sentenced to suffer rigorous imprisonment for 10 [ten] years and also to pay a fine of Rs.500/- [Rupees five hundred only] each, in default, to suffer further rigorous imprisonment for 15 [fifteen] days.

15. They are also convicted of an offence punishable under Section 448 of the I.P.C. read with Section 149 of the I.P.C. and each of them is sentenced to suffer rigorous imprisonment for 1 (one) year and also to pay a fine of Rs.500/- [Rupees five hundred only] each, in default, to suffer further rigorous imprisonment for 15 [fifteen] days.

16. They are also convicted of an offence punishable under Section 449 of the I.P.C. read with Section 149 of the I.P.C. and each of them is sentenced to suffer rigorous imprisonment for 10 [Ten] years and also to pay a fine of Rs.500/- [Rupees five hundred only] each, in default, to suffer further rigorous imprisonment for 15 [fifteen] days.

17. They are also convicted of an offence punishable under Section 450 of the I.P.C. read with Section 149 of the I.P.C. and each of them is sentenced to suffer rigorous imprisonment for 10 [Ten] years and also to pay a fine of Rs.500/- [Rupees five hundred only] each, in default, to suffer further rigorous imprisonment for 15 [fifteen] days.

18. They are also convicted of an offence punishable under Section 451 of the I.P.C. read with Section 149 of the IPC and each of them is sentenced to suffer rigorous imprisonment for 2 [Two] years and also to pay a fine of Rs.500/- [Rupees five hundred only] each, in default, to suffer further rigorous imprisonment for 15 [fifteen] days.

19. Accused No.11 - Sanjay @ Bhopo Ratilal Thakkar,

Accused No.12 - Bahadursinh @ Jitu Chandrasinh Chauhan, Accused No.15 - Dinesh Phulchand Rajbhar, Accused No.16 - Shanabhai Chimanbhai Baria and Accused No.20 - Suresh @ Lalo Devjibhai Vasava are convicted of an offence punishable under Section 144 of the I.P.C. and each of them is sentenced to suffer rigorous imprisonment for 2 [two] years, and also to pay a fine of Rs.500/- [Rupees five hundred only] each, in default, to suffer further rigorous imprisonment for 15 [fifteen] days.

20. They are also convicted of an offence punishable under Section 148 of the I.P.C. and each of them is sentenced to suffer rigorous imprisonment for 3 [three] years, and also to pay a fine of Rs.1,000/- [Rupees one thousand only] each, in default, to suffer rigorous imprisonment for 1 [one] month.

21. All the substantive sentences, except the sentences of imprisonment for life, shall run concurrently.

22. The accused shall be entitled for set off as per Section 428 of the Code of Criminal Procedure.

23. The sentences of imprisonment for life shall run after the expiration of the concurrent sentences for imprisonment for terms.

24. No order for the disposal of the property is passed at this stage, as the case against the original accused Nos.6, 7, 8 and 9 is pending.

25. Issue notices to Nasibulla Habibulla Shaikh [P.W.30], Nafitulla Habibulla Shaikh [P.W.31], Smt.Saherunnisa Habibulla Shaikh [P.W.35], Smt.Saherabanu Habibulla Shaikh [P.W.40] and Smt.Zahira Habibulla Shaikh [P.W.41] to show cause why each of them should not be tried summarily for giving false evidence and punished for the offences punishable under Section 193 of the I.P.C., as contemplated under Section 344 of the Code of Criminal Procedure, returnable on 20/03/2006.

26. If fine is realized, an amount of Rs.20,000/- [Rupees twenty thousand only] each shall be paid to each of the injured witnesses -i.e. Taufel Ahmed Habibulla Siddiqui [P.W.26], Raees Khan Nankau Khan [P.W.27], Shehzad Khan Hasan Khan Pathan [P.W.28] and Sailun Hasan Khan Pathan [P.W.32], as compensation under Section 357(1)(b) of the Code of Criminal Procedure.

27. Out of the fine imposed on accused nos.4, 11, 12, 15 and 20, if realized, an amount of Rs.60,000/- [Rupees sixty thousand only] shall be paid to Smt.Sharjahan

Kausarali Shaikh [P.W.34]; and from the remaining amount, an amount of Rs.40,000/- [Rupees forty thousand only] [or such other amount as may be available] shall be paid to Aslambhai Haroonbhai Shaikh [P.W.42], as compensation under Section 357(1)(c) of the Code of Criminal Procedure.

(A.M.Thipsay)
Addl.Sessions Judge,
February 24, 2006 **Greater Bombay (Mazgaon)**