**Annexure A**

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No. 1943 of 2009

With

CRIMINAL MISC.APPLICATION No. 1959 of 2009

With

CRIMINAL MISC.APPLICATION No. 1961 of 2009

With

CRIMINAL MISC.APPLICATION No. 2015 of 2009

In CRIMINAL MISC.APPLICATION No. 1943 of 2009

With

CRIMINAL MISC.APPLICATION No. 2109 of 2009

In CRIMINAL MISC.APPLICATION No. 1959 of 2009

With

CRIMINAL MISC.APPLICATION No. 2018 of 2009

In CRIMINAL MISC.APPLICATION No. 1961 of 2009

For Approval and Signature:

HONOURABLE MR.JUSTICE D.H.WAGHELA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgment ?

2. To be referred to the Reporter or not ?

3. Whether their Lordships wish to see the fair copy of the judgment ?

4. Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5. Whether it is to be circulated to the civil judge ? 1 & 2 YES; 3 to 5 NO

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STATE OF GUJARAT - Applicant

Versus

MAYABEN SURENDRABHAI KODNANI & ANOTHER Respondents

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Appearance :
MR JM PANCHAL SPECIAL PUBLIC PROSECUTOR with MR UA TRIVEDI ADDL PUBLIC PROSECUTOR for Petitioner
MESSRS SV RAJU, YN OZA and MR MAHESH JETHMALANI, Senior Advocates, with MR MITESH R AMIN for Respondents DR MUKUL SINHA with MR SH IYER for Applicants in Cr.M.A.Nos.2015,2109 and 2018 of 2009
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CORAM :

HONOURABLE MR.JUSTICE D.H.WAGHELA

Date : 27/03/2009

CAV JUDGMENT

1. These petitions are preferred by the State for cancellation of anticipatory bail granted by the Sessions Court, Ahmedabad to two respondents in two riot-related criminal cases in which total 106 persons were killed, many injured and three persons were missing who are now declared to be dead. The facts and the cases being interconnected and the contentions and the legal issues being common, all the three cases were argued and heard together and they are disposed by this common judgment.

2. In Criminal Misc. Application No.1943 of 2009, the respondent is granted anticipatory bail by the impugned order dated 05.02.2009 mainly on the grounds that the respondent was implicated in the offence only on the basis of the statements indicating her presence in the mob and incitement as also for the reasons that she was a woman who was not even alleged to have

attempted to tamper with the evidence and grant of bail was not likely to hamper the investigation. In the second case against the same respondent, bail is granted on similar grounds with the additional ground of parity with other co-accused persons who were released on regular bail even though they were alleged to have possessed weapons at the time of the offences. These two original criminal cases are notoriously known as "Naroda Patia" and "Naroda Gaon" cases, respectively registered as C.R.No.100 of 2002 and C.R.No.98 of 2002. The third petition against another respondent is related to the latter Naroda Gaon case in which the respondent is granted anticipatory bail on the grounds that his name has first figured six years after the incident, that other accused persons holding weapons in the same incident have been released on regular bail, that he does not have a criminal record, that he has not attempted to tamper with any evidence and he is not likely to commit offences.

3. Challenging the above orders, on affidavit of Deputy Superintendent of Police, Special Investigation Team (SIT), Riot Cases, it is contended that, by virtue of the statements of several witnesses recorded during the investigation by SIT, involvement of the respondents was proved from the inception and they were alleged to be leading the mob due to which their role could be distinguished from other accused persons. That, the respondent in Criminal Misc. Applications No.1943 of 2009 and 1959 of 2009 is presently a Minister of State and, therefore, there were ample chances of tampering of witnesses and evidence. That, learned Sessions Judge has not properly considered the evidence and, without looking to the seriousness of the offences of which investigation was going on, exercised the discretion on irrelevant and untenable grounds. That, according to one of the statements of witnesses, the respondent was alleged to have fired from her pistol and was also alleged to have distributed swords to the mob. It is averred that learned Sessions Judge has ignored in the impugned judgment the relevant considerations of gravity of the offences, probability of tampering of the prosecution witnesses as also wider interest of the society and impact of such orders. It is also submitted that the SIT was diligently investigating serious offences pursuant to the orders of the Apex Court and even alibis put forward by the respondents were investigated and thereafter it was prima facie found that the respondents were involved in the acts of spreading communal riots resulting into mass murder, destruction of property of a large number of people and other offences. On the other hand, the respondents were not fully co-operating with the investigating agency and they were making themselves unavailable when required. It is also averred that, even as early as in March 2002, applications were made from relief camps by the victims naming the respondents. It is clearly averred in the petitions that, according to the original FIRs dated 28.2.2002, Gujarat Bandh was declared on 28.2.2002 by Vishwa Hindu Parishad pursuant to carnage in a railway coach at Godhra on 27.2.2002 and communal riots were spread in the entire State of Gujarat, including Ahmedabad City. Properties belonging to Muslim community were damaged, looted and set on fire by mobs of thousands of people of Hindu community and many persons, including females and children, were killed. It is alleged in the FIRs lodged by Police Inspectors that the mobs were headed and instigated by the leaders of VHP and BJP. In the FIRs lodged against only five of named VHP and BJP workers with unnamed members of the mob consisting of thousands of persons, offences punishable under sections 143, 147, 148, 149, 436, 395, 302 of IPC and section 135 of Bombay Police Act were registered and several successive charge-sheets for heinous offences against many other persons were already filed.

4. Learned Special Public Prosecutor Mr. J. M. Panchal, appearing for the petitioner-State, submitted that the investigation presently undertaken by the SIT was pursuant to the order dated 26.3.2008 of the Supreme Court in Writ Petition (Cri.) No.109 of 2003 and other allied matters wherein, inter alia, further investigation of two cases of Naroda Patia and Naroda Gaon was ordered. There was specific direction of the Supreme Court that the SIT shall not confine the investigation by recording statements of those who came forward to give his or her version and shall be free to make such enquiries and investigation as felt by it to be necessary. The State is directed to provide necessary infrastructure and resources for effective working of the SIT. It was pointed out from the order dated 26.3.2008 that, after hearing the parties and considering the sensitive nature of the cases, it was felt that appointment of a special investigation team was warranted; and even after statement of learned senior counsel appearing for the State that the State's approach was fair and it was not interested in sheltering any culprit or guilty person, there was an agreement that there was need for a special investigation team. Therefore, the SIT having been assigned by the Supreme Court an important task in sensitive cases, it was not proper or in the interest of proper investigation that any accused person would be granted advance protection on the basis of irrelevant considerations.

4.1 It was submitted that the offences punishable under section 302 of IPC read with several other sections were being investigated under the supervision of highly experienced and senior members of the SIT and prima facie case of involvement of the respondents was already established, even as further investigation was continued and required. But the seriousness and gravity of mass murder with its impact on the society and continued prominence of the respondents could not have permitted any Court to exercise judicial discretion in their favour, particularly when the victims and the witnesses were still suffering and vulnerable to various influences. Learned counsel referred to statements of various witnesses to indicate the role ascribed to the respondents and the material suggesting clear attempts at intimidating and influencing witnesses, all of which was not given due weightage in the impugned judgments. He further submitted that a detailed discussion of the material against the respondents, which is available as of now, must not be put to critical analysis and examination by the Court at this stage, as the investigation was underway. He further submitted that, in fact, custodial interrogation of several persons, including the respondents, was required for proper investigation and the Court ought to facilitate that task rather than hampering the investigation by offering an umbrella to the accused persons on the basis of delayed disclosure of their names and lapse of time, or likelihood of their co-operation.

4.2 Learned counsel relied upon judgment of three-Judge bench of the Supreme Court in Pokar Ram v. State of Rajasthan [(1985) 2 SCC 597] to submit that anticipatory bail, to some extent, intrudes in the sphere of investigation of crime and the court must be cautious and circumspect in exercising such power of a discretionary nature. Some very compelling circumstances must be made out for granting bail to a person accused of murder by firearm when the investigation is in progress. If the discretionary power to grant anticipatory bail were exercised sub-silentio as to reasons or on considerations irrelevant or not germane to the determination, such order could not be sustained and if such an order is allowed to stand, faith of public in administration of justice is

likely to be shaken. Relying upon the order in Kiran Devi v. State of Rajasthan [1987 Supp. SCC 459], it was submitted that in a murder case, when investigation was still incomplete, anticipatory bail should not have been granted. With the observation that the proper course was to leave it to the trial Court to do the needful if and when the person concerned was arrested in light of the record available at that point of time, the order of the High Court granting anticipatory bail was set aside by the Apex Court.

4.3 Decision of the Apex Court in Satish Jaggi v. State of Chhattisgarh [(2008) 1 SCC (Cri.) 660] was pressed into service for the following observations, even in case of regular bail:

"12. Normally, if the offence is non-bailable also, bail can be granted if the facts and circumstances so demand. We have already observed that in granting bail in non-bailable offence, the primary consideration is the gravity and the nature of the offence. A reading of the order of the learned Chief Justice shows that the nature and the gravity of the offence and its impact on the democratic fabric of the society was not at all considered. We are more concerned with the observations and findings recorded by the learned Chief Justice on the credibility and the evidential value of the witnesses at the stage of granting bail. By making such observations and findings, the learned Chief Justice has virtually acquitted the accused of all the criminal charges leveled against him even before the trial. The trial is in progress and if such findings are allowed to stand it would seriously prejudice the prosecution case. At the stage of granting of bail, the court can only go into the question of the prima facie case established for granting bail. It cannot go into the question of credibility and reliability of the witnesses put up by the prosecution. The question of credibility and reliability of prosecution witnesses can only be tested during the trial."

Recent judgment of the Apex Court in Gobarbhai Naranbhai Singala v. State of Gujarat [2008 (3) GLR 2192] was relied upon for the following propositions even in a case of bail during trial which was pending since four years:

"24. This court in Amarmani Tripathi (2005 (8) SCC 21) had held that while considering the application for bail, what is required to be looked is (i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence; (ii) nature and gravity of the charge; (iii) severity of the punishment in the event of conviction; (iv) danger of the accused absconding or fleeing if released on bail; (v) character, behaviour, means, position and standing of the accused; (vi) likelihood of the offence being repeated; (vii) reasonable apprehension of the witnesses being tampered with; and (viii) danger, of course, of justice being thwarted by grant of bail.

"25. In Panchanan Mishra v. Digambar Mishra [2005 (3) SCC 143], the Court while considering the question of cancellation of bail, observed:

"13. ....The object underlying the cancellation of bail is to protect the fair trial and secure justice being done to the society by preventing the accused who is set at liberty by the bail order from tampering with the evidence in the heinous crime.....It hardly requires to be stated that once a person is released on bail in serious criminal cases where the punishment is quite stringent and deterrent, the accused in order to get away from the clutches of the same indulge in various activities like tampering with the prosecution witnesses, threatening the family members of the deceased victim and also create problems of law and order situation."

"26. We are of the view that the High Court has completely ignored the general principles for grant of bail in a heinous crime of commission of murder in which the sentence, if convicted, is death or life imprisonment. "

4.4 Recent judgment of the Supreme Court in State of Maharashtra v. Mohd. Sajid Husain Mohd. S. Husain [(2008) 1 SCC (Cri.) 176] was relied upon for the following observations made therein:

"23. So far as the fact that the respondents have not been named in the first information report is concerned, suffice it to say that the first information report may not be encyclopaedic.

24. ... ... ...

"25. Out of the eight respondents, five are police officers, two are politicians and one is owner of a hotel. It is not in dispute that after having come to learn that their names had been taken by the prosecutrix in her supplementary statement, they had been absconding for a long time. It is not necessary for us to record their respective period of abscondance. We may furthermore notice that the respondents had not scrupulously complied with the conditions imposed upon them. Admittedly, at least on four occasions, some of them were not present.

"26. ... ... ...

"27. There cannot be any direct proof that the respondents have been tampering with evidence, but that question will have to be considered by the appropriate authority at the appropriate stage.

"30. A case of this nature should be allowed to be fully investigated. Once a criminal case is set in motion by lodging an information in regard to the commission of the offence in terms of section 154 of Cr.P.C., it may not always be held to be imperative that all the accused persons must be named in the first information report. It has not been denied nor disputed that the

prosecutrix does not bear any animosity against the respondents. There is no reason for her to falsely implicate them. It is also not a case that she did so at the behest of some other person, who may be inimically disposed towards the respondents. The prosecution has disclosed the manner in which she was being taken from place to place which finds some corroboration from the testimonies of the other witnesses and, thus, we can safely arrive at a conclusion that at least at this stage her evidence should not be rejected outrightly.

"31. Parameters for grant of anticipatory bail in such a serious offence, being under sections 376, 376 (2)(g) IPC, in our opinion, are required to be satisfied. (See e.g. D.K.Ganesh Babu v. P.T.Manokaran - (2007) 4 SCC 434).

4.5 Dwelling on the issue of necessity of custodial interrogation, learned counsel relied upon judgment of the Supreme Court in State (CBI) v. Anil Sharma [(1997) 7 SCC 187] and emphasized:

"6. We find force in the submission of the CBI that custodial interrogation is qualitatively more elicitation-oriented than questioning a suspect who is well ensconced with a favourable order under section 438 of the Code. In a case like this, effective interrogation of a suspected person is of tremendous advantage in disinterring many useful informations and also materials which would have been concealed. Success in such interrogation would elude if the suspected person knows that he is well protected and insulated by a pre-arrest bail order during the time he is interrogated. Very often interrogation in such a condition would reduce to a mere ritual. The argument that the custodial interrogation is fraught with the danger of the person being subjected to third-degree methods need not be countenanced, for, such an argument can be advanced by all accused in all criminal cases. The court has to presume that responsible police officers would conduct themselves in a responsible manner and that those entrusted with the task of disinterring offences would not conduct themselves as offenders.

"8. .....At any rate, the learned single Judge ought not to have side-stepped the apprehension expressed by the CBI (that the respondent would influence the witnesses) as one which can be made against all accused persons in all cases. The apprehension was quite reasonable when considering the high position which the respondent held and in the nature of accusation relating to a period during which he held such office."

4.6 As for the ground of parity, learned counsel Mr.Panchal relied upon following observations made by this Court in Dineshkumar Vasudev Nayak v. State of Gujarat [2003 (2) GLH 274]:

"4. .....All judicial and quasi-judicial authorities have not only to serve the public but also to create confidence in the minds of the public. It is, however, also observed in the same judgment

that all the accused of a case always do not stand on the same footing. While considering bail of different accused, the court has to find out whether they stand on the same footing or not. Even if role assigned to various accused is same yet they may stand on different footing. .....Nevertheless the principle of grant of bail on parity cannot be allowed to be carried to an absurd or illogical conclusion so as to put a Judge in a tight and strait-jacket to grant bail automatically.....

"5. .....Apart from that, parity cannot be pressed only on the basis of similarity in the role ascribed to the different accused persons since decision on a bail application depends on several other factors, including the personal circumstances of the accused person and his record of behaviour before and after commission of the offence. Therefore, strictly speaking, the rule of parity can be applied only in cases where not only the role in the particular offence is found to be similar but the circumstances of the petitioner and other relevant factors are broadly at par. ...."

5. Concluding and summarizing his arguments, learned counsel Mr.Panchal submitted that during the course of investigation, the SIT was, prima facie, fully satisfied about the presence and role of the respondents in and during the commission of serious offences, their attempts at tampering with the evidence and their non co-operation with the investigation to the extent that notices under section 160 of Cr.P.C. could not be served upon them. It was submitted that in the peculiar facts of prolonged investigation by the State agencies and further investigation under the orders of the Apex Court by an independent team, there were bound to be some minor discrepancies in the statements of eye witnesses and victims who were homeless and bereaved residents of relief camps in the immediate aftermath of riots. Relying upon judgment of the Supreme Court in Dinesh M.N. (S.P.) v. State of Gujarat [2008 (3) GLR 2310], it was submitted that if irrelevant materials were considered, it added vulnerability to the order granting bail. Once it was concluded that bail was granted on untenable grounds and relevant materials were kept out of consideration, the plea of absence of supervening circumstances would have no leg to stand. It was submitted that for constituting the offence under section 149 of IPC, an overt act on the part of accused is not required, as held by the Apex Court in Sunil Kumar v. State of Rajasthan [2005 SCC (Cri.) 1230]. In the facts emerging from the record, it was clear that the respondents were leaders and had taken a leadership role in inciting the mob which attacked absolutely innocent persons, according to the submission. It was also submitted that the respondents were, by virtue of their position and influence, already kept away from the investigating agency of the State and hence the apprehension of their wielding effective influence on the witnesses was real and perfectly plausible. It was also pointed out that no sooner their alibis were fully investigated and their presence was satisfactorily established by independent record of location of their mobile phones at the relevant time, they had become unavailable to the SIT and approached the Court for anticipatory bail, rather than even responding to the call of the SIT.

6. Arguing for the respondents, learned senior counsel Mr.S.V.Raju, Mr.Y.N.Oza and Mr.Mahesh Jethmalani vehemently submitted, in effect and substance, that the respondents being prominent leaders in politics and public life, a conspiracy was carried on to implicate them in serious offences and permanently ruin their prestige and career. Learned counsel were at pains to show from perusal of the statements of witnesses, used as material against them, that not only

were there serious discrepancies and contradictions between any two statements but even in the successive statements of the same witness. A story was being evolved by successive statements belatedly ascribing more and more serious role to the respondents, according to the submission. It was contended that even as several NGOs and interested persons were helping and assisting the witnesses in the relief camps, the respondents were not named or implicated by the witnesses at that time in their complaints or representations. And in their statements and grievances expressed in the affidavits filed before the Supreme Court which were drafted by lawyers and social activists, the witnesses had not made the statements which were now made before the SIT after more than six years of the offences. Therefore, in short, the material placed before the Court in the form of statements of witnesses was not reliable, according to the submission. It was also submitted that the time of presence of the respondents in or near the mob could not, anyhow, tally with the independent documentary evidence of record of the location of mobile phones of the respondents and some of the witnesses were obviously interested witnesses and political rivals. It was, on that basis, submitted that there was an attempt at framing the respondents by constantly improving the prosecution case, while the respondents were ready and willing to co-operate with the investigation and unlikely to abscond.

7. It was also submitted for the respondent that cancellation of bail already granted by exercise of judicial discretion was on a different footing and required more serious consideration, even as the applications for cancellation of anticipatory bail were not maintainable under the provisions of sub-section (2) of section 439 of Cr.P.C. It was submitted that that provision clearly envisages arrest of the accused person who has been released on bail under the provisions of Chapter XXXIII of Cr.P.C.; whereas no direction to arrest a person who has been granted anticipatory bail could be issued. Relying upon judgment of the Supreme Court in M.C.Abraham v. State of Maharashtra [(2003) 2 SCC 649], it was submitted that even in case where anticipatory bail is not granted, an order to arrest does not necessarily follow. Emphasizing the factor of lapse of six years and earlier investigation by high-ranking officers, pending petitions before the Supreme Court, it was submitted that the statements of some witnesses and other material collected during the course of earlier investigation could not be ignored and the absence of any material therein against the respondents would weigh with the court in exercise of judicious discretion in favour of the respondents who were, at the worst, alleged to be present for some time at the scene of the offence.

7.1 Relying upon Constitution Bench decision of the Supreme Court in Shri Gurubaksh Singh Sibbia v. State of Punjab [(1980) 2 SCC 565] and decision of this Court in Solanki Ravibhai Dipubhai v. State of Gujarat [1992 (1) GLR 631], it was submitted that even in a case of serious offence, such as murder, Court has absolute discretion to grant anticipatory bail if the circumstances broadly justified the grant. It was vehemently argued by all the three learned counsel that none of the witnesses and their statements were reliable if they were put to judicial scrutiny even for the purpose of formation of a prima facie opinion about involvement of the respondents in any of the alleged serious offences. It is not even the case of the SIT that the respondents had indulged themselves in any act of violence and admittedly the alleged killing and arson in both the cases had taken place after the respondents had left the scene, according to the submission. Relying upon judgment of the Supreme Court in Nawab Ali v. State of Uttar

Pradesh [(1974) 4 SCC 600], it was submitted that it was incumbent upon the prosecution to show that the person concerned was a member of the unlawful assembly at the time of commission of the offence. If the person concerned goes away and ceases to be a member of the unlawful assembly before commission of the offence, no vicarious liability could be fastened upon him under section 149 of IPC because of any subsequent act done by the other members of the unlawful assembly. It was, on that basis, submitted that there were no good and sufficient reasons to overturn the impugned orders so as to expose the respondents to humiliation of arrest and custodial interrogation.

7.2 It was further submitted for the respondents that, even as the SIT had taken over the investigation since long and several charge-sheets were already filed, the respondents were not ever charge-sheeted and there was no new material justifying their arrest now. That the witnesses were suffering from political mala fide insofar as the persons having interest adverse to the respondents were made to make statements implicating the respondents. That even the witnesses who had filed their affidavits earlier before the Supreme Court making grievances about the investigation had not named the respondents or ascribed them roles which they were now ascribing in the statements before the SIT. Therefore, this Court ought not to allow custodial interrogation of the respondents on the basis of unreliable and contradictory versions of volatile witnesses who have all throughout been helped by interested NGOs and professional advocates. It was repeatedly argued that none of the statements on which the petitioner relied would stand a judicial scrutiny and they would stand thoroughly discredited before the Court by virtue of the discrepancies and improvements in their own statements. Adding to the arguments of learned senior counsel for the respondents, learned counsel Mr.Amin submitted that four of the witnesses relied upon by the petitioner were in fact persons accused of murder in Criminal Case No.254 of 2004, related to the same riot case, even as admittedly they were acquitted. It was also argued by learned senior advocate Mr.Oza that the statements relied upon by the SIT were not in fact recorded by the officer named in the order dated 26.3.2008 of the Apex Court and hence such recording of statements by any officer other than the officers constituting the SIT were non-est or could not be relied.

8. Examining the controversial material and circumstances appearing against the respondents against the backdrop of above contentions, it is clear and undisputable that in the first case registered as C.R.No.100 of 2002 (Naroda Patia), 98 persons were killed and in the second case, C.R.No.98 of 2002, 11 persons were killed and many persons were injured in both the cases. The FIRs appeared to have been registered on the same day while the riots and arson and looting had still not ceased. It could also not be disputed that members of the minority community were fleeing from the scenes of the offences and taking shelter elsewhere or in the relief camps set up for the riot affected people. The statements or complaints made by such victims of the riots in such circumstances have to be read in the context of the prevailing situation and the state of affairs in which names of prominent persons like the respondents were clearly alleged to have been omitted from their statements by the investigating officer and the complaints about such investigation had led to filing of petitions before the Supreme Court and ultimately the constitution of SIT after six years. Therefore, absence of important details about the offences or names of the respondents in the earlier statements or complaints made before the investigating

agencies or the lapse of time of six years could not by itself make the subsequent statements of the same witnesses contradictory or unreliable. However, it is not that no witness has ever implicated the respondents before the investigation by SIT. No less than six witnesses have mentioned the names of the respondents in the year 2002 itself. Therefore, the argument that the respondents are being implicated for the first time by or through the SIT cannot be accepted at this stage. In both the cases, there are statements of witnesses indicating that a huge crowd armed with weapons had gathered at the scene of the offences when the respondents had reached and they had incited and instigated the mob into attacking the area populated by minority community. The respondents were identified as operating with the mob after coming to the spot by particular vehicles and several victims had fallen to the bullets of the police, while one of the respondents was present. It is also alleged that the respondents had offered weapons or cans of inflammable liquid and subsequently intimidated some of the witnesses for removal of the name of one of the respondents presumably from the list of persons being implicated during investigation by the SIT. It has been clearly alleged that the names of the respondents were not being recorded by the investigating officer while earlier statements were recorded in the year 2002.

9. However, it is also true that presence of the respondents at the scenes of the offences is alleged to be for a limited period and the hours of their presence in the mob widely vary from statement to statement. It was in that context that the plea of alibi was forcefully pressed to firstly claim that very presence of the respondents at the time of offence was doubtful and the witnesses stood discredited only on account of impossibility of the respondents being present at the time mentioned by the witnesses. It is also true that there are discrepancies among the statements of witnesses as far as roles ascribed to the respondents are concerned and no definite conclusion as regards actual activity and words spoken by the respondents could be drawn. At the same time, admittedly, record of location of the mobile phones of the respondents indicated that the mobile phone of Dr.Kodnani was switched off between 07.53 a.m. to 09.57 a.m. on 28.2.2002. Her presence was noted at the Legislative Assembly in Gandhinagar at 08.40 a.m. and thereafter the first call was received by her at 09.57 a.m. and it was recorded at the tower several kilometers away from Naroda area. However, even after making necessary discount for traveling time from the Legislative Assembly to Naroda area and from Naroda area to the place where the first call at 09.57 a.m. was received, she could have been in Naroda area for around 40 minutes in the morning of 28.02.2002. Similarly, by virtue of the call record, she could be presumed to have been in Naroda area in the afternoon. In the case of second respondent, the record of location of his mobile phone also indicated his presence in Naroda area at least from 10.11 to 11.18 and 12.25 to 12.37 hours. And, no less than 14 witnesses have alleged that he indulged in inciting the mob which was armed and shouting provocative slogans to mount violent attack on the members of minority community.

10. Taking an overall view of the material briefly narrated hereinabove and, following Satish Jaggi (supra), avoiding a detailed analysis of the statements of witnesses with all the alleged exaggerations, improvements, discrepancies and contradictions, it could be reasonably concluded

that, prima facie, there was sufficient material to implicate the respondents in very serious offences and to fully and fairly investigate further. Even as learned counsel on both sides extensively referred to the voluminous material in the form of statements of a number of witnesses to support their arguments on the issue of prima facie case against the respondents, it was evident that different witnesses and victims making statements at different points of time and claiming to have witnessed the activity of the respondents from different standpoint at different locations and time could not have produced an accurate or perfectly consistent account of exact time, location and role of the respondents. However, their presence in, and incitement of the mobs which were violently active has fairly clearly stood out from the number of statements of witnesses and victims, even after considering the discrepancies emphasized and doubts raised about reliability of the witnesses. There are no less than 40 statements of witnesses which directly name the respondents in one or the other or both the cases. In fact, some of the statements of the witnesses, such as Habib U. Mirza, indicate some prior-planning and preparation for carrying out the riots even as police force was approached by the victims for help and it was present at the scenes of the offences. It is of a piece with the submission that some of the police personnel concerned were now being implicated and that puts the earlier investigation by local officers in a shade and under the cloud of serious doubt. Under such circumstances, a more intensive investigation and custodial interrogation of important persons may be reasonably called for.

11. As for the argument that the petitions were not maintainable under sub-section (2) of 439 of Cr.P.C., it was seen that the provisions of sub-section (2) of section 439 were there in the earlier Code of 1898, whereas section 438 was later on included in Chapter XXXIII of Cr.P.C. along with renumbered provision for cancellation of bail. Since the provision of sub-section (2) of section 439 applies to the cases of bail granted under that Chapter, it may as well apply to the grant of anticipatory bail under section 438. However, even if literal interpretation is put upon the language in which the provision is couched, inherent powers of the High Court acknowledged in section 482 of Cr.P.C. could always be invoked in the aid of an order required to secure the ends of justice and for preventing abuse of the process of any court. As observed by the Supreme Court in Pepsi Foods Ltd. v. Special Judicial Magistrate [AIR 1998 SC 128], nomenclature under which petition was filed was not quite relevant and that did not debar the Court from exercising its jurisdiction which otherwise it possessed unless there was special procedure prescribed which procedure was mandatory. If in a case the Court finds that the appellants could not invoke its jurisdiction under Art. 226, the Court can certainly treat the petition as one under Art. 227 or S. 482 of the Code. It may not, however, be lost sight of that provisions of revision and appeal exist in the Code, but sometimes, for immediate relief, S. 482 of the Code or Art. 227 may have to be resorted to for correcting some grave errors found to have been committed by the subordinate Courts.

12. The modalities of investigation to be conducted by the SIT is expressly directed to be worked out by it and the grievance about recording of statements by officers other than the members of SIT has to be stated to be rejected because no injunction against recording of statements by other officers enrolled by the SIT could be found or read in the aforesaid order of the Supreme Court. It could not be gainsaid that the SIT had no axe to grind except discharging the duty of

submitting a proper report of investigation and minor discrepancies in the statements of witnesses would only add to their credibility, in the peculiar facts and circumstances of the case. The major omissions or inconsistencies in the statements of the same witnesses, during the earlier investigation and during the investigation by SIT, indicate the inadequacy or impropriety of the earlier investigation necessitating the constitution of SIT by the Supreme Court after five years of pendency of the petitions before it and also indicate that prominent people could have successfully influenced the investigation to keep their names away from being mentioned during the earlier investigation.

13. Considering all the contentions and averments made on both sides as also the material appearing against the respondents, it is clear and not in serious dispute that the respondents were, at the relevant time, prominent leaders of VHP which had called the bandh, or of the party in power and they were present at the scenes of offences for some time. It is also in evidence that violent mobs had gathered with weapons and the atmosphere was surcharged with anger and hatred following burning of a railway coach along with passengers at Godhra on the previous day; and 54 burnt bodies being brought to Ahmedabad on 28.2.2002. The attitude and activities of the respondents in that milieu is not even claimed to be towards quelling or controlling the mobs nor is it believable that they visited the scenes of offences for any personal or private purpose. In such circumstances, prima facie, the allegations of inciting or encouraging the mobs into wanton display of hatred, destruction of properties and killing of innocent men, women and children produce a chilling picture of communal violence on an unprecedented scale, leaving on the psyche of ordinary citizens scars which might take decades to fade. Therefore, the offences which are alleged to have been committed by faceless mobs of thousands of persons led by few have to be treated as very heinous and having far reaching implications. As recently observed by the Apex Court in State of Punjab v. Rakesh Kumar [2008 (12) SCALE 95: "....For instance, a murder committed due to deep-seated mutual and personal rivalry may not call for penalty of death. But an organized crime or mass murders of innocent people would call for imposition of death sentence as deterrence.....". While such crimes are investigated by one after the other agency and matters have reached upto the highest court for redressal of grievances about investigation, there is no doubting that the belated investigation must not be hampered by providing protective umbrella to the persons who may be found to be involved.

14. The exercise of judicial discretion in favour of the respondents, who are ascribed leadership roles, on irrelevant grounds of they having not tampered with the evidence or being unlikely to commit other offence was highly improper and perverse and calls for interference, particularly when the investigation is still underway and the respondents still hold the status or position from where they can influence the witnesses. The relevant considerations for grant of anticipatory bail, viz: gravity of the offence, status and position of the accused persons, stage of investigation, likelihood of evidence being tampered, wider interest of justice and public at large and prima facie case appearing against the accused persons as also severity of punishment to which they may be exposed, are disregarded in the impugned orders making them even more vulnerable. The distance in time from the date of the alleged offences to the present stage of investigation is unfortunate and attributable to the failure of law-enforcement agencies, but it cannot derogate from the requirements of bringing to book all the persons who might have had a role in rudely

disrupting the lives of millions of citizens eking out their living in harmony in a progressive state of secular democratic republic of India. As observed by the Supreme Court in its order dated 26.3.2008 (supra): ".....Communal harmony is the hallmark of democracy..... If in the name of religion people are killed, that is absolutely a slur and blot on the society governed by the rule of law..... Religious fanatics really do not belong to any religion. They are no better than terrorists who kill innocent people for no rhyme or reason.....". And, when the State Government is pursuing the proceedings for proper investigation by the SIT constituted by the Supreme Court and consisting of independent high-ranking and experienced officers, the contention without any supporting material that there is a conspiracy to frame the respondents cannot be countenanced.

15. Therefore, in the facts and for the reasons discussed hereinabove, the petitions are allowed and impugned judgment and orders dated 05.02.2009 in Criminal Misc. Applications No.277, 278 and 279 of 2009 are set aside. Rule in each petition is made absolute with the clarification that the conclusions drawn and observations made hereinabove are for the limited purpose of deciding the petitions and may not necessarily be applicable at a different stage in a different context. Misc. Criminal Applications No.2015, 2109 and 2018 of 2009 are disposed as not pressed by learned counsel Dr.Sinha as he only proposed to, and was permitted to, emphasize and highlight a few points which were argued by learned Special Public Prosecutor Mr. Panchal.

Sd/-

( D. H. Waghela, J.)

Upon this judgment being pronounced today, learned senior counsel Mr. Raju prayed for staying the operation of this judgment for a period of six weeks. There being no justification for grant of such relief, the request is rejected.

Sd/-

( D. H. Waghela, J.)