Judgement of the Gujarat High Court in BEST Bakery Case
Justices B J SETHNA ,J and J R VORA
December 26, 2003/ January 12, 2004

Jan 12 16:25 2004 Order dated 26/12/2003 for CR.
A / 956/2003 Page 1

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 956 of 2003

With

CRIMINAL MISC. APPLICATION No 7677 of 2003

With

CRIMINAL MISC. APPLICATION No. 9825 of 2003

For Approval and Signature:

HON'BLE MR. JUSTICE B. J. SHETHNA
and
HON'BLE MR. JUSTICE J. R. VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
2. To be referred to the Reporter or not? : YES
3. Whether Their Lordships wish to see the fair copy of the judgement? : YES
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
5. Whether it is to be circulated to the concerned Magistrate / Magistrates, Judge/ Judges, Tribunal / Tribunals? : YES

STATE OF GUJARAT
Versus
RAJUBHAI DHAMIBHAI BARIYA

Appearance:

MR SN SHELAT, ADVOCATE GENERAL for Appellant State
MR NITIN M AMIN for Petitioner No. 1
MR UA TRIVEDI for Petitioner No. 1
MR. SUSHIL KUMAR, SENIOR COUNSEL FOR
MR SV RAJU for Respondent No. 1, 15-16
MR BS PATEL for Respondent No. 2
MRS RANJAN B JPATEL for Respondent No. 2
MS ASHA D TIWARI for Respondent No. 2
MR ASHUTOSH R BHATT for Respondent No. 3-4,
MR HARESH J TRIVEDI for Respondent No. 5,14
HL PATEL ADVOCATES for Respondent No. 6-7
MR MJ BUDDHBHATTI for Respondent No. 8-9
MR NK MAJMUDAR for Respondent No. 10, 12, 17, 19
MR SK PATEL for Respondent No. 11
MR HD VASAVADA for Respondent No. 12
MR KIRAN D PANDEY for Respondent No. 13
MR BHARGAV N BHATT for Respondent No. 18
MR PUSHPADATTA VYAS for Respondent No. 21

CORAM : HON'BLE MR. JUSTICE B. J. SHETHNA
and
HON'BLE MR. JUSTICE J. R. VORA

Date of decision : 26/12/2003

ORAL JUDGEMENT (Per : HON'BLE MR. JUSTICE B. J. SHETHNA)

1. Against the judgement and order of acquittal dated 27.6.2003 passed by learned Additional Sessions Judge , Fast Track Court No. 1, Vadodara, in Session Case No. 248/2002 acquitting the respondents accused for the offences punishable under Sections 147, 149, 188, 504, 342, 427, 436, 395, 307, and 302 of the IPC, the appellant – State of Gujarat has files the above Appeal. Thereafter, the State of Gujarat had filed the above Criminal Misc. Application No. 9677/2003 in the said Appeal and prayed that the appellate – State be permitted to produce the affidavits of four witnesses, namely, (i) Zahirabibi, Exh. 46, (ii) Sairabanu Habibulla Shaikh, Exh. 39, (iii) Sahejadkhan Hasankhan, Exh. 124 and (iv) Mohmad Asaraf Shaikh, Exh. 123 on record and further evidence of the witnesses be permitted to be recorded and also be ordered retrial after quashing the entire proceedings. Thereafter, another criminal Misc. Application No. 9825 of 2003 was filed in the said Appeal by the State of Gujarat and prayed that it may be permitted to place on record the documents at "Annexure-A Colly", in the appeal, and the same may be considered as corroborative piece of evidence. The said application is filed under Section 391 read with Section 311 of the Criminal Procedure Code, 1973.

2. As per the hope expressed by the Hon'ble Supreme Court, when the matter was placed before this Court on 19.12.2003, we immediately started hearing of the Appeal as well as both the above applications and heard learned Advocate General Shri S. N. Shelat for the appellant State of Gujarat as well as learned defence Counsel Shri Sushil Kumar appearing for all the respondents, accused for almost about a week and today at the fag end of the day, the marathon hearing of these matters has come to an end.

3. Having heard Shri. S. N. Shelat, learned Advocate General for the appellant State of Gujarat and Senior Advocate Shri. Sushil Kumar appearing as counsel for all the Advocates of the respondents accused we are fully convinced that there is no substance in all these matters including the Appeal and, therefore, they are required to be dismissed with detailed reasoned order as the matters were argued for several days before us. We would have liked to assign reasons and passed the detailed judgement in the open court, but today being the last day before the Winter Vacation and Court will be reopening only from January 12, 2004, therefore, we thought it fit to defer the assigning the reasons after Winter Vacation, while dismissing all these matters.

4. Having heard the learned Counsel for the parties, we are of the considered opinion that the Appeal as well as Criminal Misc. applications are required to be dismissed and accordingly they are dismissed. Today is the last day before Winter Vacation. Reasons to follow, Accordingly this Appeal as well as both the applications stand dismissed. Bail bonds of the respondents – accused stand cancelled.

R E A S O N S

Hearing of this appeal and applications commenced on 19.12.2003, and thereafter we continuously heard these matters on 20th, 22nd to 24th and 26th of December, 2003. From 27th December, 2003 to January 11, 2004, Court had to remain closed because of the Winter Vacation, therefore, on the fag and of the day i.e. 26.12.2003, without assigning any reasons, all these matters were dismissed and "Reasons" were to follow. Now, we are assigning detailed reasons for the dismissal of these matters.

1. At the outset, it may be stated that, learned Senior Advocate Shri Sushil Kumar, appearing as Counsel for all the learned Advocates of the respondents accused, had vehemently submitted that the State of Gujarat had filed the Appeal against the impugned judgement and order of acquittal, passed by the learned Trial Judge, only because it was challenged by National Human Rights Commission (for short 'NHRC") before the Supreme Court on 8.8.2003. he submitted that the impugned judgement and order of acquittal passed by the learned Trial Judge is absolutely just, legal and proper, and in normal circumstances, it should have been accepted by the State, but under the compelling circumstances, the State had filed this Appeal and put all the respondents accused to a great economic loss and undue harassment. He also submitted that NHRC, which is an AUGUST Independent Institution, ought not to have taken undue interest, in the matter and straightway approached the Supreme Court. He also submitted that it was very much doubtful whether Institution like NHRC can become litigant before any court. According to Mr. Sushil Kumar, NHRC has no locus standi to challenge the impugned

judgement and order of acquittal straightway before the Supreme Court by way of SLP by bypassing the High Court. He also submitted that sofar the Hon'ble Supreme Court has not finally adjudicated the question as to whether such SLP against the judgement and order of acquittal passed by the Trial Judge is maintainable before it under Article 136 of the Constitution or not? therefore, this Court should not hear and decide this acquittal appeal till the matter pending before the Supreme Court is finally decided. He also submitted that the Trial Court is subordinate to this Court under the Constitution, therefore, this court can always issue any directions to the Trial Court, but this Court, is not subordinate to the Supreme Court. He submitted that the Supreme Court can only quash and set aside the judgement and order passed by this Court, in its power under Article 136 of the Constitution, but it cannot issue any direction to this Court to hear and decide the Appeal at the earliest. He, therefore, submitted that such directions issued by the Supreme Court, should not be taken seriously, and the acquittal appeal be heard in normal course, as there is no urgency in the matter. He also submitted that this Court is taking up old criminal conviction appeals of 1990 onwards, where the accused persons are in jail since number of years, therefore, preference should be given to those matters in which accused are lingering in jail since years and not to this acquittal appeal. He also submitted that till the SLP filed against the impugned is not decided by the Supreme Court, this Court should not decide the State Appeal filed against the order of acquittal passed by the Trial Court because by keeping SLP pending before it against the same judgement and order of acquittal, indirectly undue pressure is brought on this court. He also submitted that this Court may not decide the State Appeal till the Supreme Court finally disposed of SLP pending before it, as sofar the Supreme Court itself has not decided the maintainability of such SLP filed directly against the judgement and order of acquittal passed by the Trial Court before it. Alternatively, he submitted that if this Court does not accept any of the preliminary objections about the hearing of the appeal and decide to hear and dispose of the Appeal, then, without being swayed away of the observations made by the Supreme Court, in its order passed in SLP and other cases, it may decide the said Appeal and the applications filed in it only on merits and in advocates with Criminal Law, which is prevailing in this Country till the day.

The State of Gujarat has filed this Appeal against the impugned judgement and order of acquittal passed by the Trial Court, but it cannot be said that because NHRC challenging the impugned order of acquittal passed by the Trial Court directly before the Supreme Court by way of SLP, therefore, under pressure or duress, the State had to file this acquittal appeal before this Court. It may also be stated that the impugned judgement and order of acquittal was passed by the Trial Court on 27.6.2003, period of limitation to file an Appeal against an order of acquittal was 90 days in the State of Gujarat, which period would have expired somewhere on 25.9.2003. As we all know that before filing the appeal and challenging the order of acquittal, lengthy procedure has to be followed. After receiving the judgement and order of acquittal, the Public Prosecutor, who conducted the case, has to apply his mind and having carefully gone through the same, if he is satisfied, then, he may recommend the case for filing appeal against the order of acquittal to the State through the concerned authority. On receiving his opinion, the Legal Department may consider the proposal and decide as to whether appeal should be filed or not? under the circumstances, if the appeal is filed against the judgement and order of

acquittal passed by the Trial Court by the State of Gujarat in this Court on 7.8.2003, then, by no stretch of imagination, it can be said that under compulsion of duress the state had filed the acquittal appeal in this case.

When the matter filed by NHRC against the judgment and order of acquttal passed by the Trial Court is pending before the Hon'ble Supreme Court, and the Hon'ble Supreme Court itself has kept the question open regarding the maintainability of such appeal before it, then, it would not be proper on our part to express any opinion about the contention raised by learned Senior Advocate Mr. Sushil Kumar on locus standi on NHRC.

It is true that sofar the Hon'ble Supreme Court has not adjudicated the question, whether such SLP before it against the impugned judgement and order of the Trial Court is maintainable or not? However, we are of the considered opinion that merely because of the case is pending before the Apex Court, that fact itself should not debar us from hearing and deciding the State Appeal.

It is also true that this Court is taking up old conviction appeals of 1990 onwards, where the accused are in jail since number of years. It is also true that this Court is not subordinate to the Hon'ble Supreme Court. It is also true that the matter had not gone to the Supreme Court against the order passed by this Court, in which such directions are issued. It is also true that the matter is still pending before the Hon'ble Supreme Court against the judgement and order of acquittal passed by the Trial Court. But, we are fo the considered opinion that merely because the Hon'ble Supreme Court has thought it fit to keep the matter pending before it, it can never be said that undue pressure is brought on this court to decide the State Appeal. It is wrong to say that this court may not be able to decide the appeal strictly in accordance with law because matter is pending before Supreme Court. It is undermining the independence of this Court.

2. Learned Advocate General Shri Shelat had brought to our notice the order dated 17.10.2003 passed by the Hon'ble Supreme Court in Writ Petition (Criminal) No. 109/03, wherein it is observed by the Hon'ble Supreme Court that, "We hope that the hearing of the appeal will commence on 1st December, 2003 and the matter will be decided expeditiously."

From the bare reading of the order dated 17.102003 passed by the Hon'ble Supreme Court, it is more than clear that, the Hon'ble Supreme Court, has not issued by direction to this Court to decide the Appeal at the earliest. It has only expressed hope that the hearing of the appeal may commence on 1st December, 2003 and the matter be decided expeditiously. It may be stated that while admitting this Appeal, Division Bench of this Court (Coram: D. K. Trivedi & M. S. Shah, JJ) had fixed the hearing of the Appeal on 1st December, 2003. On that day, it was placed before another Division Bench of this Court (Coram: K.R. Vays & K.M. Mehta, JJ). and that being the first day of hearing and time was prayed for by the Advocates of the accused for preparing themselves in the matter, therefore, as stated by the learned Advocate at the Bar, the hearing of the matter was kept on 17.12.2003. However, on 17th December, 2003, when it

was placed before another Bench (Coram: K.R. Vyas & A.L. Dave, JJ), Hon'ble Mr. Justice A. L. Dave had exception to the hearing of this Appeal and, therefore, the matter was placed by the office of this court before the Hon'b;e Chief Justice on the Administrative side for placing it before the appropriate Bench. Thereupon, the Hon'ble Chief Justice ordered to place these matters before another Division Bench (Coram: J. M. Panchal and M.C. Patel, JJ). Accordingly, the matter was placed by the office on 18.12.2003 before Hon'ble Mr. Justice J. M. Panchal, senior member of the Bench, for obtaining convenient date and time of His Lordships for hearing of these matters. However, J. M. Panchal, J. M. the ordered that the matter may receive consideration by a Bench of which he is not one of the members. In view of the endorsement made by J. M. Panchal J. the matter was immediately placed it once again before the Hon'ble Chief Justice of this Court on that very day i.e. on 18.17.2003. Thereupon, the Hon'ble the chief Justice passed an order on that very day i.e. on 18.12.2003 to post these matters before this Division Bench on 19.12.2003. Accordingly, it was placed before us.

Due deference to the hope expressed by the Hon'ble Supreme Court, immediately, we started hearing of these matters and continuously heard it for six days. We may also state that the Hon'ble Supreme Court has also made it clear in its order dated 17.10.2003 that it has not expressed any opinion or made any observation as regards the merits of the criminal appeal pending before this court. It has also observed that in case any observation made by it, then it will not come in the way of the High Court while deciding the appeal on merits. Thus, there is no substance in the submission of learned Senior Counsel Shri Sushil Kumar that the Hon'ble Supreme Court had issued directions to this court treating it as subordinate court. There is also no substance in the submission that by keeping SLP pending, undue pressure is brought on this court to decide the appeal, and that this court may not be able to decide the appeal on merits and strictly in accordance with the Law prevailing today in the country.

3. Mr. Sushil Kumar. Learned Senior Advocate then submitted that NHRC had directly approached the Supreme Court against the impugned judgement and order passed by the Trial Court in this case only because of media hype, though the impugned judgement and order of acquittal passed by the Trial Court is just, legal and proper. He had gone to that extent by submitting that media and some, without any basic knowledge and concept of Criminal Law, have almost found the accused guilty much before the state appeal filed against the impugned judgement and order of acquittal passed by the Trial Court under Sections 386 of the Criminal Procedure Code was even heard and decided by this High Court, which is highly improper.

Mr. Sushil Kumar had vahemently submitted that it was unfortunate that none else but the Chairman of NHRC who is former Chief Justice of the Supreme Court of India, severely criticized the impugned judgement and order of acquittal passed by the learned Trial Judge. In this case immediately after the judgement was pronounced by the learned Trial Judge, without even looking at it he has called it miscarriage of justice. He submitted that inspired by this, one and sundry, started to even looking at it or applying their mind and understanding the correct position of law. He had also submitted that it was highly improper on the part of the Chairman of the NHRC to call the judgement as

miscarriage of justice, which may even amount to contempt of the court. He had also submitted that when the Chairman of Court. He had also submitted that when the Chairman of the NHRC realized his mistake after going through the judgement and order of acquittal, then, only with a view to save the situation, under the compelling circumstances, he decided to approach the Supreme Court and accordingly matter was filed by NHRC before the Supreme Court and the impugned judgement and order of acquittal passed by the learned Trial Judge has been challenged by bypassing this High Court. He also submitted that after the Chairman of the NHRC made the statement that the judgement and order of the learned Trial Judge amounts to miscarriage of justice, then there was a tremendous pressure on him from media, therefore, though the judgement and order of the learned Trial Judge was absolutely just, legal and proper and there was no miscarriage of justice, NHRC had to approach the Supreme Court directly against the judgement and order of acquittal passed by the Trial Court. He, therefore, submitted that this Court may straightway dismiss the appeal and the applications filed in it as there is no substance in any of it.

Whether the aforesaid statement made by the Chairman of NHRC immediately after the pronounced of the judgement and order of acquittal by the Trial Court, amounts to contempt of court or not? Whether the NHRC could directly approach the Hon'ble Supreme Court against the impugned order of acquittal passed by the Trial Court or not? and all other questions raised by Mr. Sushil Kumar cannot be answered by this Court because matter filed by the NHRC is very much pending before the Hon'ble Supreme Court and we are of the considered opinion, that this court is not forum, where such questions can be raised.

Media is not a party before this Court, therefore, it would not be proper on our part to express our opinion about it. But, we must state that this court is the highest court of the State and by no stretch of imagination, it can be said that because of the media, this court is likely to be swayed away and decide the appeal not on merits or not in accordance with law. It is undermining the independence of the Judges of this court, who have always decided the cases without fear or favour and without being influenced by anything, strictly only in accordance with law. This case is also decided only on merits and strictly in accordance with law, after hearing both the learned counsel Shri S. N. Shelat, learned Advocate General for the State of Gujarat appellant and defence counsel i.e. Shri Sushil Kumar for the respondents accused.

4. This bring us to the submissions made by the learned Advocate General in support of his case in acquittal appeal i.e. Criminal Appeal No. 956 of 2003.

Learned Advocate General Shri Shelat, firstly, submitted that under section 386 of the Criminal Procedure Code, 1973 (for short "Code"), this court being appellate court, has power under Clause (1) of Section 386 to order the retrial. In this case, according to Mr. Shelat, learned Advocate General, this court should consider this case as an exceptional case, which requires retrial in view of the lapses on the part of the Investigating Agency, Prosecution and the learned Trial Judge, who conducted the trial in this case. In support of his submission, learned Advocate General submitted that (i) one

witness after another resiled from their statements giving rise to a reasonable suspicion that they have been coerced into doing so; (ii) the Hon'ble Supreme Court and the Prosecutors have not put proper questions to the witnesses who were declared hostile as to ascertain why they were resiling; (iii) on the same day i.e. on 9.5.2003, four witnesses have been examined and they were declared hostile. Neither the court, nor the prosecutor, had taken any care about it when subsequently Zahirabibi examined on 17.5.2003 to see that she does not turn hostile. He submitted that it was the duty of the Public Prosecutor and the Court to give her protection when four witnesses have already turned on 9th May, 2003, and (iv) in all 73 witnesses were examined by the prosecution, but out of them, as many as 37 witnesses turned hostile including injured witnesses and eye witnesses to the incident as well as the panch witnesses. He submitted that it is difficult to believe that the injured witnesses, whose near relatives burnt alive or murdered in the incident, would not support the prosecution. This shows that the trial was not fail and it was heavily loaded in favour of the accused and the witnesses had not deposed fearlessly.

In support of his submission of setting aside the judgement and order of acquittal passed by the learned Trial Judge and ordering retrial, Mr. Advocate General had cited following judgements of the Hon'ble Apex Court and High Courts, which are as under:

(i) Raghunadan vs. State of U. P., reported in AIR 1974 SC 463.
(ii) State of Rajasthan vs. Ani @ Hanif, reported in AIR 1997 SC 1023.
(iii) State of Gujarat of vs. Mohanlal, reported in AIR 1987 SC 1321.
(iv) Rajendra Shamji Soni vs. Union of India, reported in AIR 1991 SC 134+.
(v) Ramanna vs. State of Maharashtra, reported in 2003 (4) Crimes 33.
(vi) Mohanlal Shamji Soni vs. Union of India, reported in AIR 1991 SC 1346.
(vii) State of Gujarat vs. Satwara K. Mavji, reported in 1993 (1) GLH 171.
(viii) Gulammohmed Mohmed Yusuf vs. State of Gujarat, reported in 1994 (2) GLH 82.
(ix) Vishal Rajendra Trivedi vs. State of Gujarat reported in 1995 (2) GLH 1102; and
(x) State of Gujarat vs. V. N. Rajpara (Criminal Misc. Application No. 1863 of 2001.)

5. As against that learned defence counsel Shri Sushil Kumar for the respondents accused submitted that this Court has wide powers under section 386 of the Code for retrial of the case, but no ground is made out in this case for ordering retrial as submitted by the learned Advocate General. He submitted that in the instant case, now the opportunity cannot be given to the prosecution case to fill up the lacuna. In support of his submission, Mr. Sushil Kumar has relied upon the following judgements of the Supreme Court and other High Courts, which are as under :

(i) Machander vs. Hyderabad State, reported in AIR 1955 SC 792.
(ii) State of UP vs. Moti Ram and another, reported in AIR 1990 SC 1709.
(iii) Ramanlal Rathi vs. The State, reported in AIR (38) 1951 Calcutta 305.
(iv) Bir Singh and Others vs. State of Uttar Pradesh, reported in (1977) 4 SCC. 420.
(v) Akalu Ahir vs. Ramdeo Ram, reported in (1973) 2 SCC 583.
(vi) Yash Pal vs. State of Punjab, reported in 1990 Cri. LJ 746, and

(vii) R. N. Kakkar vs. Hanif Gafoor Naviwala and Ors., reportedin 1996 Cri. LJ 365.

There are no two opinions about the powers of this Court. As an appellate court under section 386 of the Code, this Court can always order retrial, provided there is a case for retrial, otherwise not. Hon'ble Supreme Court has time and again said that more restrain is necessary when you have wide powers. Keeping in mind the principle laid down by the Hon'ble Supreme Court , while considering the prayer for retrial, we have considered the facts of this case in detail and we are fully satisfied that this is not a cse where the retrial should be ordered.

6. Learned Advocate General Mr. Shelat has submitted that one after other witnesses turned hostile before the court, that was sufficient to raise a reasonable suspicion that under threat or coercion, they had turned hostile. This submission of learned Advocate General cannot be accepted for the simple reason that there may be more than one reasons for the witnesses from resiling from their so called statements made before the police. It is known to everyone that no signature of the witness is obtained below his / her statement recorded by the police under Section 161 of the Code. Signature is obtained only on the complaint. First of all, there is nothing to show that these witnesses had ever made their so called statements before the police and possibility of this case cannot be ruled out. If they had not made any statement before the Police, than, there was no question of resiling from their so called statements either under threat or coercion. It may also be stated that in all 37 witnesses were declared hostile, out of them seven were none-else but victims and eye witnesses, three of them had received injuries during the incident. All these 7 witnesses were from Uttar Pradesh and not knowing Gujarati, still their so called statements are recorded by the Police in Gujarati. It is not the case that the said statements of the witnesses recorded in Gujarati were read over and explained to them in Hindi. The possibility of these seven witnesses telling the truth before the Court in their evidence also cannot be ruled out because they were not only the victims but some of them were injured and lost their near and dear ones in the incident. It was the best opportunity for them to depose against the accused, if at all they had seen the respondents accused taking active part in the incident with other persons of the mob of m ore than 1000 to 1500 then they would have definitely identified the accused persons, who were very much present in the court, and deposed against them because in the court there was no threat or coercion. We are also not prepared to believe that other four eye witnesses escaped unhurt without any injury on their persons when Police claimed that they were also tied and beaten during the incident. It raises serious doubt about the investigation carried out by the Police in this case.

We failed to appreciate the submission of learned Advocate General that neither the Prosecutor nor the learned Judge had put any questions to the witnesses, who were not supporting the prosecution and tried to know from them that why they were not supporting the prosecution case. The Prosecutor is the guaroian of the society, who is concerned with punishing the guilty and saving the innocent. He has to protect the interest of the society and has to see that wrong doers must be punished, but at the same time, innocent persons should not be punished wrongly. Similarly, neither the Public Prosecutor nor the learned Trial Judge can put any leading questions to the witnesses.

Neither the prosecutor nor the learned Judge can cross their limits and become prosecutor.

7. Learned Advocate General then made a serious grievance that neither the Public Prosecutor not the learned Judge had taken any care to protect witness Zahirabibi, who was to be examined on 17.5.2003, especially when on 9.5.2003, as many as four witnesses, out of them 7 injured persons, turned hostile. This submission has no substance. On 17.5.2003, in all three witnesses including Zahirabibi were examined. Out of three witnesses, one was injured. It may be stated that if they were really threatened by any one prior to the recording of their evidence, then, they would have definitely complained about it at least to someone, but that is not the case. As stated earlier, it was very much doubtful whether the witnesses had ever made their statements before the Police or not? Zahirabibi's statement recorded on 2.3.2002 is in Gujarati and the same was treated as FIR by the Police, therefore, her signature was obtained below the same without reading it over and explaining the same to her in Gujarati. Zahirabibi has simply admitted her signature below her so called complaint, but she has clearly denied the contents of it. We are also not prepared to believe that she was threatened, therefore, she turned hostile because she deposed before the court on 17.5.2003. Trial continued thereafter and the learned Trial Judge pronounced the judgement only on 27.6.2003 after more than a period of one month. It is to be noted that immediately on the next day of the pronouncement of judgement, this witness Zahirabibi had made the statement that she was threatened, therefore, she had turned hostile before the court. We have serious doubt about it. If she can make such statement on the next day after the judgement was pronounced, then the question is, why she had not stated so till 27.6.2003 till the judgement was pronounced? When she turned hostile on 17.5.2003. There seems to be a definite design and conspiracy to malign the people by misusing this witness Zahirabibi, who is hardly 19 years old. She can easily fall in pray of anyone and play in the dirty hands of antisocial and anti-national elements.

Learned Advocate General ought to have remembered that the prosecution had examined as many as 73 witnesses in the case. Out of them, 37 have turned hostile whereas 36 have supported the prosecution case. Out of 37 witnesses who turned hostile, only 7 were the eye witnesses whereas 20 were the panch witnesses, and it is known to everyone that in most of the cases in our country panchas turned hostile. Thus, it can never be said that the trial was not fair and it was heavily loaded in favour of the accused and the witnesses had not deposed fearlessly, as submitted by learned Advocate General Mr. Shelat for the appellant State of Gujarat.

From the affidavit of Zahira Hibibulla Shaikh filed before the Hon'ble Supreme Court, which is now sought to be brought on record of the appeal by way of an application, one thing is clear that from the date of her deposition before the Court on 17.5.2003 till the judgement was pronounced by the learned Judge on 27.6.2003, she had not made grievance or complaint to anyone about the threat administered to her at the time of deposition before the Trial Court. It is only after one English Daily Newspaper "Indian Express" people reaching Zahira after the pronouncement of judgement, she came out with a case that she was threatened at the time of her deposition, therefore, she

could not speak the truth before the Court. Wheels move very fast thereafter. On the third day of the pronouncement of judgement of the learned Trial Judge, Zahira was out of State and on the public platform in presence of others she reiterated about the threat administered to her. From all these, we have reasonable apprehension in our mind that there is a deep-rooted conspiracy of misusing this witness Zahira, victim of the unfortunate incident, by some people, with an ulterior motive, and unfortunately poor people, like Zahira and others, have easily fallen in their pray.

7. A Learned Advocate General Mr. Shelat then severely criticized the learned Judge when he said in para 48 of his judgement that it is not the court of justice in its real sense but it is a court of evidence. He submitted that the learned Judge should have known that the provisions are therein the Code in enable him to conduct criminal trial in such a manner that he can ensure that real justice is done and find out the real truth in the matter. He submitted that the learned Judge should have held the trial of this case in-camera, so that the witnesses would have deposed before him fearlessly, Learned Advocate General drawn our attention to the provisions of Section 9 (6) of the code, which reads as under :

Sec. 9(6): The Court of Sessions shall ordinarily hold its sitting at such place or places as the High Court may, by notification, specify, but, if, in any particular case, the Court of Sessions is of opinion that it will tend to the general convenience of the parties and witnesses to hold its sittings at any other place in the Sessions Divisions, it may, with the consent of the prosecution and the accused, sit at the place for the disposal of the case or the examination of any witnesses or witnesses therein."

Learned Advocate General also severely criticized the Public Prosecutor for not applying before the Court for conducting the trial in-camera when one witness after the other were resiling from their statements and turned hostile in the court. He has also made reference to the provisions of section 327 (1) of the Code for this purpose.

It is true that on 9.5.2003, as many as 4 eye witnesses, including two injured persons, examined before the Court turned hostile. They were closely related to the deceased, but all of them have denied to make any statement before the Police under Section 161 of the Code as claimed by the prosecution. In that case, it would be difficult for either the Public Prosecutor or the learned Trial Judge to even realize that they had resiled from their statements before the court because of threat. There are number of cases in which injured persons closely related to the deceased have turned hostile, therefore, unless some glaring things come to the notice of either of the Public Prosecutor or the learned Judge, they would not even think that the witnesses were resiling from their so called statements before the Police under Section 161 of the Code because of threat. It is also true that on the next date of hearing on 17.5.2003 three more eye witness and complainant Zahira Habibulla Shaikh, and all of them including Zahira resiled from their statements. Shaherunisha, widow of Habibulla Shaikh and Raju @ Nasibulla Habibulla Shaikh both denied to have made any statements before the Police, whereas complainant Zahirabibi denied the contents of her complaint but admitted her signature below her statement, which was treated as complaint by the police. It may be remembered that the said statement of Zahira is in Gujarati and there is no endorsement

made below it that it was read over and explained to her in Hindi. It may be stated that out of this 7 eye witnesses, five of them have lost their near and dear ones in the incident. Three of them had also received injuries during the incident. Under the circumstances, when they resiled from their so called statements made before the Police under Sec. 161 of the Code and come out with the case that no such statements were made by them and when they failed to identify the accused sitting in the court as assailants, then even a remote idea would not come either in the mind of the Public Prosecutor or the learned Judge that the witnesses were not deposing truth because of threat given to them. We can understand that if anyone of them had even directly or indirectly suggested or indicated either to the Public Prosecutor or the learned Judge that they were threatened by someone not to depose the truth before the court during the pendency of the trial and in spite of it, if no steps were taken either by the Public Prosecutor or the learned Judge, then it could have been very well said that the Public Prosecutor should have applied before the learned Judge for holding the trial in camera or the learned Judge himself should have thought offered protection to the witnesses. But, that was not the case. At the cost of repetition, we may state that, their evidence came to be recorded on 9.5.2003 and 17.5.2003 before the court and the judgement came to be pronounced on 27.6.2003 after a period of one month and till that day, no one said about such threat. In that view of the matter, the submission made by learned Advocate General that the learned Public Prosecutor and the learned Judge failed to discharge their duties by not holding the trial in-camera, has to be rejected and it is rejected.

8. From the affidavits of the witnesses filed before the Hon'ble Supreme Court, which are sought to be brought on record of the appeal it appears that now the witnesses have made allegations even against the learned Judge also. It is said that looking at the accused who were sitting in the court, they were frightened and that was one of the reasons for them not to speak the truth. This is nothing but a gross contempt. The trial was conducted in the open court in the presence of many including the relatives of the witnesses.

It may also be stated that ordinarily, the Sessions Court is supposed to hold the trial at such places as specified by the High Court under the Notification, but in any particular case, if the Sessions Court is of the opinion that it will tend to the general convenience of the parties and the witnesses to hold its sittings at any other place in the Sessions Division, then, it may, sit at the place for the disposal of the case or the examination of any witnesses or witnesses therein, but that is subject to the consent of the prosecution and / or the accused persons. Thus, under Section 9 (6) of the Code, what is required by the Sessions Court to see the general convenience of the parties and witnesses to hold its sitting at any other place in the Sessions Division than the place notified by the High Court, and that too, with the consent of the prosecution and / or the accused.

Thus, it is clear that first requirement under Section 9 (6) of the Code is that the learned Sessions Judge must be of the opinion that it would tend to the general convenience of the parties and witnesses to hold its sitting at any other place in the Sessions Division than the place notified by the High Court. There was nothing on the record to form such opinion by the learned Judge to hold the trial in-camera. The word used in Section 9 (6) of the Code that the Sessions Court may hold its sittings at any other

place in the Sessions Division, if it is of the opinion that it will tend to the general convenience of the parties and witnesses, then only with the consent of the prosecution and / or the accused persons it can have trial at any other place. Thus, even if the learned Judge was of such opinion to hold the trial in-camera, than also, without the consent of the prosecution or the accused persons, be could not have done it. The learned Trial Judge is not found to act in accordance with law as provided under Section 9 (6) of the code.

In support of his above contention, learned Advocate General, had also placed reliance on the provisions of Section 327 (1) (2) of the Code. We would like to reproduce the same which is as under :

327. Count to be open: (1) The place in which any Criminal Court is held for the purpose of inquiring into or trying any offence shall be deemed to be an open court to which the public generally may have access, so far as the same can conveniently contain them.

Provided that the presiding Judge or Magistrate may, if he thinks fit, order at any stage of any inquiry into, or trial of, any particular case, that the public generally, or any particular person, shall not have access to, or be or remain in, the room building used by the court.

(2) Notwithstanding anything contained in sub-section (1), the inquiry into and trial of rape or an offence under section 326, section 376A, section 376B, Section 376C or Section 376D of the Indian Penal Code (45 of 1860) shall be conducted in camera.

Provided that the presiding Judge may, if he thinks fit, or on an application made by either of the parties, allow any particular person to have access to, or be or remain in, the room or building used by the court."

It is clear from the bare reading of Section 327 of the code that the cases should be tried in an open court but in an acceptional case if the Presiding Officer of the Court thinks, it fit, then only he may decide to hold the trial in remain, otherwise not. As stated earlier, in the instant case, there was nothing on which the learned Trial Judge could have even thought if fit to hold the trial in camera. At the cost of repetition, we may state that, as stated earlier, if the trial was held in camera and if the witnesses had said the same things which they have stated in the open court, then the learned Judge would have been subjected to severe criticism.

9. It was then contended by learned Advocate General Mr. Shelat that when one after the other witnesses were resiling from their statements made before the Police while deposing in the Court, then, the learned Judge on his own should have postponed or adjourned the trial as like to reproduce as under :

309 : Power to postpone or adjourn proceedings :

(1) In every inquiry or trial the proceedings shall be held as expeditiously as possible, and in particular, when the examination of witnesses has once begun, the same shall be continued from day to day until all the witnesses in attendance have been

examined, unless the court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded.

(2) If the court after taking cognizable of an offence, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time, for reasons to be recorded, postpone, of adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody.

Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time:

Provided further that when witnesses are in attendance no adjournment or postponement shall be granted, without examining them, except for special reasons to be recorded in writing.

[Provided also that no adjournment shall be granted for the purpose only of enabling the accused person to show cause against the sentence proposed to be imposed on him.]

From the bare reading of Section 309 of the Code, it is clear that the trial should be held as expeditiously as possible and when the examination of witnesses once begin, the same shall continue from day to day until all the witnesses in attendance have been examined unless the court finds the adjournment of the trial beyond the following day to be necessary by recording reasons for adjournment of trial. It is true that under Section 309 (2) if the court finds it necessary or advisable to postpone the trial, then it may postpone it from time to time for recording the reasons for it for a reasonable time only. However, the court without any basis for it, cannot postpone the hearing of the trial. Learned Advocate General has overlooked the proviso to Section 309 (1) of the code which clearly provides that when the witnesses are in attendance, then they have to be examined by the court and no adjournment should be granted without assigning special reasons in writing. Learned Judge was most experienced Judge who had conducted hundreds of criminal trials for the major offence under Section 302 of the IPC, etc, and there may by many cases resulted into acquittal because of the lack of evidence or the main prosecution witnesses turning hostile for whatever reasons. The learned Judge would not get dream or even a remote idea in his mind that the witnesses in this case were turning hostile and resiling from their so called statements made before the Police under Section 161 of the Code only because of threat and for no other reasons. At the cost of repetition we may state that, it may be that, the witnesses may not have made any statements before the Police or that there may be other reasons for not supporting the prosecution.

Learned Advocate General has completely overlooked the fact that the riot cases were to be given top priority, therefore, they were placed before the Fast Track Courts, and being the Judge of the Fast Track Court, the learned Trial Judge cannot postpone the hearing of the trial without any solid reasons for it. In the instant case, there were no reasons much less solid reasons for the learned Judge to postpone the trial. If without any

solid or valid reasons, the learned Judge had postponed the trial, then, he would have been subjected to severe criticism for delaying the trial.

10. Learned Advocate General Shri Shelat then contended that the learned Judge ought to have exercised his power under Section 311 of the Code and recalled and re-examined the witnesses already examined because their evidence was essential to arrive at the just decision of the case. It is no doubt true that the learned Trial Judge had wide power under section 311 of the Code to recall and examine any witnesses if his evidence appears to him to be essential for the just decision of the case. But in the instant case, all the eye witnesses had clearly stated before the court that they had never made any statements before the Police and thereby resiled from their earlier so called statements recorded by the Police. When the evidence of the witnesses who have been already turned hostile, does not appear to be essential to the learned Judge for arriving at just decision of the case, then there was no question of the learned Judge exercising his power under Section 311 of the Code. Hence this submission of learned Advocate General Mr. Shelat is also rejected.

11. Learned Advocate General then contended that the learned Judge ought to have proceeded under Section 319 of the Code for coming to the conclusion that there were other persons also, who, in fact appear to be guilty. For the first time, this grievance seems to have been made in the argument that too without any basis. Therefore, the same is required to be rejected outright and accordingly it is rejected.

12. Learned Advocate General then submitted that in the instant case the learned Judge had powers under section 165 of the Evidence Act, he could have resorted to the provisions of Section 165 of the Evidence Act, but he has miserably failed to exercise his powers under Section 165 of the Evidence Act and because of that the case has resulted into acquittal. In support of his submission, Mr. Shelat has relied upon the following judgement of the Supreme Court, which are as under :

(i) Raghunadan vs. State of U. P. reported in AIR 1974 sc. 463.
(ii) State of Rajasthan vs. Ani @ Hanif, reported in AIR 1997 sc 1023.
(iii) State of Gujarat vs. Mohanlal, reported in AIR 1987 sc. 1321.
(iv) Rajendra Prasad vs. Narcotic Cell. Reported in AIR 1999 sc 2292, and
(v) Ramanna vs. State of Maharashtra, reported in 2003 (4) Crimes 33.

We would like to reproduce section 165 of the Evidence Act, 1872 (for short "the Act") which is as under :

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

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

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

From the bare reading of Section 165 of the Evidence Act, it is clear that the learned Judge in order to discover or to obtain proper proof of the relevant fact could have asked any question he pleases, in any form, at any time, to any witness subject to proviso (1) of Section 165 of the Act that the judgement must be based upon facts declared under the Act to be relevant and duly proved. Second proviso to Section 165 of the Act shall not authorize to any Judge to compel any witness answer any question. There cannot be any quarrel with the principle laid down by the Hon'ble Supreme Court in the aforesaid judgements about the powers of the learned Trial Judge under section 165 of the Evidence Act, but none of the judgement of the Hon'ble Supreme Court has application to the facts of the present case, therefore, we have retrained ourselves from dealing with the same in detail. Suffice it to say that there was nothing on record before the learned Trial Judge to exercise his powers under Section 165 of the Act. Hence this submission of the learned Advocate General is also rejected.

13. At this state, we must state that the learned defence Counsel Shri Sushil Kumar has brought to our notice provisions of Section 167 of the said Act and submitted that there cannot be no new trial in this case. He submitted that improper admission and rejection of evidence by itself would not be a ground for a new trial or retrial by reversing the judgement and order of acquittal passed in this case.

14. Learned Advocate General then made serious grievance about the failure on the part of the Public Prosecutor for not examining injured witnesses. He submitted that the Public Prosecutor had produced Exh. 36 / 68, statement of Rahishkhan Aminkhan Mohmad @ Pathan (at page 486 of the compilation) on the commencement of the prosecution case though the prosecution was neither relying on it nor it was called upon by the accused sought to be produced it before the court. He submitted that the said statement of Rahishkhan Pathan is allowed to be wrongly exhibited and treated as FIR by the Public Prosecutor. In the cross examination of PI Shri Baria, PW – 70, Exh. 171 though it was recorded by Head Constable Abhesinh Fatabhai, PW – 72 Exh. 182, who was examined later on 20.6.2002 whereas PI Paria was examined before the court earlier on 18.6.2002. He submitted that in the said statement of this witness Rahishkhan Pathan, recorded on 2.3.20032, the names of the accused persons were not disclosed, but in his subsequent statement recorded on 4.3.2002 by PI Baria in SSG Hospital, Vadodara, he had given names of at least 5 accused persons. In spite of it, when Rahishkhan Pathan's

previous statement dated 2.3.2002 was exhibited as Exh. 180 and treated s FIR, the Public Prosecutor failed to put the subsequent statement of Rahishkhan Pathan recorded by PI Shri Baria on 4.3.2002 at SSG Hospital, Vadodara, disclosing the names of five accused to PI Baria when he was examined before the court. He submitted that witness summons was issued against Rahishkhan Pathan on 27.4.2003 for examining him on 9.5.2003, but it could not be served on the ground that he had left for his native in Uttar Pradesh. Therefore, second summons was issued on 9.6.2003 for recording his evidence on the next day i.e. on 10.6.2003 giving only one day time not when it could not be served, then third summons was issued on 13.6.2003 for remaining present before the court on 16.6.2003, which also could not be served for the same reason. Ultimately, on 18.62003, the Public Prosecutor gave purshis for dropping him as witness and the same was granted by the learned Trial Judge and Rahishkhan was dropped as witness. This goes to show that both the Public Prosecutor as well as the court failed to discharge their duties.

It may be that in the instant case, the Public Prosecutor may not have conducted the case in a more skilful way, but it cannot be said even for a moment that the Public Prosecutor not properly conducted the case Truth always comes out from any corner, first statement of Rahishkhan recorded on 2.3.2002 after the investigation in the case started and when it has come on record and given Exhibit, then no grievance should be made about it at least by the learned Advocate General representing the State of Gujarat. The model role of the Public Prosecutor is to place everything on record of the case before the court for all living at the just conclusion and he has not to act like a prosecutor. It is true that Rahishkhan is not examined in this case because all the summons issued could not be served as he left for his native place in Uttar Pradesh, but the question is, how long one may wait for the witness? When the matter is placed before the Fast Track Court and there was always a demand to expedite the trial and dispose of the same at the earliest. In that view of the matter, if the learned Public Prosecutor dropped this witness Rahishkhan as prosecution witness, then no fault can be found with it.

It was submitted that the learned Trial Judge has committed serious error in acquitting the accused, though there was no case against them, which is most unfortunate. We failed to appreciate that when the first statement of Rahishkhan Pathan was recorded on 2.3.2002 at 1200 noon at SSG Hospital, Vadodara he was absolutely conscious and fit to make his statement, which is duly borne out from the evidence of Dr. Meena and at that time, except narrating the incident in brief, he had not disclosed the names of any of the accused as assailants. He was absolutely clear that some unknown persons of the mob assaulted them with the weapons, then why PI Baria has not kept such important statement of Rahishkhan with him during the investigation? and recorded so called statement of Rahishkhan on 4.3.2002. wherein Rahishkhan stated to have given names of 5 accused persons. We are at pains to note that in the instant case, right from the beginning, the investigation carried out by the Police was absolutely dishonest and faulty. When the Police did not find the real culprits, then they have falsely involved the respondents in this case as accused, who were none else but the neighbours of the victims.

14-A. Learned Advocate General Mr. Shelat then submitted that Sahejadkhan Hasankhan, PW – 48 Exh. 124, was not examined by the prosecution on the ground that he was of unsound mind. He submitted that summons was issued on 9.6.2003 for remaining present on the next day i.e. on 10.6.2003. on 10.6.2003, Sahejadkhan Hasankhan remained present before the court but not examined and dropped by the Public Prosecutor by submitting purshis Exh. 125 on the ground that he was mentally unfit to depose before the Court and the learned Judge had also granted that application and did not examine him. He submitted that when such as application was made by the prosecution for dropping him as witness on the ground of his mental condition, then, first of all, it was the duty of the learned Judge to find out as to whether he was of really unsound mind or not? by getting him examined through Civil Surgeon or Doctor from Psychiatric Department and after providing him proper medical treatment, he could have been examined later on. He also submitted that this witness Sahejadkhan Hasankhan had received serious injuries and Dr. Meena PW – 9 Exh. 49 has not stated in her evidence that he was not mentally sound. The police has also not reported that this witness was of unsound mind. During the investigation, it was never stated before the Police that he was of unsound mind when his statement was recorded on 6.3.2002. Sahejadkhan Hasankhan was unconscious between 2nd to 6th of March, 20002. When he regained consciousness, his statement came to be recorded on 6.3.2002 by PI Shri Baria in which he gave names of four accused, i.e. A.5, A.6, A.8 and A. 11. This witness has also now filed an affidavit before the Hon'ble Supreme Court in a matter pending before it and narrated the whole incident in detail. He, therefore, submitted that instead of dropping him as witness, if the learned Judge had deferred his examination till he recovered, then, being injured witness, he would have been the best witness for the prosecution. He has also submitted that PI Shri Baria who was examined on 18.6.2003 specifically denied the suggestion made by the defence that this witness Sahejadkhan Hasankhan was mentally not sound. Unfortunately, the learned Judge had not taken care to re-examine or recall him as witness because the Prosecutor failed to discharge his duties by recalling this witness Sahejadkhan Hasankhan after he had recovered.

This submission of learned Advocate General seems to be confused one. First it gives us an impression that Sahejadkhan Hasankhan was of sound mind when he was examined by Dr. Meena on 2.3.2002, therefore, PI Baria recorded his statement on 6.3.2002 after he regained his consciousness in the SSG Hospital, wherein he stated to have named four accused persons. At the same time, the submission is that when this witness Sahejadkhan Hasankhan appeared before the court on 10.6.2003, he was not of sound mind, and the prosecution should have asked for time for recording his evidence before the Court till he recovered from his mental sickness and become fully fit to depose before the court. Instead of that the Public Prosecutor submitted an application Exh. 125 for dropping him as witness which was granted by the learned Judge without verifying of seeking any opinion of the Doctor about the mental illness of Sahejadkhan Hasankhan. From the note made by the learned Trial Judge while recording evidence of Sahejadkhan Hasankhan, it is clear that when he was produced before him he was repeatedly asked where he was staying? But, he could not reply to it. When such a simple question could not be replied by him, then, looking at the behaviour of Sahejadkhan Hasankhan, the learned Judge noted that he was mentally unfit and not in a position to reply any question

and not able to understand seriousness of the oath. The learned Public Prosecutor had also noted behaviour of this witness Sahejadkhan in the court. Sahejadkhan was not in a position to come to the court on his own because of his mental condition, therefore, he was brought by his brother Riazkhan Hasankhan. When he was in the witness box, he was murmuring "meri akal mari gai hai" and not able to understand anything and looking everywhere like an insane person. Therefore, the Public Prosecutor submitted an application dated 10.6.2003 Exh. 125 wherein he had stated that when this witness Sahejadkhan was produced before the court in the witness box, court asked him, where he is staying and from where he has come? He was not able to understand it. Looking to his behaviour and expression in the witness box, it was noticed that he was not in a position to depose on oath and not able to understand the meaning of the oath and not able to come to the court on his own, therefore, he was brought by his real brother Riazkhan. When he was stating in the box that "meri akal mari gai hai" and looking everywhere, the said application was submitted. It is also stated in the said application Exh. 125 by the Public Prosecutor that he had inquired from his real brother Riazkhan, who had come with this witness to the court about his understanding and mental condition, and about his mental condition Riazkhan told him that his brother Sahejadkhan was mentally unfit because he was hit by something on his head and not able to understand anything and that he had lost his memory, Signature of Riazkhan brother of Sahejadkhan was also obtained on the said application. Therefore, by way of an application Exh. 125. The Public Prosecutor declared that he does not want to examine Sahejadkhan under the aforesaid circumstances. The said application Exh. 125 for dropping Sahejadkhan as witness also bears the signature of his real brother Riazkhan.

In the aforesaid circumstances, except submitting such application for dropping him as witness, the Public Prosecutor could not have done anything else and when such an application was submitted before the learned Trial Judge, then the learned Judge had no option but to grant it, which was granted by him. If a person of unsound mind is produced before the court for the purpose of examination, then he was not required to be sent for medical treatment before the Psychiatric by the Court, when his close relatives were very much there to look after him.

Dr. Meena, PW – 9 Exh. 49 who examined this witness Sahejadkhan for his injuries when he was brought to the hospital on 6.2.2002. At that time he was unconscious, therefore, she could have only treated him for his injuries and there was no question of Dr. Meena giving any opinion as to whether this witness Sahejadkhan was of mentally sound or not?

15. Learned Advocate General Shri Shelat has then taken us through the affidavit of this witness Sahejadkhan Hasankhan filed before the Supreme Court in a matter pending before it, which is sought to be brought on record of the Appeal by way of an application being Criminal Misc. Application No. 7677 of 2003, which is at 660 to 665 of the compilation. However, it does not bear the date on which this affidavit was sworn and before whom it was sworn. However, when asked about it, learned Advocate General, on the instructions, received from Advocate Shri Trimmizi, stated that the said affidavit was

sworn in before the Notary at Mumbai on 18.8.2003, having thumb impression of this witness Sahejadkhan Hasankhan on it.

Learned defence Counsel Shri Sushil Kumar had raised serious objections about such affidavit of this witness Sahejadkhan Hasankhan being taken on record of the Appeal, therefore, we will deal with the same later on when we come to the application for taking it as an additional evidence on record submitted by the State of Gujarat for the purpose of retrial. From the affidavit of this witness Sahejadkhan , it appears that, be could specifically named two accused (1) Sanjay @ Thakkar and (2) Dinesh Phoolchand Rajgar. It is surprising to note that in his entire affidavit, this witness Sahejadkhan has nowhere stated that his statement was ever recorded by the Police about the incident in question. He has also not stated that he was not mentally imbalanced or unfit at least on the day on which he was taken to the court for recording of his evidence i.e. 10.6.2003 and that his brother Raizkhan had not taken him to the court on 10.6.2003, and signed the purshis about his mental condition. In para – 17 of his affidavit, he had stated that, after receiving the summons, he went to the court along with Mohamad Ashraf, after the testimony of Zahirabibi and her family members was over in the court and also stated that he cannot recall the exact data without looking at the copy of the summons. Thus, now he has come out with totally different story before the Hon'ble Supreme Court that he had gone with his real brother Raizkhan for deposing before the court. This is factually incorrect because he was taken to the court on 10.6.2003 for recording of his evidence by his real brother Raizkhan because he was mentally unfit on that day. In his entire affidavit, he had nowhere stated that he met PI Baria after the incident, and that PI Shri Baria had recorded his statement. Para – 19 of his affidavit suggests that the day on which i.e. on 10.6.2003 when he was produced before the learned Trial Judge for his examination, he was of not sound mind, which is as under :

"19. Immediately thereafter I was summoned in the witness box and I remembered how paralyzed with terror I felt. Many of the accused persons were seated in the court room with "tilaks" on their forehead and without even normal handcuffs. Fear had trapped my tongue and no words would come out. I remembered clearly that I desperately gestured in the left side of my head and back of my neck where I bore injuries of the brutal attacks. At this point, the lawyer standing in front simply stalled the whole proceedings by saying "yeh pagal ho gaya hai". (He has gone mad). That is why the media also reported that I had gone mad. I do a responsible and highly technically skilled job of managing the heal / temperature in a Bakery even now. Is this the job of a mad person? Even if there is the slightest charge in the temperature, my biscuits will burn. I was shocked at this because I am entirely in my right mind. I deeply regret when I heard the honourable Judge said to me, "you will go for treatment and than we will examine you."

The last three lines of Para – 19 of his affidavit, prima facie, constitute the criminal contempt when he tried to malign the learned Judge by putting in his mouth what he had never said in the court. This court being court of record, would have initiated contempt proceedings, but this affidavit is filed first before the Supreme Court and the matter is already pending before it, therefore, at present, we have decided not to take apy contempt proceedings against this witness Sahejadkhan. We would also like to reproduce

the averments made by this witness Sahejadkhan in Paras 21 and 22 of his affidavit, which reads as under :

21. Today, a week after Zahira Bibi and her family have had the courage to speak up, I feel that I can to do the same. The Citizens for Justice and Peace have given me this opportunity and I wished to avail of it. I wish to seek justice for what happened, for the lives lost and the destruction caused on March 1.2.2002.

22. I have made this statement of my own free will and having fully understood the implications of this statement. I have made this statement in the presence and upon detailed questioning of a journalist / human rights activist, and an advocate, Teesta Setalvad and Mihir Desai respectively. This affidavit has been made in English but read out to me in Hindi which I have understood and thereafter, signed.

It is stated at the Bar that the Citizens for Justice and Piece – petitioner before the Supreme Court in this case, is situated at Mumbai. Like other affidavits, this affidavit of Sahejadkhan was also sworn before the Notary Public at Mumbai whereas this witness resides at Vadodara. From Para – 22 of his affidavit it appears that an attempt is made by the journalists / human rights activists and advocate Teesta Setalvad and Mihir Desai, respectively, of the Citizens for Justice and Piece to have parallel investigating agency, whereas the statutory authority to investigate any case in Police, CBI or any other agency established under the Statute. We do not know how far it is proper But, we can certainly state that it is not permissible under the law.

Last two lines of Para – 22 of the affidavit of Sahejadkhan is pertinent to be noted, wherein it is stated that the affidavit has been made in English, but read out to him in Hindi, which he had understood and only, thereafter, signed it. This itself raises serious doubt about the evidence of PI Baria before the Court when he stated that he had recorded the statement of Sahejadkhan, which is annexed by the State of Gujarat along with the Application No. 7677 / 2003 at page 667 of the compilation. The said statement is in Gujarati and there is no endorsement made below it by Shri Baria that it was read over and explained to him in Hindi. In view of the above discussion, the submission of Mr. Shelat, learned Advocate General that non-examination of injured Witness Sahejadkhan on the ground of unsound mind resulted into failure of justice and therefore, retrial should be ordered is re required to be rejected and it is rejected.

Learned Advocate Counsel Shri Sushil Kumar had drawn our attention to the afidavit of Zahira Habibulla Sahikh. Which is filed before the Supreme Court in a case pending before it, for taking it as an additional evidence in the Appeal, in an application filed by the State of Gujarat against the judgement and order of acquittal passed buy the Trial Court, wherein para 31 at page 608 she has stated that Shehzad and Shailun, who where also victims in the attack, had been injured on their head, and because of which, they went to their village and where not in a fit state of mind to name anybody. This clearly goes to show that Shehzadkhan had lost his memory during the incident, and it clearly proves that when this witness Shehzadkhan was produced before the Court on 10.06.2003, he was of unsound mind.

16 Learned Advocate General then submitted that Public Prosecutor had not examined injured witness Shailun Hasankhan Pathan, brother of Shahejadkhan Hasankhan, on the ground hat summons issued to him on 9.6.2003 calling upon him to remain present before the court on 10.6.2003, could not be served. He submitted that his injured witness Shailun Hasankhan had disclosed names of three accused persons, namely, accused no. 6 Jayantibhai, accused no.8 Mafat @ Mahesh Manilal Gohil and accused no. 11 Sanjay @ Bhopo Bobdo Rattilal Thakkar, as assailants in his statement dated 6.3.2002 recorded by PT Shri Barja. His injury certificateExh 51. Also shows that he had received three injuries on head. Instead of that, without assigning any reasons, the prosecution had dropped him. He, therefore, submitted that non-examination of this injured witnes Shailun Hasankhan, has resulted into failure of justice. It is true that, injury certificate Exh. 51 of Shailun Hasankhan, produced on record by the prosecution show that he was brought to the hospital on 2.3.2002 at 11.35 a.m. in an unconscious condition. He has three injuries on his head. Previous history of case was narrated to Dr. Meena by Raizkhan Pathan that Shilun was assaulted with stick. PI ShriBhariaPW-70 Exh. 171 das nowhere stated in his evidence before the court has he had ever recorded the statement of Shailun during the investigation. In view of this, it is difficult for this court to accept the contention of learned Advocate was recorded on 6.3.2002. Admittedly, the summons ware issued to this witness could not be seved because he left Gujarat and went to his native. The affidavit of his brother Shahejadkhan Hasnkhan at page 660 of the compilation filed before the Hon'ble Supreme Court, which is tried to be brought on record of the appeal, shows that after his brother Shailun attacked during the incident, be became unconscious and though physically he has recovered now, but lost his balance of mind and he lives in his village and his life is ruined by theassailants. Zahirabibi Habibjull Shaikh has also stated in para 31 of her affidavit filed before the Supreme Court, which is sought to be brought on record of the appeal (page 600 of the compilation) shows that not only Shailun but his brother Shahejadkhan, victims of the incident, both received injuries on their head and because of that, they lost their memories and went to their village. Thus, he is not fit to depose before the court. If that is so, then where is the question of now examining Shailun Hasankhan Pathan by the prosecution as submitted by the learned Advocate General, that non-examination of injured witness, Shailun Hasankhan, resulted into failure of justice, and therefore, retrial should be ordered, has to be rejected and accordingly it is rejected.

17. Learned Advocate Genereal Mr. Shelat then submitted that fourth injured eye witness Tufel Habibulla Shaikh has not been examined by the prosecutor, whose statement was recorded on 4.3.2002 by PI Shri Baria, wherein he had disclosed names of four accused, namely, accused No. 5Yogesh @ Painter Laxmansinh Verma, accused No. 6 Jayantibhai Jamsinh Gohilo, accused no. 8. Mafat @ Mahesh Manilal Gohil and

accused no. 11 Sanjay @ Bhopo Ratilal Thakkar. In spite of this, no summons have been issued to this witness Tufel Ahmad, and not examined before the court. His injury certificate issued by Dr. Meena is prodced at Exh. 59. Dr. Meena PW-9 has stated in her evidence that Tufel was brought to the hospital 2.3.2002 at 12.25 pm in an unconscious condition, as per the case of the history narrated by Raizkhan Pathan, by an unidentified weapon he was assaulted, but no name of the assailants were disclosed. PI Shri Baria claimed to have recorded the statement of Tufel along with the statements of other witnesses on 4.3.2002, but he has not stated a word in the evidence about what was stated by Tufel in his statement before him. When whereabouts of Tufel is not known to anyone, then no fault can be found for non-examining his witness. Hence, this submission of Mr. Shelat, learned Advaocate General that non-examination of the injured Tufel has resulted into failure of justice is required to rejected.

Learned Advocate General then submitted that Yasimbanu, wife of Nafitulla Shaikh, was an important eye witness, who had witnessed the incident. Her statement was recorded by PI Shri Baria on 4.3.2002, wherein she had disclosed the names of at least three persons i.e. assused No. 5 Yogesh @ Painter Laxmansinh Verma, accused No. 6 Jayanti Jasminh Gohil and accused No. 11 Sanjay Bhopo @ Bobdo Ratilal Thakkar as assailants, and as per her statement, she had also received the injuries during the incident. In spite of it, she was not examined by the Doctor. He submitted that no summons was issued to this witness Yasminbanu and resons were not disclosed that non-examination of Yasminbanu. Who was an important eye witness, has resulted into failure of justice, therefore, retrial should be ordered. This submission has no. substance at all. PI Shri Baria has nowhere stated in his evidence before the court that he had recorded the statement of eye witness Yasminbanu, who had also received injury during the incident. As per the so called police statement recorded on 4.3.2002 if Yasminbanu was also present at the time of incident and received injury during the incident then, why medical certificate issued by the doctor about the injuries received by Yasminbanu, was not obtained by PI Shri Baria? The submission of learned Advocate General was that though Yasminbanu received injuries, she was not examined by the Doctor. This submission was made only because no injury certificate was issued by the Doctor. In fact, this clearly establish that Yasminbanu was never present during the incident. If she was present and received injuries. Then she would have also been taken to the hospital on 2.3.2002 along with Raizkhan Pathan and other injured witnesses and she would have also been immediately treated and issued certificate by Dr. Meena. If she was conscious, then her statement could have been immediately recorded on that very day on 2.3.2002 by PI Shri Bari and he would not have waited to record her statement till 4.2.2002.

Learned Defence Counsel Shri Suhil Kumar had brought to our notice to the averments made in para18 of the affidavit dated14.8.2003 (sworn at Mumbai before the Notary) of Shaherabanu Habibulla Shaikh, and filed before the Supreme Court, in the case pending before it, wherein she has stated that after the incident she was in the hospital sitting with her sister-in-law Yasmin (Tina) and her brother Nafitull. When she (Yasmin) was singing

a song, her brother Nafitulla slapped her. Thereupon, she stated crying and went outside and called her maternal uncle on phone from Chhota Udaipur with her mother. He came in the evening and took her with him to Chota Udaipur. If that is so, then where is the question of Yasminbanu's statement being recorded on 4.3.2002 by PI Shri Baria as submitted by learned Advocate General Shri Shelat.

Chhota Udaipur is at a distance of 100 Kms away from the place of incident which took place at Hanuman Tekri, Vadodra. From the above, it is clear that in absence of any injury certificate issued by the Doctor, it would have been almost impossible for the prosecution to prove its case, therefore, the learned Prosecutor might have decided not to examine Yasminbanu.

At this stage, it may be stated that the entire case was sought to reopened by an English Daily Newspapaer " Indian Express ", whose reported approached Zahirabibi on the next day after the judgment was pronounced, and at that time, for the first time, Zahirabibi came out with a case that they were threatened, therefore, they did not tell the truth before the Court. This was accepted as gospel truth and, thereafter, the matter is taken up the NHRC and others before the Supreme Court.

It may be stated that as soon as the hearing of these matters was over on 26.12.2003, without assigning any reasons due to paucity of time, we ad dismissed all these matters. Next day i.e. on 26.122003, there is a news item at page 3 of the Times of India (Ahmedabad Edition) with the headlines "Hanuman Tekri upbeat after HC verdict in Best case" and as per the statement of this witness Yasminbanu, wife of Nafitullah, none of the 21 accused, who were booked had taken part in the carnage and they were reiterating this time and again. Rashidabibi, mother of Yasmin, stated that complaint filed bu Zahira and her family members were totally false and the 21 accused were wrongly implicated.

We may make it clear that we are not using it for the purpose of confirming the order of acquittal passed by the learned Trial Judge as no such statement made subsequently by anyone can be taken mote of or considered by a court after the judgment is pronounces by the Trial Court. But these two incidents show that anyone can make any type of statement, outside the court, after trial is over. Question is, "whether any importance be attached to it or even note of it can be taken or not?". If it is left to us, then we would have definitely said 'No'. If any importance is given to it or even note of it is taken by the Court, then trial before the trial court would stand nugatory. It would nothing but mockery of justice.

Today, in this case, the state has challenged the order of acquittal passed in favours of the accused and prayed for retrial on the ground that because of threat, the important eye witnesses, some of them injured, turned hostile before the court, have now filed their affidavits before the Apex Court to that effect, therefore, after taking their affidavits on the record of the Appeal, matter be remanded to the trial court for retrial of the case. Tomorrow an accused challenges the order of conviction and sentence of hanging for the major offence under section 302 IPC passed by the trial court in appeal and produced an affidavit of the eye witness, on whose evidence given on oath he was found guilty by the

trial court, stating that the accused was not the real culprit and someone else was the culprit but due to the pervious enmity between them (he and the accused) he had falsely deposed against the accused before the court, but now his conscious bites that because of his false evidence innocent accused will be hanged. There may be several other reasons also for the witness to file such affidavit in Appeal. Should court accepts such affidavit in Appeal? And order retrial by setting aside the order of conviction and sentence passed by the trial court.

Is there any guarantee that whatever stated in the affidavit after the trail is over, is true because it is on oath, and not what deposed before the trial court, which was also on oath? Is there any guarantee that the witness may not one again change his version before the trial court on retrial for any other reasons and tell different story? What importance be attached to the evidence of such witness examined again before the trial court on retrial? What is the guarantee that the witness may tell the truth and nothing but the truth, on retrial, before the trial court? And once again may not support the prosecution for any reason, last but not the least, what would happen if such witness, on retrial, states that his or her affidavit filed in appeal was false? Or he or she was misguided? Or his r her signature was obtained on such affidavit?

Everything has an end including the trial. One cannot be tried endlessly for an indefinite period when question of his personal liberty is involved. It is no doubt true that this court has powers for ordering retrial, but in case of Ulka Kolka vs. State of Maharashtra, reported in AIR 1963 SC 1531 while approving the judgement of the Divisional Bench in the case of Ramanlal Rathi vs. State Hon'ble Supreme Court held " that the appellate powers can be exercised in exceptional cases where the interests of public justice require interference for the correction of a manifest illegality or the prevention of gross miscarriage of justice, or where there is some glaring defects in the procedure or there is a manifest error on a point of law and consequently there has been a flagrant miscarriage of justice,……..” a retrial may be ordered when the original trial has not been satisfactory for particula reasons, for example, if evidence has been wrongly rejected which ashould have been admitted or admitted when it should have been rejected or the court had refused to hear certain, witness who should have been heard. But retrial cannot be prdered on the ground that the prosecution did not produce the proper evidence and did not know how to prove their case.”

On the facts of the present case we are of the confirmed opinion that no retrial can be ordered as it may seriously prejudice the interest of the accused, whose personal liberty is at stake.

It is no doubt true that in the case of Vishal Rajendra Trivedi vs. The state of Gujarat, reported in 1995 (2) GLH 1102, Division Bench of this Court in an appeal filed by the accused against against the order of conviction under Sec. 302 IPC for committing murder of his mother and sentenced to suffer life imprisonment as an exceptional case, had taken the affidavit of the father of the accused and permitted him to be further examied before it and accepting his evidence led before this court, converted the conviction from major offence under Section 302 IPC to lesser offence under Sec 304

Part-I IPC giving benefit to the accused of one of the exceptions to Section 300 IPC. But with due respect to the learned Advocate General Shri Shelat, the said judgement of this court is not at all applicable on the facts of this case. In Vishal's case (supra) the witness never tried to change the entire color of the matter while further deposing before the court that under what circumstances incident happened. The facts of the present case are totally different and we have already narrated earlier in detail, that under what circumstances an attempt is made for retrial.

18. Learned Advocate General Mr. Shelat then submitte that in a most suspicious circumstances Lalmohamad Khudabax Shaikh, PW-15 Exh. 18 (page 107 of the paper book) was hurriedly examined on 27.5.2003 though summons was issued to him for remaining present on 6th June, 2003. He submitted that this witness Lalmohmad seems to have been won over by the accused, therefore, he was kept present earlier on 27.5.2003 for recording of his evidence, when that day was kept for recording the evidence of Doctors. He submitted that the first statement of Lalmohmad was recorded by PI Shri Baria on 9.3.2002, which contains only estimated loss to his property. He had not seen the incident, therefore, he cannot be called as an eye witness to the incident. No names of the accused were disclosed by him in his statement. Thereafter, he returned from his native on 14.6.2002 and wanted to have the panchnama of his godown, estimating loss of Rs. 25,000/-. However , on 16.6.2002 he stated in his statement before the Police that loss to his property was of Rs. 1,36,000/-. He also submitted that Lalmohamad claimed in his evidence before the court that the accused persons, in fact, saved lives of 65 Muslims, including his own life, of that area of Hanuman Tekri. He submitted that looking into the statements of other eye witnesses including injured, it is not possible to believe the evidence of Lalmohmad that all the accused protected the lives of 65 Muslims of that area. He submitted that though he has not stated in the statement before the Police that the accused saved the lives of 65 Muslims, he has improvised his statement by deposing on oath before the court. At this stage, it was the duty of the Public Prosecutor immediately to declare him hostile and cross-examine him, or at least sought clarification in re-examination after he had made statement in favour of the accused in the cross-examination of the advocate of the accused and get the things clear. But, unfortunately, the Public Prosecutor failed to discharge his duties. Similarly, the learned Judge also failed to discharge his duties by not declaring this witness as hostile or not re-examining him.

We are really shocked and surprised with the submission of learned Advocate General when he had tried to make use of the previous statements made by this witness Lalmohmad before the Police on 9.3.2002 and 16.2.2002, because PI Shri Baria, who was in-charge of the investigation till 10th of March, 2002, has not stated a word in his evidence that he had recorded statement of this witness Lalmohmad on 9.3.2002. the contents of the said statement was never stated by PI Shri Baria in his evidence before the court. PI Kanani, who subsequently, took over investigation from PI Baria on 10.3.2002 has only state that he had recorded the statement of the victims of the incident including the statement of Lalmohmad, but he had not stated in his evidence what was stated by Lalmohmad in his statement before him. Learned Advocate Genreal cannot make use of the previous statement of this witness Lalmohmad made before the Police. It is clear form

the evidence of PT Kanani that Lalmohmad was alsovictim of the incident. It has also come on the record that there were soe houses of Muslims in the locality of Hanuman Tekri, but except 14 people of Best Bakery, none else, suffered any injury from the mob, which as per the prosecution case, continuously tried to attack Best Bakery right from 7.30 p.m. on 1st March, 2002 till 10.00 a.m. on 2nd of March, 2002. this clearly goes top show that Lalmohmad, who was also staying in the same are, took shelter with his 14 family members in tha house of accused Munna. Like wise, other Muslims of that area, also took shelter in the house of the accused persons, and the accused persons protected their lives being their neighbours. We failed to appreciate that when the truth has come on record, then why, an attempt is made by the learned Advocate General to send the matter for retrial. Retrial means nothing but gross harassment to the respondents accused persons, who are not found guilty either by the trial court or by this court. Justice should be done to one and al including the accused, and after appreciating evidence on record of the case if it is found that, they were not the real culprits, then it would be against the interest of justice, if retrial is ordered.

Learned Advocate General argued that this witness, Lalmohmad must have been won over, therefore, he should have been declared hostile by the learned Public Prosecutor and the learned Judge. Shri Shelat should have remembered that those other witnesses including Zahira and other eye witnesses and injured eye witnesses had to be declared as hostile witnesses because they had also stated something before the court, which was not stated by them before the Police. In that case, can it not be said that they must have been also won over by the accused? If answer is 'Yes" then the history of threat has to be ruled out.

18. In the present case, as per the prosecution case, mob of 10,000 to 15,000 people continued to attack Best Bakery from 1st March, 2002 at 7.00 p.m. till 2nd of March, 2002 at 10.00 a.m., but the Police was not able to find out the real culprits, an being exasperated, it had falsely involved 21 respondents accused in the case, who are neighbours. They were not there, therefore, the prosecution witnesses including injured witness and complainant Zahira have not stated before the Court that the respondents accuse were the real assailants. Zahira denied the contents of her complaint, which is tried to be treated as FIR by the prosecution, except admitting her signature below it. A the cost of repetition, we may state that all these seven eye witnesses, were the victims of the incident, and lost their near and dear ones during the incident, but they have initially not tried to falsely involve the accused respondents when they were examined on oath before the court on 9th and 17th of May 2003. the judgment was pronounced on 27.6.2003, till then, none of them made any complaint or grievance to anyone about the threat given to them. Then how come that all of a sudden, on the next day of the pronouncement of judgment, first complainant Zahira came out with a case that one was threatened which was followed by others. If Zahira and others had really seen the accused persons taking active part in the mob of 10,000 to 15,000 massacring and murdering their near and dear ones, then, it was the best

opportunity for them to say so before the court. If they had actually seen the accused then even if such so called threat was given, then also they would definitely stated so against the accused. The question is that, how come that all of a sudden after the judgment was pronounced by the learned Trial Judge, the affect of the threat had vanished and on the next day Zahira got courage of telling the truth. Is it that whatever she has stated before the press reporter and later on in her affidavit filed before the Supreme Court is true? And not what she stated earlier before the trial court on oath? If it is accepted that whatever she has stated before the press reporter after the pronouncement of the judgment and in her affidavit filed before the Supreme Court in a pending matter is true, then are the accused person required to be convicted? If such course is adopted, then there is no need of investigation by Police or any other authorized agencies recognized under the laws, and the whole examination of the witnesses by the Public Prosecutor in the court and then cross-examination, is also not required. The court has to straightway convict the accused. But that is not permissible under our present criminal system and the laws so far laid down by the Supreme Court.

19. Similarly, grievance was made by learned Advocate General about Kanchanbhai Punjabhai Mali, Pw-28, Exh, 104, whose evidence was recorded on 9.6.2003., whereas his statement was recorded before the police on 3.3.2002, who has started in para-7 of his evidence that Lalmohmad was staying near Best Bakery, having about 18 to 20 members in his family, other Muslims families were also staying in the area and the population was about 65 to 75, and during the incident, people of their area saved lives of those 65 to 75 Muslims and gave protection to them. According to him, if the people of Best Bakery had also come out, then they would have also been saved. This was the case of Lalmohmad, but the learned Advocate General made a serious grievance that it was the improvised version of this witness Kanchanbhai Punjabhai Mali and the learned Public Prosecutor should have got it clarified in his re-examination. He also submitted that he could have been declared hostile. We are really surprised that how he can be declared hostile? Merely because he had narrated the truth, therefore, he is to be declared hostile?. It is unfortunate that the learned Advocate General of the State of Gujarat is trying to run away from the truth in this appeal, and only trying for retrial of the case. At the cost of repetition, we may state that any order of retrial, would cause serious prejudice to the accused, who have suffered so far economically as well as mentally.

20. Similarly, grievance was made by the learned Advocate General about Jyotsnaben Bhatt. PW-29 Exh. 105 (at page136 of compilation) that her statement was recorded by the Police on 3.3.2002, whereas her evidence was recorded before the court on 9.6.2003. She had also stated that it was the accused persons staying in their neighborhood saved family members of the Muslims staying in their locality and protected and saved the lives

of about 65 to 70 Muslims, this was not stated by the witness in her statement before the Police, therefore, it was improvisation in her evidence, learned Advocate General submitted that she could have been re-examined by the Public Prosecutor and the clarification should have been sought for. It may be stated that this witness Jyotsnaben Bhatt and witness Kanchanbhai Punjabhai Mali,PW-28 had never stated in their statements before the police about the accused respondent being the assailants. They had clearly stated that a big mob of about 1,000 to 2,000 people came on the night of 1.3.2002 and set the Best Bakery on fire. In that view of the matter, we failed to appreciate the submission of Mr. Learned Advocate General that both these witness should have been declared hostile and contradicted with their previous statements by the Public Prosecutor, and / or that they should have been, at least, re-examined.

Considering the evidence on record, the learned Judge has rightly came to the conclusion that the prosecution has miserably failed to prove its case against the respondents – accused, and the Police investigation in this case is absolutely faulty. It is clear from the evidence on record that when the Police was not able to reach the real culprits, then they decided to involve the innocent neighbours, who have in fact saved the lives of about 65 to 70 Muslims of that area, as accused persons by preparing false documents and statements of the witnesses. This very witnesses when examined before the court seems to have stated the truth before the court, but unfortunately, it seems that for some reasons, after the pronouncement of the judgment, they fell in the hands of some, who prefer to remain behind the curtain.

Certain elements failed everywhere, at all levels, and to obstruct the development and progress of the State, and trying to misuse the process of law, so far they have not fully succeeded. Sometime back in the mane of environment, matter was filed before the Apex court in Narmada matter, which was dismissed by the Apex Court. However, because of the ex parte ad interim order, they were successful in causing huge loss, running into thousands of crores of rupees to the state because of the delay in construction of the dam, Ultimately, such huge loss had to be suffered by the people of the state for no fault of their. Gujarat is very much part and parcel of our Nation and any loss to the State means loss to the Nation.

Once again, almost similar attempt is made not only to cause indirect financial loss to the State, but to create rift between the two communities and spread hatred in the people of the State. Financial loss can be recovered at any time, but it is very difficult to rebuild confidence, faith and harmony between people of the two communities. This time, target is none else but the judiciary of the state and the system as whole which is really a matter of grave concern. Most unfortunate part of it is that, some people within the State and the Nation, without realizing the pros and cons of it, unnecessarily giving undue importance to such elements, who are misusing poor persons like Zahira and others.

Today, period of almost two year has padded after the communal riots broke out in the State in March 2002 due to Godhra carnage. Therefore , the normalcy has returned long back, barring stray incidents here or there. Once again peace is prevailing in the State and there is communal harmony between both the communities, and there is a congenial atmosphere to strengthen it. Instead of that, there are some persons, for their petty benefits, trying to add the fuel to the fire, which is already extinguished, and keep the situation tense. They do not know that great harm they are causing to the State and the Nation. One should not cut the branch on which he sits. Nation will suffer if Gujarat is made to suffer. It is most unfortunate that attempt is made to create a false impression not only in the other States but also in the world that the Gujarat is a terrorist State, which is factually wrong. On the contrary, by and large, the people of the state are peace loving and the atmosphere in the state has always remained peaceful and communal harmony is also maintained, barring few occasions. It is no doubt true that communal riots are no way good for anyone in our country. It is most unfortunate that since partition in 1947, communal riots are taking place in different part of our country and Gujarat is not an exception. In the past also, this State and other States had seen worst communal riots for various reasons, but normalcy returned very soon and, thereafter, peace prevailed because of the good efforts of wise people of both the communities. It would be much better if wise people of both the communities sit together and think it in a proper manner and workout in the proper direction a plan, so that, in future, such riots do not take place. Perhaps, lok Adalat, may be the best medium to solve such problems for ever. It will not be out of context to state that one of us (B.J. Shethna.J.) witnessed the settlement of almost similar problem at Surat in a lok Adalat held on 2.10.2003 on the birth day of our Father of our Nation, Shri Mahatma Gandhiji. Two sects of Muslims were fighting for worshipping and ownership of a Mosque at Surat for several years, which ultimately resulted into group clashes, in which many persons were seriously injured. Cross criminal cases were filed against each other. And the matters were pending before the Court of Chief Judicial Magistrate, Surat. The learned CJM tried to find out the real cause and persuaded people of one sect at a short distance from the place where the Mosque was existing and also to provide funds for its construction. Both the parties agree and not only the cross criminal cases filed between the parties were compromised, but the main dispute regarding worshipping and ownership of the Mosque pending between the two sects of Muslims for several years was amicably settled for ever.

If we can extend hand of friendship to our neighbouring nations, which was said to be a terrorist State, by forgetting the painful past, then we failed to understand why communal harmony prevailing in the state should not be maintained and strengthened by our own people. It would be much better if every citizens of this Country treat the state of Gujarat equally like other States and maintain its honour and dignity. It is most unfortunate that only few handful of people are indulging in dirty tactics and wrongly defaming the States and its people for ulterior motives and reasons. Much could have been said about such elements, but it would have been once again used as publicity, therefore, best thing is to simply ignore them. Even a note taken of this elements amounts to giving some importance. Which they do not deserve it at all. Therefore, we do not want to say anything more in the matter except expressing out sincere hopes that let the wise senses

prevail and peace and communal harmony prevailing in the State, be not only maintained but also strengthened with the best efforts of wise people of both the communities.

> 22.Learned Advocate General Mr. Shelat then submitted that relatives of the accused has been cited as witnesses. They are (1) Shikhi Khokhar, PW – 30, Exh. 106, wife of the accused Yasin Khokhart, Accused no. 13, (2) Nanduben Jamsi Gohil, mother of Jayantibhai Gohil accused No. 6 and grandmother of Ramesh alias Rinku Gohil, (3) Kamla Ravaji Solanki, PW – 37 Exh. 113, mother of accused No. 9 Munno@ harshad Solanki (4) Ranjit babula, friend of accused No. 19 Kamlesh Bhikhabhai Tadvi, accused No. 17 Tulsi Bhuikhubhai Tadvi and accused No.18 Shailesh Bhikhabhai Tadvi; Maltiben, mother of Ravi Rajaram Chauhan, accused 21, (6) Pratap Tulsi Vanzara, PW57 Ext.13, brother of accused No. 11 Sanjay @ Bhopo Bodbo Ratilal Thakkar. It is nowhere stated that the persons who are relatives of the accused, cannot be examined as witnesses. Hence, this submission of Mr. Advocate General cannot be accepted and is rejected accordingly.

> 23.Learned Advocate General then submitted that Salimbhai and Suresh Padhiyar, who are important witnesses of discovery panchnama of weapons, but they have not been examined, therefore, the contents of the panchnama could not be proved, this has resulted into serious prejudice to the prosecution. It true that they have not been examined as witnesses, but even if they where examined, it would not have taken the prosecution case any further, when all the important eye witnesses including injured persons have not supported the prosecution case. Hence this submission of learned Advocate General has no merit and is rejected accordingly.

24. Learned Advocate General then submitted that Zahirabibi, PW-6 Exh, 46, Sairabanu Habibulla Shaikh, PW-1 Exh. 39, Shahajadkhan Hasankhan, PW-48 Exh. 124 and Mohmad Asaraf Shaikh, PW-47 Exh. 123, have filed their affidavits before the Supreme Court, narrating the circumstances under which they have deposed before the trial court, and application is filed in this Appeal to produce those affidavits on record of the case. Considering the averments made in it, this court should order retrial by quashing and setting aside the order fo acquittal passed by the trial court.

Late on we will come to the applications submitted by the appellant – State of Gujarat for taking the affidavits of the aforesaid four persons on record of the Appeal because it was seriously objected by the defence councel Shri Sushil Kumar for the respondents accused on the ground that there is no provision under which this court, being appellate court, can take any other document of material on the record of the appeal, which was not there before the Trial court. However, at this stage, we may state that apart from the fact that there is serious doubt of the truthfulness of the affidavits, bare reading of the affidavits also do not inspire any confidence, therefore, no such importance can be attached to it.

25. Learned Advocate General Mr. Shelat the submitted that the Investigation Officers had not remained present all throughout the proceedings, therefore, the witnesses turned

hostile. He submitted that this Court and the hon'ble Supreme Court have now pronounced that during the conduct of the trial, their presence is vital as it will ensure that the witnesses are produced before the court. In support of his submission, the learned Advocate General has relied upon a decision of this Court in the case of Kantilal Kalidas vs. Stated of Gujarat, reports in 1998 (3) GLR 214, and also relied upon a decision of the Apex Court in the matter of Shailendra Kumar vs. State of Bihar, reported in 2001 (10) JT 111.

We are really surprised with the submission of learned Advocate General in this case because while trying to explain the delay of 3 days in sending the FIR of Zahirabibi, learned Advocate General submitte that there were so many incidents took place in the city and therefore, the delay of 3 days occurred in sending the said FIR to the court as all the Police Officers were on patrolling. Now, when the Investigation Officers have not remained present all throughout the proceedings, then the grievance is made that because of their absence, witness turned hostile. In fact no prejudice is caused to the prosecution in this case. Therefore, on this ground, retrial cannot be ordered.

26. While summing up his submission in the appeal, learned Advocate General Shri Shalat submitte that (1) the trial was not satisfactory, (2) is was not full and fair trial, and (3) the witnesses had not deposed before the court fearlessly, therefore, retrial should be ordered.

We have already dealt with these submissions earlier, therefore, we would not like to deal with the same again in detail, but we are of the considered opinion that there is nothing on record to show that when the witness fearlessly and that the trial court, they had not deposed fearlessly and that the trial was not fair. In a given circumstances, any Public Prosecutor or Judge would not have conducted the trial in any better manner and ultimate result would have been the same.

27. Learned Advocate General then submitted that the Trial court wrongly treated the statement of Raizkhan recorded on 2.3.2002 at 12.00 noon by Abhesing, Fatesing, Head Constable of Panigate Police Station, PW-72 Exh.182 (198 of the compilation) at SSG Hospital as FIR, and not treated the statement of Zahirbibi recorded on 2.3.2002 at 11.15 a.m. by PI Shri Baria, which was eralier in point of them, then the statement of Raizkhan recorded by Head Constable Abhesing fatesing. He submitted that on 2.3.2002 at about 11.50 a.m. the medical officer of the SSG Hospital, Vadodara, sent vardhi to the Panigar Police Station and Abhesing Fatesing, Head Constable, at Panigate Police Station reached to the SSG hospital at 12' O clock and recored the statement of Raizkhan, whereas the statement of Zahirabibi was already recorded by PI Baria at 11.15 a.m. on the very day i.e. on 2.3.2002 which was signed by Zahirabibi, which disclosed the commission of an offence, therefore, it should have been threated as FIR by the learned Trial Judge. He also submitted that without examining Raizkhan Pathan, as prosecution witness, his statement was treated as FIR, Exh 180 by the learned Trial Judge. He submitted that merely because the statement dated 2.3.2002 recorded by PI Varia at 11.15 a.m. received by the court on 5.3.2002, after 3 days and have held that it was manipulate and not exhibited the same. Less said better about this witness PI Baria. He claimed to have recorded the so

called statement of Zahirabibi which was signed by her on 2.3.2002 at 11.15 a.m. at SSG hospital, but Zahirabibi is now claiming in her affidavit filed before the Supreme Court that her statement was recorded at the place of incident. We failed to appreciate that why this witness PI Baria had not kept the statement of Raizkhan Pathan, recorded by Head Constable Ahesing Fatesing on that very day on 2.3.2002 at 12.00 noon, during investigation. If he had at all recorded so called statement of Zahirabibi on 2.3.2002 at 11.15 a.m. , then why there was a delay of 4 hours in registering it at the Police Station? It was registered at Panigate Police Station? It was registered at Panigate Police Station only at 3.15 p.m. on 2.3.2002. Why the said FIR was not sent within 24 hours to the learned Magistrate? Why there was a delay of 3 hours in reaching the FIR to the learned Magistrate? It reached only on 5.3.2002. This PI Baria stated that as soon as he received the message, he immediately reached to the place of incident at 10.47 a.m. and at that time, his van and van no. 1 and Shri Piyush P Patel, DCP had almost reached simultaneously one after one at the place of incident. However, this DCP Shri Piyush Patel, PW-71 Exh. 181, who also claimed to have reached the place of incident at 10.57 a.m. on reaching the message, has not at all referred to the presence of this witness PI Baria at the place of incident. According to him given information by PSI Rathod, who was there at the place of incident when he reached at 10.53 a.m. However, this I sPI Baria ahs not stated a word in his evidence about the presence of PSI Rathod. It is interesting to note that this DCP Shri Piyush Patel also claimed that when he reached to the place of incident at 10.53 a.m. he had seen Zahira crying, who aged about 35 to 40 years. When asked, she stated about the incident and also disclosed the names of some of the assailants, but he does not remember the names of all the accused, except Jayanti who was having tea lari, lalo and Kiran. As soon as got the names from Zahira, he started combing operation to arrest the accused, and also made police bandobust in that area as other Muslims may not be made to suffer. Thereafter, he claimed to have reached the SSG Hospital before 12.00 noon and contacted the injured persons for the purpose of collecting other information. However, his statement was never recorded by this PI Shri Baria till he was in-charge of the investigation i.e. upto 10.20.2002. His statement came to be recorded by another Investigating Officer only on 24.3.2002 i.e. after 22 days of the incident. This is PI Shri Baria has not al all referred to the presence of this witness Shri Piyus Patel in the Hospital when he recorded the FIR of Zahirabibi and statement of other persons in the hospital. This DCP Shri Piyush Patel claimed that Zahirabibi was about 34 to 40 years old, whereas Zahira was hardly 18 years old. This witness Piyush Patel admitted in his cross-examination that he had not named Zahira in his statement recorded by the police. He has also admitted that being a higher police officer it was his duty to take down the complaint on the spot, but he did not make any attempt for it. He also admitted in his cross-examination that though he was aware that he should immediately give his statement before the Police, but till 24.3.2002 he had not called the Investigating Officer for recording of his statement. He denied in his cross-examination that only with a view to make the prosecution case strong, he being higher officer, was subsequently got up as witness, but it is clear from his evidence that he was subsequently got up as witness to strengthen the case against the accused. He also admitted that prior to 24.3.2002, often he had gone to Panigate Police Station. In spite of it, his statement was never recorded between 2.3.2002 to 24.3.2002. Why? All these facts suggest that the statement of Zahirabibi was subsequently got up only because Raizkhan in his statement recorded on

2.3.2002 at 12.00 noon clearly disclosed that comission of an offence, wherein no names of the accused persons were disclosed. It is also clear that only with a view to falsely involve the accused, the so called Complaint or FIR or statement of Zahira was subsequently concocted and the FIR was sent to concerned JMFC after delay of 3 days. Zahirabibi has clearly denied to have made any statement whatsoever before the Police on 2.3.2002 except her signature on the complaint. Under the circumstances, the Trial Judge was absolutely justified in holding that the police tried to manipulate FIR, therefore, rightly not exhibited.

28. Learned Advocate General Mr. Shelat next contended that as per the present record of the case before the Trial Court and his Court, there is no substantive evidence since all the eye witnesses examined by the prosecution have turned hostile except the evidence of Deputy Commissioner of Police MR. Piyush Patel, Exh.181, before whom Zhaira alleged to have disclosed names of the accused, however, he remembered names of only three accused. He submitted that if fax message dated2.5.2002 sent to the DGP. Intelligence , Home Secretary and Director General of Police, Gandhinagar, with the names of the accused is brought on record of the case in this appeal, then it will prove that FIR was not manipulated as found by the learned Trial Judge. He also submitted that from 1st to 5th of March, 2002, messages where received by the Panigate Police Station, therefore, if the fax message and other messages are brought on record, then, it can be used as corroborative piece of evidence by the prosecution in support of its case that FIR of Zahira recorded by the Police was not manipulated. This submission of Mr. Shelat, learned Advocate General cannot be accepted for the simple reason that those documents were very much there with the Police during investigation and also at the stage of trial, but the prosecution had never thought it fit produce it on record during the trial. It is only after the learned Trial Judge found that the FIR was manipulated one, therefore, now an attempt is made to bring the Fax Message and the subsequent messages received by the Panigate Police Station on the record of the case by way of an additional evidence in this appeal, so that it can be used as corroborative piece of evidence.

Learned Defence counsel Mr. Sushil Kumar has vehemently submitted that if the Police can manipulate the FIR, then it is very easy for them to manipulate Fax Message also. There is lot of substance in this submission. We are of the opinion that when the police had these documents with it during the investigation and trial, then it ought to have been produced before the trial court. Now, at such a belated stage, we are not inclined to permit the prosecution to bring it on record of this appeal. Hence, this submission of learned Advocate General Mr. Shelat is rejected.

Even otherwise nothing comes out from the message because Zahira has denied to have made such statement, therefore, Fax message has no importance. We have already dealt with the evidence of DCP Shri Piyush Patel earlier and found that this witness Shri Piyush Patel is subsequently got up as witness only with a view to strengthen the prosecution case.

29. Mr. Shelat then submitted that the FIR was recorded on 2.3.2002 itself, which can be seen from the inquest panchnamas recorded on 2.3.2002 wherein crime register is also mentioned, and there is no dispute about the inquest panchnamas. However, learned Advocate General has completely overlooked the timings of recording of those inquest panchnamas. If he had seen timings, then he would not have made this submission.

30. Mr. Advocate General the submitted that reliance was wrongly palced upon Vardhi Exh. 178 (page 483 of the compilation) for treating it as an FIR by the defence Counsel. He submitted that it was a simple message received by the PSO of Panigate Police Station from the SSG, Hospital, which was cryptic message, therefore, it cannot be treated as an FIR. In support of his submission, learned Advocate General has placed reliance on two judgments of this Court, namely, (i) State of Gujarat vs. Panabhai 1991 (i)GLH 85 and (ii) State of Gujarat vs. Allarakha. 1999 (2) GLR 1723. It may be stated that the defence Counsel Shri Sushil Lumar had vehemently submitted that this Vardhi, Exh. 178 was received by PSO of Panigate Police Station from Dr.Meenaben of SSG Hospital, Vadodara, at 11.30 a.m. on2.3.2002, which disclosed the commission of a cognizable offence stated to have been committed by the unknown persons with weapons, therefore, it should have been treated as FIR by the learned Trial Judge because on the basis of this Vardhi, the Police machinery set in motion and investigation started and Head Constable Shri Abhesing Fatabhai, PW – 72 Exh. 182 went to SSG Hospital and recorded the statement of Raizkhan, wherein also no names of the accused were disclosed. It is true that in the said Vardhi, no names of the accused disclosed. It also disclosed the commission of a cognizable offence and also the fact that three injured witnesses had received injuries with weapons like sticks, but on facts of this case, we are of the considered opinion that the same cannot be treated as FIR as submitted by defence Counsel Shri Sushil Kumar. However, this Vardhi, - Exh. 178 can certainly be used in favour of the accused because no names of the accused were disclosed in it. Under the circumstances, we are of the considered opinion that the learned Trial Judge was right in treating the statement of Raizkhan recorded by Head Constable at SSG Hospital, Vadodara, on 2.3.2002 at 12.00 noon as FIR because it was recorded at the earliest point of time and giving full details of the commission of an offence and the unknown assailants. However, the submission of Mr. Shelat, learned Advocate General to treat the statement of Zahira recorded by PI Shri Baria as FIR cannot be accepted in view of the fact that the said FIR was manipulated later on as found by the learned Trial Judge.

31. Learned Advocate General Shri Shelat then submitted that the defence Counsel vehemently objected about the gross delay in FIR reaching to the Magistrate. He submitted that there was a delay of 10 days in case of Paresh Bhavsar vs. Sadik Yakubbhai, reported in 1993 SC 1544, in reaching FIR to the Magistrate. It was not considered fatal to the prosecution by the Apex Court. Mere delay in reaching FIR to the Magistrate itself would not be fatal to the prosecution, but coupled with other facts, which we have already narrated earlier, shows that in this case FIR was manipulated and, therefore, there was a delay of 3 days in receiving the same by the Magistrate. In that view of the matter, the submission of the learned Advocate General Shri Shelat has to be rejected.

32. Learned Advocate General Shri Shelat then submitted than Deputy Commissioner of Police Shri Piyush Patel, was examined as PW – 71 at Exh. 181 had reached the place of incident immediately on receiving the message at 10.53 at the place of incident. Before him, Zahira had disclosed the names of the accused persons, out of them he remembered only three. Therefore, learned Trial Judge was wrong in discarding his evidence. He submitted that in the case of State of Gujarat vs. Mohanlal, reported in AIR 1987 SC 1321, the Supreme Court held that "ends of justice are not satisfied only when the accused in a criminal case is acquitted. The community acting through the State and the Public Prosecutor is also entitled to justice. The cause of the community deserves equal treatment in the hands of the Court in discharge of its judicial function."

We bow down to the law laid down by the Hon'ble Supreme Court that every one coming to the court is entitled to justice, but those who do not come with clean hands, are not entitled to justice. We have already criticized the evidence of this Deputy Commissioner of Police Shri Piyush Patel, who miserably failed to discharged his duties, in not recording the FIR of Zahira at the place of incident. He has not even bothered to make his statement before the Police when investigation of the case was started by PI Shri Baria, who was subordinate to him. After a delay of 22 days, he thought it fit to make his statement on 24.3.2002 before another IO Shri Kanani. Much more could have been stated against this officer, who has miserably failed to discharge his duties and in our considered opinion, the learned Trial Judge has rightly discharged his evidence.

33. Learned Advocate General Shri Shelat, has relied upon the following judgements of the Supreme Court for the purpose of retrial by submitted that it is an exceptional case and trial was not full and fair and not satisfactory and heavily loaded in favour of the accused, which are as under :

1. Rajeswar Prasad vs. state of West Bengal, reported in AIR 1865 SC 1887:
2. Hussain Umar vs. Dalipsinghji, reported in AIR 1970 SC, 45:
3. Raghunandan vs. State of UP, reported in AIR 1974 SC 463;
4. Ayodhya Dube vs. Ram Sumar Singh, reported in AIR 1981 SC 1415;
5. State of Rajasthan vs. Anil @ Manif, reported in AIR 1997 SC 1023.
6. Kaptain Sing vs. State of MP, reported in AIR 1997 SC 2485:
7. Rajendra Prasad vs. Narcotic Cell, reported in AIR 1999 Sc 2292.

We have discussed in detail the entire case of the prosecution and we are fully convinced that by no stretch of imagination, it can be said that the trial was either not full or fair or not satisfactory and it was heavily loaded in favour of the accused. Facts of every case is bound to be different and the law laid down by the Hon'ble Supreme Court in all its judgements will have to be carefully applied on facts of the present case. All the aforesaid judgements cited by the learned Advocate General in support of his contention for retrial do not apply to the facts of the present case, therefore. we have not dealt with all the judgements cited by the learned Advocate General in detail.

Main substance of the aforesaid judgements of the Hon'ble Supreme Court is that the appellate powers can be exercised in exceptional cases where the interests of public

justice require interference for the correction of a manifest illegality or the prevention of a gross miscarriage of justice, or where there is some glaring defects in the procedure or there is a manifest error on a point of law and consequently there has been a flagrant miscarriage of justice.

His Lordship Harries the then C. J. speaking for the Division Bench of Calcutta High Court in the case of Ramanlal Rathi vs. The State, reported in AIR 1951 Cal. 305 observed that "a retrial may be ordered when the original trial has not been satisfactory for particular reasons, for example, if evidence had been wrongly rejected which should have been admitted, or admitted when it should have been rejected, or the court had refused to hear certain witness who should have been heard. But retrial cannot be ordered on the ground that the prosecution did not produce the proper evidence and did not know how to prove their case."

This judgement of the Division Bench of the Calcutta High Court later on came to be considered by the Hon'ble Supreme Court in the case of Ukha Kolka vs. State of Maharashtra, reported in AIR 1963 SC 1531 and the Hon'ble Apex Court approved that decision of the Division Bench of the Calcutta High Court. Considering the principle laid down by the Hon'ble Supreme Court, we find that neither any manifest illegalities committed by the learned Trial Judge in this case nor any glaring defects were there in the procedure of learned Trial Judge while trying the case. Merely because the prosecution did not know to prove its case before the learned Trial Judge, retrial cannot be ordered on the ground that the prosecution did not produce the proper evidence, as submitted by learned Advocate General.

We are of the clear opinion that in the instant case by an indirect method, an attempt is made to direct the Sessions Court to convict the accused so that indirectly the finding of acquittal recorded by the Trial Court is converted into one of conviction, which has not been done and cannot be done.

34. It may be stated that as per the prosecution case, huge mob of about 1,000 Hindus massacred and killed 11 persons from minority community of Muslims and three persons of their own Hindu community, in all 14 persons including men, women and minor children, in a most barbaric manner in a gruesome incident, during communal riots. Therefore, it is a matter of interests of public justice and this court would have definitely exercised its appellate powers in the case and corrected illegalities, if any, committed by the learned Trial Judge while trying the case and acquitting the accused. But, in the instant case, after carefully going through the entire evidence on record and the reasons of acquittal assigned by the learned Trial Judge and appreciating the arguments of the learned Advocate General Shri Shelat and defence counsel Shri Sushil Kumar, we find that while passing an order of acquittal, the learned Trial Judge has not committed any irregularly or illegality, much less manifest illegality resulting into the miscarriage of justice, therefore, there is no question of exercising powers of this court in this Appeal and ordering retrial of the accused by setting aside the impugned judgement and order of acquittal passed by the learned Trial Judge.

35. Before concluding the reasons for dismissing the Appeal and rejecting the prayer for retrial, we must state that as per the prosecution case, huge mob of about 1,000 to 1,500 people continuously tried to attack the building of Best Bakery and set fire, and tried to kill the inhabitants of it either by burning them alive or killing them with weapons from 7.00 p.m. of 1st March 2002 and continued their attacking till next day morning i.e. on 2.3.2002 upto 10.00 a.m. It is also the case of the prosecution that among those 14 persons, who were killed or burnt alive, three of them were Hindus. All the eye witnesses including injured persons of the case were inhabitants of the Best Bakery. As per the prosecution case, they gave the names of the accused, who were their neighbours. If they were knowing the accused persons, then the accused persons bound to know them being their neighbours. When they were knowing that at least three Hindus were working and staying in the Best Bakery and told them that they were Hindus, then they would not have killed at least those three persons of their own community. If the accused were the real culprits, then they would not have waited for the whole night right from 7.00 p.m. on 1.3.2002 to the next day morning i.e. 2nd of March, 2002, upto 10.00 a.m. for killing and assaulting the inhabitants of the Best Bakery. The whole night was to their disposal and if at all they wanted to kill the inhabitants of Best Bakery, then they would have done it by taking advantage of darkness of the night, so that nobody surviving in the attack could identify them. It is also the case of the prosecution that the deceased persons and eye witnesses including injured were tied by the accused and other members of the mob and they were tried to be burnt alive by setting fire and beaten with the weapons like sticks, swords, etc. If it was so, then we failed to appreciate that out of this seven eye witnesses, four witnesses escaped totally unhurt without any injury whatsoever on their persons. It has also come on record that apart from Best Bakery, there were other houses of Muslims in the locality and about 65 to 75 Muslims were staying there, but no bodily injuries were caused to them. It is only possible if they were saved by the accused, who were their neighbours and other neighbours. One should not forget that there was extensive damage to their properties during that night by mob. If the accused participated in causing extensive damage to the properties during the incident, then they would not have spared those other 65, to 75 Muslims of their locality. The very fact that those other 65 to 75 Muslims survived unhurt during the incident shows that they were saved and protected by the accused and other neighbours of the locality.

We have no reason to discard the testimony of Lalmohmad who has clearly stated before the court that it was the accused persons who saved not only him, his family but also saved about 65 to 70 other Muslims of the locality.

One more important aspect is that the prosecution tried to prove the presence of the accused during the incident by recovery of blood stains and weapons, but the FSL Report clearly shows that there were no blood marks on any of the weapons. For the aforesaid reasons and agreeing with the reasons assigned by the learned Trial Judge for acquitting the respondents accused, the Appeal filed by the State against the impugned judgement and order of acquittal passed by the learned Trial Judge acquitting the respondents accused is required to be dismissed.

36. This brings us to the Application being Criminal Misc. Application No. 7677 of 2003 filed in Criminal Appeal No. 965 of 2003, by the applicant State of Gujarat, under Sections 391 read with Section 311 of the Code, wherein para 7 (a) it is prayed that the applicant be permitted to produce affidavits of four witnesses, i.e. (i) Zahira Bibi (Exh. 46), (ii) Saira Habibulla Shaikh (Exh. 39), (iii) Shahzadkhan Hasankhan (Exh. 124) and (iv) Mohamad Asraf Shaikh (Exh. 123), on record of the case and further evidence be permitted to be recorded of these witnesses by ordering retrial. Along with the affidavits of those four witnesses, their police statements recorded under Section 361 of the Code are also annexed. However, at the time of argument, learned Advocate General Shri Shelat submitted that though the statements of the witnesses were produced along with the application, their prayer in the application is limited to produce the affidavits of those four witnesses. It was also submitted that if those affidavits were to be granted, then merits of the affidavits as regards involvement of the accused may not be relevant at this stage, and the contents of the affidavits are only to show the atmosphere prevailing in the court room when the trial was going on before the learned Trial Judge. However, learned defence Counsel Shri Sushil Kumar vehemently objected granting of this application on the ground that the applicant State of Gujarat failed to make out any case in this application for taking additional evidence on record either under Section 391 or Section 311 of the Code. According to him, such powers cannot be misused for filling up the lacuna of gap in the prosecution case. He also submitted that under section 386 of the code this court can only peruse the record of the case sent for under section 385 (2) of the code and the appeal has to be decided on the basis of such record and no other record can be taken into consideration while deciding the appeal. He submitted that the Contemporaneous record of this case includes 217 exibition, judgement of the learned Trial Judge is Exh, 218, and all these affidavits directly filed by the witnesses before the Supreme Court in a matter pending before it , Which are now tried to be brought on record of the appeal by the application state , by way of indirect method, which is highly improper and his court should strongly condemn it.
We find lot of substance in the submission made by learned defense Counsel Shri Sushil Kumar. It is nothing but an indirect method of bringing those four affidavits on record of the Appeal , which were not the part of the record of the Trail Court. No one including state be allowed to take advantage of its own wrong . If such an application is allowed , then it would amount to capricious exercise of powers of this court in favour of the prosecution to fill up the lacuna . Terefore, the application for bringing these affidavits on record is required to be rejected.

37 We are really shocked and surprised that along with this application, the applicant State of Gujarat has also produced the statements of those four witness stated to hbave been recorded by the Police under section 161 of the Code. Even, I learned Advocate General appearing for the State of Gujarat was not able to explain it. Not only this , the applicant state of Appeal that (1) the statements recorded during the course of the investigation should have been accepted as evidence even if the witnesses were treated as hostile ;
(2) PW-6 Zahira was not in an injured condition; and (3) conviction can be given even if all the witnesses are hostile , as pointed out by the learned Defense Counsel Shri Shushil Kumar . Much could have been said about it, but in view of the judgment of the Hon'ble Supreme Court in case of Arun Devendra Oza

vs . State of Gujarat and another , reported in (2001) 10 see 195, was do not propose to offer any commands on the aforesaid grounds taken by the State of Gujarat in the appeal.

However, we are of the considered opinion that there is no substance on merits in this Criminal Misc. Application No .7677 of 2003 filed in criminal Appeal No956 of 2003 For taking the affidavits of those four witnesses on record of this case as an additional evidence and its required to be rejected and the Rule issued on its required to be rejected.
38 The applicant -- State has also filed one more application Misc. Application No.9825 of 2003 in Criminal Appeal No 956 of 2003 and prayed that the documents at 'Annexure-A Colly ', be allowed to placed on the record of the Appeal. If the Police can be manipulate FIR, than it is not difficult for them to manipulate even fax message. If this documentary was very much with them , then they should have produced it during trail at the time of recoding of the evidence, before the Trial court . Now , it cannot be allowed to be produced on record of the appeal , Even otherwise , it would not have carried the prosecution case any further because Zahira has specifically denied before the court that she has made any statement before PI Shri Baria. Like wise other documents at 'Annexure –A Colly ' were also very much there with the Police , they could have very well produced it on the record of the case before the trial Court . Under the circumstances, this court cannot exercise its power under sections 391 read with section 311 of the Code and grant this application for taking additional evidence on record Hance, this application is also required to be rejected and it is rejected.
(B J SETHNA ,J)
(J R VORA)

PN NAIR

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