

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.583 OF 2006

1. Rajubhai Dhamirbhai Baria)
Age: 45 years, (Ori.Accused No.1))
R/o Hanuman Tekdi, Daboli Road,)
Vadodara, State - Gujarat.)
)
2. Pankaj Virendragir Gosai)
(Ori. Accused No.4))
R/o as above)
)
3. Sanjay Ratilal Thakkar)
(Original Accused No.11))
R/o Mahesh Mangal Society,)
Waghodia Road, Vadodara, State-)
Gujarat.)
)
4. Bahadursinh @ Jitu Chandrasinh)
Chauhan (Ori. Accused No.12))
R/o Behind Bhabha Plan,)
C-Ramnagar Road, Sainathnagar,)
Mohd, Talao, Vadodara, State -)
Gujarat.)

All the above Appellants are)
presently undergoing sentence at)
Kolhapur Central Prison at Kolhapur)
Maharashtra) Appellants.

Versus

1. The State of Gujarat)
2. The State of Maharashtra)
3. Taufel Ahemed Habibulla)
Siddiqui)
4. Raees Khan Nankau Khan)
5. Shehzad Khan Hasan Khan)
Pathan)
6. Sailun Hasan Khan Pathan)
7. Smt. Sharjahan Kasusarali)
Shaikh.)
8. Aslambhai Haroonbhai Shaikh) Respondents.

WITH
CRIMINAL APPEAL NO.584 OF 2006

3
APEAL 583/2006, 584/2006 & 585/2006
WITH APPA 571/2011, 572/2011 & 573/2011
WITH APPA 198/2012, 199/2012 & 200/2012

1. Jagdish Chunilal Rajput)
(Ori. Accused No.14))
Age 40 years,)
R/o Ranmukteshwar Road, Tejab)
Mill Chawl, Pratap Nagar, Opp.)
Bhataji Temple, Vadodara, Sate -)
Gujarat)
2. Dinesh Phulchand Rajbhar)
(Ori Accused No.15))
R/o Daboi Road, Ansuya Nagar,)
Opp. Bhataji Temple, Vadodara)
State- Gujarat)
)
3. Suresh @ Lalo Devjibhai Vasava)
(Ori. Accused No.20))
R/o as above.)
Appellants 2 and 3 are)
presently undergoing sentence at)
Kolhapur Central Prison at)
Kolhapur, Maharashtra. Appellant)
No.1 (Orig Accused No.14) has been)
released on bail on medical ground) ... Appellants.

V/s

1. The State of Gujarat)

4
APEAL 583/2006, 584/2006 & 585/2006
WITH APPA 571/2011, 572/2011 & 573/2011
WITH APPA 198/2012, 199/2012 & 200/2012

2. The State of Maharashtra)
3. Taufel Ahemed Habibulla)
Siddiqui)
4. Raees Khan Nankau Khan)
5. Shehzad Khan Hasan Khan)
Pathan)
6. Sailun Hasan Khan Pathan)
7. Smt. Sharjahan Kausarali)
Shaikh.)
8. Aslambhai Haroonbhai Shaikh) Respondents.

WITH
CRIMINAL APPEAL NO. 585 OF 2006

1. Shanabhai Chimanbhai Baria)
(Orig. Accused No.16))
Age 42 years,)
R/o at Soma Talao, Daboi Road,)
Zopadpatti, Vadodara, State -)
Gujarat.)
)
2. Shailesh Anupbhai Tadvı)
(Ori. Accused No.18))
R/o Hanuman Tekdi, Daboi Road,)
Vadodara, State-Gujarat)
)

5
APEAL 583/2006, 584/2006 & 585/2006
WITH APPA 571/2011, 572/2011 & 573/2011
WITH APPA 198/2012, 199/2012 & 200/2012

All the above Appellants are)
presently undergoing sentence at)
Kolhapur Central Prison at)
Kolhapur, Maharashtra) Appellants

Versus

1. The State of Gujarat)
2. The State of Maharashtra)
3. Taufel Ahemed Habibulla)
Siddiqui)
4. Raees Khan Nankau Khan)
5. Shehzad Khan Hasan Khan)
Pathan)
6. Sailun Hasan Khan Pathan)
7. Smt. Sharjahan Kausarali)
Shaikh.)
8. Aslambhai Haroonbhai Shaikh) Respondents.

ALONGWITH
CRIMINAL APPLICATION NO.571 OF 2011
IN
CRIMINAL APPEAL NO.583 OF 2006

Yasmeen Banu Ismail Sheikh)
Adult, Occ: Nil)

6
APEAL 583/2006, 584/2006 & 585/2006
WITH APPA 571/2011, 572/2011 & 573/2011
WITH APPA 198/2012, 199/2012 & 200/2012

Residing at : Ganjifalia,)
Chhotapudepur, District: Baroda,)
Gujarat) Petitioner/Applicant.
(Original Witness No.29)

V/s

1. The State of Gujarat)
2. The State of Maharashtra)
3. Rajubhai Dhamirbhai Baria)
Hanuman Tekdi, Daboi Road)
Vadodara) Respondents
(No.3 Original Accused)

WITH
CRIMINAL APPLICATION NO.572 OF 2011
IN
CRIMINAL APPEAL NO.584 OF 2006

Yasmeen Banu Ismail Sheikh)
Adult, Occ: Nil)
Residing at : Ganjifalia,)
Chhotapudepur, District: Baroda,)
Gujarat) Petitioner/Applicant.
(Original Witness No.29)

V/s

7
APEAL 583/2006, 584/2006 & 585/2006
WITH APPA 571/2011, 572/2011 & 573/2011
WITH APPA 198/2012, 199/2012 & 200/2012

1. The State of Gujarat)
2. The State of Maharashtra)
3. Jagdish Chunilal Rajput)
Ramukteshwar Road, Tejab)
Mill Chawl, Pratap Nagar,) Respondents
Vadodara) (No.3 Original Accused)

WITH
CRIMINAL APPLICATION NO.573 OF 2011
IN
CRIMINAL APPLICATION NO. 585 OF 2006

- Yasmeen Banu Ismail Sheikh)
Adult, Occ: Nil)
Residing at : Ganjifalia,)
Chhotapudepur, District: Baroda,)
Gujarat) Petitioner/Applicant.
(Original Witness No.29)

V/s

1. The State of Gujarat)
2. The State of Maharashtra)
3. Shanabhai Chimanbhai Baria)
Soma Talao, Daboi Road)
Zopadpatti, Vadodara) Respondents
) (No.3 Original Accused)

8
APEAL 583/2006, 584/2006 & 585/2006
WITH APPA 571/2011, 572/2011 & 573/2011
WITH APPA 198/2012, 199/2012 & 200/2012

ALONGWITH
CRIMINAL APPLICATION NO.198 OF 2012
IN
CRIMINAL APPEAL NO.583 OF 2006

Teesta Setalvad)
Residing at "Nirant", Juhu Tara)
Road, Mumbai - 400049) Applicant.

Verus

1. The State of Gujarat)
2. The State of Maharashtra)
3. Yasmeen Banu Ismail Sheikh)
Adult Occ. Nil,)
Residing at, Ganjifalia, Chhota)
Udaipur, Baroda, Gujarat)
4. Rajubhai Dhamirbhai Baria)
(Ori. Accused No.1))
5. Pankaj Virendragir Gosai (Ori)
Accused No.4))
6. Sanjay Ratilal Thakkar (Ori)
Accused no.11))
7. Bahadursinh Chandrsinh)
Chauhan (Ori. Accused No.12))

The Respondent Nos. 4 to 7)
are presently undergoing)
sentence at Kolhapur Central)
Prison at Kolhapur, Maharashtra) Respondents.

WITH
CRIMINAL APPLICATION NO.199 OF 2012
IN
CRIMINAL APPEAL NO.584 OF 2006

Teesta Setalvad)
Residing at "Nirant", Juhu Tara)
Road, Mumbai - 400049) Applicant.

Verus

1. The State of Gujarat)
2. The State of Maharashtra)
3. Yasmeen Banu Ismail Sheikh)
Adult Occ. Nil,)
Residing at, Ganjifalia, Chhota)
Udaipur, Baroda, Gujarat)
4. Jagdish Chunilal Rajput)
(Ori. Accused No.14))
5. Dinesh Phulchand Rajbhar (Ori)
Accused No.15))

6. Suresh Devjibhai Vasava (Ori)
Accused no.20))
The Respondent Nos. 4 to 6)
are presently undergoing)
sentence at Kolhapur Central)
Prison at Kolhapur, Maharashtra) Respondents.

WITH
CRIMINAL APPLICATION NO.200 OF 2012
IN
CRIMINAL APPEAL NO. 585 OF 2006

Teesta Setalvad)
Residing at "Nirant", Juhu Tara)
Road, Mumbai - 400049) Applicant.

Verus

1. The State of Gujarat)
2. The State of Maharashtra)
3. Yasmeen Banu Ismail Sheikh)
Adult Occ. Nil,)
Residing at, Ganjifalia, Chhota)
Udaipur, Baroda, Gujarat)
4. Shanabhai Chimanbhai Baria)
(Ori. Accused No.16))

5. Shailesh Anupbhai Tadvi (Ori)
Accused No.18))
The Respondent Nos. 4 to 5)
are presently undergoing)
sentence at Kolhapur Central)
Prison at Kolhapur, Maharashtra) Respondents.

ALONGWITH
CRIMINAL APPLICATION NO.408 OF 2012
IN
CRIMINAL APPEAL NO. 583 OF 2006

- Pankaj Gir Virendra Gir Gosai)
(Aged 33 years, presently serving)
sentence of life imprisonment)
at Kolhapur Central Prison as)
convict Prisoner No.C 3623)Applicant.

V/s

1. The State of Gujarat)
2. The State of Maharashtra)
3. Taufel Ahemed Habibulla)
Siddiqui)
4. Raees Khan Nankau Khan)
5. Shehzad Khan Hasan Khan)

- Pathan)
6. Sailun Hasan Khan Pathan)
7. Smt. Sharjahan Kausarali)
Shaikh.)
8. Aslambhai Haroonbhai Shaikh) Respondents.

Mr. Adhik Shirodkar, Sr. Counsel, for the Appellants in all the above appeals.

Mr. D. S. Jambaulikar, for the Appellant Nos. 1, 2, 3 & 4 in Cri. Appeal No. 583/2006.

Mr. V. D. Bichu, for the Appellant Nos. 1, 2 & 3 in Cri. Appeal No. 584/2006.

Mr. Mangesh Pawar, for Appellant Nos. 1 & 2 in Cri. Appeal No. 585/2006.

Mrs. Manjula Rao, Spl. Public Prosecutor for the State of Gujrat with Advocates Mr. J. P. Yagnik and Anoop Pandey.

Mrs. P. H. Kantharia, APP for the State of Maharashtra.

Mr. Mihir Desai, Sr. Counsel a/w Chetan Mali, for the Applicant in APPA Nos. 198/12, 199/12, 200/12

Mr. J. P. Yagnik, APP for the State of Maharashtra in APPA No. 408/2012 (through jail).

Mr. Mahesh Jethmalani, Sr. Counsel a/w Ms. Chitra Pawar i/b Mr. Madhusudan Paresh & Hemant Yadke, for the Applicant in APPA No. 571/2011.

Mr. V. T. Tulpule, Sr. Counsel, Spl. P. P. for the State of

Gujrat.in APPA No. 571/2011

Mr. J. P. Yagnik, APP for the State of Maharashtra in APPA No. 571/2011.

Mr. Adhik Shirodkar, Sr. counsel i/b Mr. D. S. Jambaulikar, for Respondent Nos. 1, 2, 3 & 4 in APPA No. 571/2011

Mr. Mahesh Jethmalani, Sr. Counsel a/w Ms. Chitra Pawar i/b Mr. M. Paresh & Hemant Yadke, for the Applicant in APPA No. 572/2011.

Mr. V. T. Tulpule, Sr. Counsel, Spl. P. P. for the State of Gujrat in APPA No. 572/2011

Mr. J. P. Yagnik, APP for the State of Maharashtra in APPA No. 572/2011.

Mr. Adhik Shirodkar, Sr. Counsel i/b Mr. V. D. Bichu, for Respondent Nos. 1, 2 & 3 in APPA No. 572/2011.

Mr. Mahesh Jethmalani, Sr. Counsel a/w Ms. Chitra Pawar i/b Mr. M. Paresh & Hemant Yadke, for the Applicant in APPA No. 573/2011.

Mr. V. T. Tulpule, Sr. Counsel, Spl. P. P. for the State of Gujrat in APPA No. 573/2011

Mr. J. P. Yagnik, APP for the State of Maharashtra in APPA No. 573/2011.

Mr. Adhik Shirodkar, Sr. Counsel i/b Mr. Mangesh Pawar, for Respondent Nos. 1, 2.

CORAM: V.M. KANADE & P.D. KODE, JJ.
DATES: 4/7/2012, 5/7/2012, 9/7/2012 & 10/7/2012
(Judgment dictated in open Court)

ORAL JUDGMENT: (Per V.M. Kanade, J.)

04/07/2012

1. All these appeals and applications taken out therein are being disposed of by this common judgment. For the sake of convenience the appellants shall be referred to as accused by their original numbers.
2. Appellants who are the original accused are challenging the Judgment and order passed by the Sessions Court, Mumbai whereby the learned Sessions Judge was pleased to convict Accused No. 1 - Rajubhai Dhamirbhai Baria, Accused No.4 - Pankaj Virendragir Gosai, Accused No.11 - Sanjay @ Bhopo Ratilal Thakkar, Accused No.12 - Bahadursinh @ Jitu Chandrasinh Chauhan, Accused No.14 - Jagdish Chunilal Rajput, Accused No.15 - Dinesh Phulchand Rajbhar, Accused No.16 - Shanabhai Chimanbhai Baria, Accused No. 18 - Shailesh Anupbhai Tadvil and Accused No.20 - Suresh @ Lalo Devjibhai Vasava for an offence punishable under section

143 of the Indian Penal Code and each of them was sentenced to suffer rigorous imprisonment for six months and also to pay a fine of Rs 500/- each, in default, each of them was to suffer further rigorous imprisonment for fifteen days. They were also convicted for the offence punishable under section 147 of the Indian Penal Code and each of them was sentenced to suffer rigorous imprisonment for two years and also to pay a fine of Rs 1000/- each, in default, each of them was to suffer further rigorous imprisonment for one month. They were also convicted for an offence punishable under section 324 of the Indian Penal Code read with Section 149 of the Indian Penal Code and each of them was sentenced to suffer rigorous imprisonment for three years, and also to pay a fine of Rs 1000 each, in default, each of them was to suffer further rigorous imprisonment for one month. They were also convicted for an offence punishable under section 326 of the Indian Penal Code read with section 149 of the Indian Penal Code and each of them was sentenced to suffer imprisonment for life and also to pay a fine of Rs 5000/- each, in default, each of them was to suffer further rigorous imprisonment for five months. They were also convicted for an offence punishable under section 302 of the Indian Penal Code read with Section 149 of the Indian Penal code and each of them was sentenced to suffer imprisonment for life and also to pay a fine of Rs 5000/- each, in default, to suffer further rigorous imprisonment for

five months. They were also convicted for an offence punishable under section 188 of the Indian Penal Code and each of them was sentenced to suffer simple imprisonment for a period of one month.

Trial Court was also pleased to convict Accused No. 4 - Pankaj Virendragir Gosai, Accused No.11 - Sanjay @ Bhopo Ratilal Thakkar, Accused No. 12 - Bahadursinh @ Jitu Chandrasinh Chauhan, Accused No. 15 - Dinesh Phulchand Rajbhar and Accused No. 20 - Suresh @ Lalo Divjibhai Vasava for an offence punishable under Section 435 read with section 149 of the Indian Penal Code and each of them was sentenced to suffer rigorous imprisonment for seven years and also to pay a fine of Rs 5000/- each, in default, each of them was to suffer further rigorous imprisonment for five months. They were also convicted for an offence punishable under Sections 436 of the Indian Penal Code read with section 149 of the Indian Penal Code and each of them was sentenced to suffer imprisonment for life, and also to pay a fine of Rs 10,000/- each, in default, each of them was to suffer further rigorous imprisonment for ten months. They were also convicted for an offence punishable under Section 395 of the Indian Penal Code and each of them was sentenced to suffer rigorous imprisonment for ten years and also to pay a fine of Rs 500/- each, in default, each of them was to suffer further rigorous imprisonment for fifteen days.

They were also convicted for an offence punishable under Section 448 of the Indian Penal Code read with Section 149 of the Indian Penal Code and each of them was sentenced to suffer rigorous imprisonment for one year and also to pay a fine of Rs 500/- each, in default, to suffer further rigorous imprisonment for fifteen days. They were also convicted for an offence punishable under section 449 of the Indian Penal Code read with section 149 of the Indian Penal Code and each of them was sentenced to suffer rigorous imprisonment for ten years and also to pay a fine of Rs 500/- each, in default, each of them was to suffer further rigorous imprisonment for fifteen days. They were also convicted for an offence punishable under section 450 of the Indian Penal Code and each of them was sentenced to suffer rigorous imprisonment for ten years and also to pay a fine of Rs 500/- each, in default, each of them was to suffer further rigorous imprisonment for fifteen days. They were also convicted for an offence punishable under section 451 of the Indian Penal Code read with section 149 of the Indian Penal Code and each of them was sentenced to suffer rigorous imprisonment for two years and also to pay a fine of Rs 500/- each, in default, each of them was to suffer further rigorous imprisonment for fifteen days.

Trial Court was also further pleased to convict Accused No. 11 - Sanjay @ Bhopo Ratilal Thakkar, Accused No.12 -

Bahadursinh @ Jitu Chandrasinh Chauhan, Accused No.15 - Dinesh Phulchand Rajbhar, Accused No.16 - Shanabhai Chimanbhai Baria and Accused No. 20 - Suresh @ Lalo Devjibhai Vasava for the offence punishable under Section 144 of the Indian Penal code and each of them was sentenced to suffer rigorous imprisonment for two years, and also to pay a fine of Rs 500/- each, in default, each of them was to suffer further rigorous imprisonment for fifteen days. They were also convicted of an offence punishable under section 148 of the Indian Penal Code and each of them was sentenced to suffer rigorous imprisonment for three years and also to pay a fine of Rs 1000/- each, in default, each of them was to suffer rigorous imprisonment for one month.

3. Alongwith these appeals, three applications have been filed by one Teesta Setalvad, seeking leave of this Court to intervene in these appeals. Three applications also have been filed by one of the witnesses viz Yasmin - P.W.29 in which she has alleged that she was threatened, pressurized and coerced to give false evidence before the Trial Court and, therefore, she urged and prayed that that there should be re-trial in view of provisions of section 391 of the Criminal Procedure Code.

4. These appeals were admitted by this Court on 17/7/2006 and Division Bench of this Court by its order was

pleased to direct that applications which have been filed by Teesta Setalvad and P.W.29 - Yasmin may be heard alongwith the appeal.

BACKGROUND OF THE CASE:

5. There is a chequered history in respect of this trial which is now known as Best Bakery Trial. After conclusion of the trial in Gujarat Trial Court and the Gujarat High Court confirmed the order of acquittal passed by the Trial Court, an appeal was filed in the Apex Court by one of the victims Zahirabibi Habibulla Shaikh (P.W.41) alongwith one NGO - Citizens for Justice and Peace of which Mrs. Teesta Setalvad is a member and it was alleged that the witness Zahira had turned hostile because she was pressurized by certain persons in Gujarat and, therefore, it was urged that the judgment and order passed by the Trial Court at Gujarat as well as the Gujarat High Court should be set aside. The Apex Court accepted the plea of the witness Zahira and set aside the judgment and order passed by the Trial Court and the Gujarat High Court and remanded the matter after transferring it from the State of Gujarat to the State of Maharashtra and ordered re-trial and reinvestigation by the police. The Apex Court observed that the investigation made by the Investigating Officer was tainted and several reasons were given by the Apex Court while coming to this

conclusion. One of the reason given was that the prosecution had examined relatives of the accused in support of the prosecution case. The Apex court observed that this was wholly unnecessary. The Apex Court observed that adequate protection ought to have been given to the prosecution witnesses. It also came to the conclusion that there were serious lapses in the investigation and, therefore, in the operative part of order, while remanding the matter to the Bombay High Court, it requested the Hon'ble Chief Justice of this Court to entrust the matter to one of the Sessions Judges in Maharashtra. A further direction was given to the State of Maharashtra to appoint a Public Prosecutor and to pay fees of the Public Prosecutor which fees would be reimbursed by the State of Gujarat. Apart from directing re-trial by the Sessions Court in Bombay, permission was granted to the prosecution and to the Investigating Officer to order investigation, if necessary. The Supreme Court also observed that, though, under normal circumstances, whenever reinvestigation has to be done, by way of courtesy to the Court, permission has to be obtained for the purpose of reinvestigation in view of section 173(8) of the Criminal Procedure Code. It observed that such a permission may not be necessary since the Apex Court itself had granted permission for reinvestigation and, therefore, liberty was given to the Investigating Officer to start reinvestigation without formally seeking further permission

from the Trial Court. The Hon'ble Chief Justice of the Bombay High Court entrusted the matter to the Sessions Judge, Mumbai and the trial proceeded, therefore, afresh before the City Civil & Sessions Court, Mumbai.

6. From the record, it appears that the learned Sessions Judge did not question the prosecution as to whether it intended to carry out further investigation since the roznama does not make any reference to the directions which were given by the Apex Court on this aspect and the matter thereafter proceeded before the Trial Court, Mumbai.

7. It is necessary to point out, at this stage, another relevant fact which had taken place during pendency and thereafter of the trial. The prosecution witness who had turned hostile in the Sessions Court in Gujarat and who had made a grievance before the Apex court that she was coerced to turn hostile, again, in the Sessions Court, Mumbai did not support the prosecution case and she was once again declared hostile by the prosecution. An application was, therefore, filed by Smt. Teesta Setalvad in the Apex Court for taking action against her for giving false evidence on oath and for convicting her for having committed the contempt of the Supreme Court. In the application, It was urged that the statement was made by her on oath in the Apex Court and in spite of the said statement she had again resiled from the

earlier statement which she had given before the Apex Court and before the Investigating Officer who recorded the statement. The Apex Court took a serious note about this fact and was pleased to convict the said witness Zahirabibi under the Contempt of Courts Act and sentenced her to suffer simple imprisonment for a period of one year. The said witness has already undergone the said sentence.

8. Taking into consideration the aforesaid background, we will now advert to the facts of the case.

FACTS:

9. The incident which happened at the Best Bakery in Vadodara was a fallout of an earlier incident which had taken place on 27/2/2002.

10. On 27/2/2002, Sabarmati Express was returning to Vadodara and in one or two of the Bogies of the said train, number of kar sevaks which included men, women and number of children were returning back. The train was stopped near Godhra which is a town situated at a distance of about 80 to 90 kilometers from Vadodara and a mob of muslim men burnt the entire bogie and did not permit innocent kar sevaks who were mostly men, women and which also included number of children to get out of the

train. Since these people could not get down of the bogie about 56 people were harmed to death and another 46 people were seriously injured. When news of this carnage was spread, it resulted into a back-clash and riots spread throughout the State of Gujarat. Bad news generally spreads like a wild fire and a mob of Hindu men came on the streets and riots erupted at several places in Vadodara and other parts of Gujarat. One of the incidents which took place was at the Best Bakery which is situated within the jurisdiction of Panigate Police Station.

11. The prosecution case, in brief, is that at about 8 P.M. to 8.30 P.M and 9.30 P.M. in the evening on 1/3/2002, members of the family who were running the Best Bakery after completing their evening prayers had their food and, at that time, a mob of about 1000 to 1200 people marched towards the Best Bakery from all directions. According to the prosecution and the witnesses, this mob was carrying torches (mashals) and swords, iron rods, sticks and other lethal weapons and the persons from this mob were giving slogans that the properties of muslims should be torched and they should be killed and burnt. The version which is given by the prosecution witnesses is that some of the witnesses were sitting on a cot which was kept outside the Best Bakery and when they saw this mob, all of them went inside and rushed to the terrace. Some of the women and children went

to the first floor and bolted the door from inside and others went to the terrace. According to the prosecution, some of the members of the said mob directed other members to set the Bakery on fire. Prosecution case is that some of the members of the mob took away some of the articles in the Best Bakery viz Ghee, Flour (maida) and other articles and then set the timber which was stocked in the basement on fire. It is alleged that, thereafter, this mob started throwing stones, soda water bottles, the bottles which were filled with kerosene and which were set on fire, on the terrace. The said incident of arson, looting and stone throwing continued for some time and, according to the prosecution, two persons were left behind and they were assaulted with swords and other lethal weapons. The version given by the prosecution witnesses is that after they were assaulted, they all came out and dragged these two people to the first floor.

12. According to the prosecution, police jeep came near the scene of offence between 9 P.M. to 10 P.M. and when the said jeep came there, all rioters fled away. Prosecution case is that the said Police Officer did not know the location of the Best Bakery and he, therefore, came there and after the crowd dispersed, he went away with his jeep. Unfortunately for the victims they were not rescued and, as a result, saga of stone throwing and throwing of bottles filled with kerosene continued till morning.

13. Prosecution case is that two other people were tied and were set on fire during night and, in the morning, at about 9 a.m. to 9.30 a.m. approximately, these victims trapped on the terrace pleaded to the mob on the ground floor that they should be allowed to go away. They were informed by the mob that they would get them down and after giving few slaps and beating them a little, they would be allowed to go. In view of the assurance given by the mob and the accused, initially women folk were brought down on a ladder. Some of the witnesses have used the term "double sidhi" and some of them have said that it was a bamboo ladder. After women folk were brought down, the servants and other family members of Habibulla family were brought down and, thereafter, an old lady who was the owner of the Bakery was finally brought down alongwith a small goat. At this stage, it would be relevant, briefly, to state that the Best Bakery was owned by one Habibulla who had expired few months before the incident had taken place and, after his death, the bakery was run by one Nafitulla Habibulla Shaikh (P.W. 31). After the death of Habibulla, his family consisted of his wife Saherunnisa Habibulla Shaikh (P.W.40), his son Nafitulla Habibulla Shaikh (P.W.31), three sisters viz Zahirabibi Habibulla Shaikh (P.W.41), Saherabanu Habibulla Shaikh (P.W.35) and Sabira Habibulla Shaikh and also one another son Nasibulla Habibulla Shaikh (P.W.30). Alongwith the said

family members, servants who were working in the Bakery and who also stayed in the said Best Bakery were also there viz Taufel Ahmed Habibulla Siddiqui (P.W.26), Raees Khan Nankau Khan (P.W.27), Shehzad Khan Hasan Khan Pathan (P.W.28). Baliram, Raju and Prakash along with son of Nafitulla, his wife Yasmin (P.W.29) and their small daughter almost of about 2 to 3 months old also resided there. On the date of incident, alongwith these people, family members of Aslam viz his wife and two children aged between 3 to 8 also had taken refuge in their house were present.

14. After the men were brought down, they were tied and assaulted with sticks, swords and other lethal weapons. An attempt was also made to set them on fire. According to the prosecution, female folk were taken to bushes with an intention to commit rape on them.

15. Prosecution case is that news about incident at Best Bakery was received at Panigate Police Station some time between 9.45 and 10 P.M and, initially, Police Inspector Himmatsingh Baria (P.W.72) asked PSI Rathod (P.W.63) to go to the scene alongwith constables and other Officers. Accordingly, PSI Rathod was the first Police Officer who came to the scene alongwith ambulance and the prosecution case is that three women and other people narrated him the incident. Soon thereafter, Baria arrived at the scene and

took over the investigation. One other Police Officer Piyush Purshottamdas Patel (P.W.67) of the rank of DCP also arrived there soon thereafter. His statement, however, appears to have been recorded on 24/3/2002. The victims who were assaulted and who were alive were taken to the hospital alongwith Zahira and other injured women. Statement of Raees Khan (P.W.27) was recorded and, later on, in the trial which took place before the Sessions Court, his statement was treated as an FIR. The three servants who were on the terrace alongwith P.W.26, P.W. 27, P.W. 28 and P.W. 32 succumbed to the injuries before they were admitted in the hospital. These three persons were Baliram, Prakash and Raju who were admittedly Hindu servants who were working with Habibullas. The injured witnesses Taufel (P.W.26), Raees Khan (P.W.27), Shehzad Khan Hasan Khan Pathan (P.W. 28) and Sailum Hasan Khan Pathan (P.W.32) were treated in the hospital. Two doctors examined these patients viz Dr. Dilip Choksi (P.W.62) and Dr. Meena Robin (P.W.46). According to these doctors, Raees Khan was the only person who was conscious and others were unconscious and others regained consciousness after few days. Statements of these five injured persons who were working as servants with Habibullas were recorded by Police Inspector Baria (P.W.72) and after they were discharged, according to the prosecution, they went to their native places in U.P. and were not available.

16. After the Fire Brigade came on the scene, they extinguished the fire and went to the first floor and found the dead bodies of women and children on the first floor. They found two bodies on the ground floor in the bushes and in all 14 people died in the said incident. Postmortem was performed of all the people who had died in the said incident and a report was given by the doctor who had performed the postmortem.

17. Mr. Baria (P.W.72) who was initially appointed as Investigating Officer, conducted the investigation till about 10/3/2002 and later on the investigation was transferred to Police Inspector Kanani (P.W.74) taking into consideration the seriousness of the said offence. Mr. Kanani was working with CID, Gujarat and was a Senior Officer. PI Baria recorded the statement of most of the injured witnesses and other persons including Zahira and PI Kanani, thereafter, took over the investigation.

18. According to the prosecution, investigation was promptly carried out by PI Baria as well as PI Kanani and efforts were made to trace the accused. However, said efforts were futile since accused were not found at their residence. Prosecution case is that, ultimately, on 27/2/2002 accused Nos. 1 to 5 were arrested. Thereafter, on 1/4/2002

accused Nos. 6 to 12 surrendered. On 15/4/2002, accused Nos. 13 to 16 were arrested and on 17/4/2002, accused Nos. 17 to 19 were arrested and the accused No.20 was arrested on 19/5/2002. Accused No.21 was arrested on 21/5/2002. The arrest panchanama was prepared and after statements of all the witnesses were recorded, charge-sheet was filed by the prosecution and the accused were tried before the Learned Sessions Judge, Vadodara, Gujarat State. It is an admitted position that the injured servants who have now been examined in the Trial Court at Mumbai viz P.W. 26, P.W.27, P.W. 28 and P.W. 32 were not examined in the Sessions Court at Gujarat. In the Sessions Court at Gujarat all members of Habibulla family turned hostile and amongst other witnesses namely pancha witnesses also turned hostile. Trial Court at Gujarat therefore, acquitted the accused.

19. Against this order of the Trial Court, Gujarat, Saherabanu Habibulla Shaikh (P.W.35) filed Revision Application in the Gujarat High Court. Similarly, State of Gujarat also filed an appeal against acquittal in the High Court. Affidavits were also filed by members of Habibulla family in which they alleged that they were threatened and coerced to give false evidence. The Gujarat High Court, however, proceeded to examine the material which was on record and did not consider the affidavits which were filed by

the members of Habibulla family and confirmed the judgment and order passed by the Trial Court.

20. As pointed out earlier, the Supreme Court then remanded the matter to the Sessions Court, Mumbai. In the Sessions Court at Mumbai, the prosecution, apart from examining four injured servants who were working in the Best Bakery also examined Yasmin Nafitulla Habibulla Shaikh (P.W.29) who is the wife of Nafitulla Habibulla Shaikh (P.W.31). Yasmin, admittedly, was not examined by the prosecution in the Sessions Court, Gujarat. She, however, was examined in the Sessions Court, Mumbai and she supported the prosecution case. In the Sessions Court at Mumbai, one person Pankaj Shankar Sharma (P.W.73) appeared in person and informed the learned Trial Judge that he had taken interviews of several persons after the incident had taken place and it was contended that he would like to produce the CD in support of the prosecution case. The Trial Court accepted his application but, at the same time, directed the prosecution to record his statement and further directed that he should be examined as prosecution witness and the CD which was taken by him interviewing the members of Habibulla family was brought on record.

21. After the charge-sheet was filed in the Trial court in Gujarat, no reinvestigation was made by the Investigating

Officer, nor any new Investigating Officer was appointed though permission to that effect was granted by the Apex Court and the prosecution relied on the same charge-sheet which was filed along with the documents. The accused pleaded not guilty to the charge and the charge was framed by the Trial Court, Mumbai.

22. The Trial court, after perusing the evidence on record, acquitted accused Nos. 2, 3, 5, 10, 13, 17, 19 and 21. The Trial Court, however, convicted accused Nos. 1, 4, 11, 12, 14, 15, 16, 18 and 20.

23. It has to be noted here that after the trial commenced in the Sessions Court, Mumbai, four accused did not surrender and the Trial Court separated the trial in respect of accused Nos. 6 to 9. The evidence against them, however, was recorded after an order was passed under section 299 of the Criminal Procedure Code.

24. Prosecution, in all, examined about 75 witnesses in the Trial Court, Mumbai. **P.W.1** - Ratilal Dudhabhai Variya was examined to bring on record the site plan and the map which was prepared by him and the same is brought on record at Exhibit-7. He was working as Maintenance Surveyor and he was called by the prosecution to prepare the said plan. **P.W.2** - Chandrakant Kesurbhai Patel was Nayab Mamlatdar

who signed the said plan. **P.W. 3** - Mohammad Hanif Himmatbhai Shaikh was examined as panch witness who was present when the panchanama regarding the place of incident was prepared on 3/3/2002 and which panchanama is at Exhibit-13. **P.W. 4** - Kalumiya Aminmiya Shaikh was a second panch in respect of the said panchanama. **P.W. 5** - Vijaybhai Thakurbhai Waghela was a panch in respect of the inquest panchanama which was prepared on 2/3/2002 which had been brought on record at Exhibit-22 and at Exhibits 16 to 21 and 48 to 53 in respect of bodies of various victims in the said incident. **P.W.6** - Mukhtyar Mohammad Hussein Shaikh was also a panch witness in respect of the panchanama dated 22/3/2002 in respect of bones which were found near the Best Bakery and the said panchanama had been brought on record at Exhibit-24 and Exhibits 25 to 35 are slips. **P.W. 7** - Hanif Mehboobmiya Sayyed was a panch witness in respect of panchanama dated 4/3/2002 in respect of two dead bodies which were tied with rassi and wire, which is at Exhibit-37. **P.W. 8** - Jagdish Muljibhai Desai was also a panch in respect of the panchanama regarding recovery from Mafatia - accused No.8, which is at Exhibits 39 and 40. **P.W. 9** - Dayaram Ramnivaj Pal was a leading fireman from the Fire Brigade Department who arrived at Best Bakery on 2/3/2002 and who has stated about the steps taken by him after he reached there. **P.W. 10** - Kiritbhai Dayabhai Patel and **P.W. 11** - Ishwarbhai Mohanlal Suthar

also are from the Fire Brigade and who have stated about the action taken by them after they reached at the site of the incident. **P.W.12** - Satish Hiralal Rawal also was working in the Fire Brigade as driver and he carried the dead bodies of Firoze and Nasru. **P.W. 13** - Karimbhai Ibrahimhai Painter was also a panch witness in respect of the panchanama regarding the place where two dead bodies were found on 3/3/2002. The said panchanama was prepared on 4/3/2002 and it was recorded at Exhibit-46. **P.W. 14** - Shabbhir Abdul Karim Purawala was a panch witness in respect of the inquest panchanama which was prepared on 2/3/2002. He was a second panch witness in respect of Exhibits 48 to 53 and 16 to 19. **P.W. 15** - Fakirabhai Punabhai Patil, A.S.I. who assisted P.I. Kanani and acted on the instructions of Kanani (P.W.74) has brought on record Exhibit-55 which was a letter written to P.W. 74 and Exhibit-58 was a receipt. **P.W.16** - Rameshbhai Vajubhai Rathwa was working as ASI attached to the SSG Hospital and who had given vardi at SSG Hospital and who passed on the vardi as per the dictation given by Dr. Meena (P.W. 46), which is brought on record vide Exhibits 57/1, 2, 3 which were entries in the Casualty Police Register. **P.W. 17** - Gordhanbhai Mithabhai Makwana was the ASI who also gave vardi pursuant to the dictation given by Dr. Meena (P.W.46) which is at Exhibit-60. **P.W. 18** - Dinubhai Ambalal Patel was the Chief Fire Officer who had produced the registers maintained by the Fire Brigade

Department, which are brought on record at Exhibits-62 to 64 i.e. entries in X-7 Fire Register, X-8 Dead Body Log Book and X-9 Vehicles Register. **P.W. 19** - Ashokkumar Ramjibhai Waghela was an expert in the Forensic Science Laboratory who had gone to the site and submitted report which is at Exhibit-24. **P.W. 20** - Dr. Sayied Shabbirali Shamshadali who was also an expert and was working as a Professor of Anatomy and he has given his expert opinion in respect of bones of the deceased which were examined by him and the letter written to him by DCB has been brought on record at Exhibit-69. Exhibit-70 is the list. Exhibit - 71 is the Certificate. While exhibiting the document at Exhibit 70/1, an objection was taken by the defence and certain portions were marked viz H, H-1, H-2, H-3, H-4, H-5, H-6, X-11 which was a xerox copy of the list X-12. All these documents were later on proved and were marked as Exhibit-72. **P.W. 21** - Maheshchandra Chhabildas Champaneria was working as Assistant Director, Forensic Science Laboratory and was examined as an expert to give opinion about Hydro carbon of petroleum and the Articles R-1, R-6 were brought on record as Exhibit-74. The letter of Biology Department was brought on record at Exhibit-75. The letter with the opinion was brought on record at Exhibit-76 and the letter dated 12/6/2002 from Kanani which was a reply to Exhibit-77 was taken on record at Exhibit-78. **P.W. 22** - Devendra Ranmalsinh Thakor and **P.W.23** - Avdhoot Rajendra

Nagarkar were the panchas. P.W. 22 - Devendra was a recovery panch in respect of panchanama dated 4/4/2002 regarding recovery of sword, iron rod. Exhibit-80 is the paper slip, Exhibit-81 is the panchanama regarding recovery of sword and iron rod and these articles are separately exhibited as Exhibit-82. The paper-slips which were signed by panchas were brought on record at Exhibit-83. P.W. 23 - Avdhoot was a recovery panch in respect of panchanama dated 22/5/2002 which panchanama is brought on record at Exhibit-85 regarding recovery of bamboo stick (R-20) and Exhibit-86 is the slip signature (X-13). **P.W. 24** - Kamlesh Himmatbhai Darji was also a panch in respect of recovery panchanama dated 4/4/2002. This panchanama is brought on record at Exhibits-88, 89 and 90. **P.W. 25** - Sureshchandra Vithaldas Sithpuria was the Assistant Director of FSI Biology Department who has given expert opinion regarding blood stains. The letter received from DCB and other documents have been proved by him and which are at Exhibits- 93, 94, 95, 96, 97, 98, 99, 100, 101 and 102. Exhibits- 95, 96, 99 and 102 are reports tendered by him. **P.W. 26** - Taufel Ahmed Habibulla Siddiqui is an injured eye witness. **P.W. 27** - Raees Khan Nankau Khan who is also an injured eye witness. **P.W. 28** - Shehzad Khan Hasan Khan Pathan is also an injured eye witness. All these three persons were working in the said Best Bakery. **P.W. 29** - Yasmin Nafitulla Habibulla Shaikh is also an eye witness who

is wife of Nafitulla (owner of the best Bakery) who was examined for the first time in the Sessions Court, Mumbai. She was not examined in the Sessions court at Gujarat.

P.W. 30 - Nasibulla Habibulla Shaikh is a son of Habibulla and a brother of Nafitulla and he is the co-owner of the Best Bakery and he was examined as an eye witness who turned hostile. **P.W. 31** - Nafitulla Habibulla Shaikh who was the owner of the Best Bakery was examined as an eye witness by the prosecution. He, however, did not support the prosecution case and turned hostile. **P.W. 32** - Sailum Hasan Khan Pathan is an injured eye witness and he was a worker working at Best Bakery alongwith P.W. 26 to P.W. 28. P.W. 32 and P.W. 26 to 28 were not examined by the prosecution in the trial in Gujarat. **P.W. 33** - Mohammad Ashraf Mohammed Haroon Shaikh is the brother of Aslam who was present at the Best Bakery at 7.30 P.M. and relative of one of the victims who has given evidence which is mostly in the nature of hearsay evidence. **P.W. 34** - Sharjanhan Kausarali Shaikh is also a wife of Kaushar Mama who had died in the said incident and her evidence also is hear-say evidence. **P.W. 35** - Saherabanu Habibulla Shaikh is the sister of Zaheera and was examined as an eye witness. She, however, turned hostile. **P.W. 36** - Lal Mohammed Khudabaksh Shaikh Is the owner of godown whose property viz godown was burnt. He was present in the locality in the residence of one of the accused. **P.W. 37** - Abdul Samin

Abdul Gani Mansuri is the second panch in respect of recovery panchanama dated 22/5/2002 which is at Exhibit-85. The said panchanama is in respect of recovery of bamboo sticks. **P.W. 38** - Abdul Rehman Gulam Mohammad Kadiwala was the panch witness in respect of panchanama at Exhibit-130 regarding recovery of a sword (R-23) from accused No.6 and also regarding recovery of Sura (R-24) and Pipe (R-25) from accused No.7. He has also brought on record Exhibits-129 and 128 which is a slip of the panchanama signed by him. **P.W. 39** - Iqbal Ahmed Ali Ahmed Ansari was also a witness carrying on bakery business and who is a leader of muslim community. His evidence is mostly hear-say evidence. **P.W. 40** - Saherunnisa Habibulla Shaikh is the mother of Zahirabibi and wife of late Habibulla who was examined as an eye witness but who turned hostile and did not support the prosecution case. **P.W.-41** - Zahirabibi Habibulla Shaikh is a witness whose statement has been treated as first information. She is the sister of Nafitulla (P.W.31) who was examined as an eye witness. She, however, turned hostile and did not support the prosecution case. **P.W. 42** - Aslambhai Haroonbhai Shaikh is a relative of the victim whose wife and children died on the first floor of the Best Bakery. **P.W. 43** - Jyotsnaben Maheshchandra Bhatt is a neighbour of Nafitulla and who was examined as an eye witness. However, she turned hostile. **P.W. 44** - Kanchanbhai Punjabhai Mali is

one of the neighbours of Nafitulla and was examined as an eye witness. This witness, however, did not support the prosecution case. **P.W. 45** - Veersingh Chandrasingh Zala is also one of the neighbours of Nafitulla (P.W.31). He however, turned hostile and did not support the prosecution case. P.W. Nos. 46, 47, 48 and 49 are doctors who have been examined by the prosecution. **P.W. 46** - Dr. Smt. Meena Robin was attached to SSG Hospital, Vadodara who has issued injury certificate and has given history in the vardi. These documents are produced at Exhibits 163, 167, 169 and 171. **P.W. 47** - Dr. Smt. Sutapa Basu was attached to SSG Hospital, who carried out postmortem of Zainabai, Subhau and Ramesh and her opinion has been brought on record at Exhibit-4, Exhibit-192, Exhibit-193, Exhibit-194. Exhibit-195 is in respect of correction made in Exhibit-193. **P.W. 48** - Dr. Beejaysinh G. Rathod was attached to SSG Hospital who performed postmortem and he has given his opinion on the postmortem notes after the postmortem which was performed on Sabira at Exhibit-198, Shabnam at Exhibit-199, Prakash at Exhibit-201, Firoze at Exhibits 202 and 203, Nasru at Exhibit-204 and 205 and he also gave a Yadi at Exhibits 200 and 199 which contains postmortem notes in respect of Rukshana wife of Firoze. **P.W. 49** - Dr. Kishore P. Desai was attached to SSG Hospital. He has performed postmortem and has given opinion regarding the cause of death in respect of Babli and Baliram, which is

brought on record at Exhibits-207 and 208 **P.W. 50** - Paresh Tribhuvan Brahmhatt, **P.W. 51** - Habibbhai Dawoodbhai Arab, **P.W. 52** - Razakbhai Noorbhai Vora and **P.W. 53** - Rajesh Shantilal Rana were panchas in respect of arrest of the accused. P.W. 50 - Paresh is the panch in respect of arrest panchanama dated 27/3/2002 in respect of A-1 to A-5 which is at Exhibit-210. P.W. 51 - Habibbhai is the panch in respect of arrest panchanama dated 1/4/2002 in respect of A-6 to A-12, which is on record at Exhibit-212. P.W. 52 - Razakbhai is the panch witness in respect of arrest panchanama dated 17/4/2002 in respect of A-17 to A-18, which is at Exhibit-214 and P.W.53 - Rajesh is the panch witness in respect of arrest panchanama dated 17/4/2002 in respect of arrest of A-19, which is at Exhibit-214. **P.W. 54** - Dr. K.H. Chavale was attached to SSG Hospital who has performed postmortem in respect of Sipli and Mantasha daughters of Firoze and an opinion given by him is at Exhibits-218, 219 and 220. **P.W. 55** - Arvindhbai Somabhai Rana was the panch in respect of arrest of A-20 on 19/5/2002 and the panchanama is at Exhibit-222, **P.W. 56** - Abdul Rehman Allauddin Pathan was also a panch in respect of arrest of A-13 to A-16 on 15/4/2002 and the arrest panchanama is at Exhibit-224. **P.W. 57** - Gulam Mohd. Usmanbhai Memon was also a panch in respect of arrest panchanama dated 21/5/2002 in respect of A-21, which is at Exhibit-226. **P.W. 58** - Chandrakant Ramchandra

Shrivastava was examined in respect of telephone call made by him to Panigate Police Station at 10.30 a.m. on 2/3/2002. He was the Corporator of the said area at the relevant time. **P.W. 59** - P.I. Rajendra K. Chavan was attached to Santacruz Police Station, Mumbai who recorded the statement of Zahirabibi in Mumbai after Vododara trial. **P.W. 60** - Dr. Jagdish Sitaram Soni was examined as an expert witness. He was working as Assistant Professor of Anatomy and has given opinion about the bones. **P.W. 61** - Bhimsinh Somsinh Solanki was a Police Head Constable at the relevant time and he was attached to Wadi Police Station and particularly to Mobile-1 Unit on 1/3/2002. **P.W. 62** - Dr. Dilip Bhalchandra Choksi was attached to SSG Hospital and he has examined the victims. **P.W. 63** - Balwantsinh Udesinh Rathod was the Police Officer who was attached to Panigate Police Station and particularly to Mobile-1 Unit of the said Police Station and he was the First Police Officer in point of time to reach the Best Bakery site on 2/3/2002 before Baria (P.W.72). **P.W.64** - Prakash Bansidhar Pathak was the Assistant Sub-Inspector, Special Branch and he has brought on record a Notification which was issued in respect of arrest pertaining to curfew which was announced and continued and he has brought on record Notification at Exhibits-253, 254 and 255. **P.W. 65** - Parimal Keshabhai Velera was the Dy. Commissioner of State Intelligence who sanctioned Bill for video shooting which was done at the site and at other

places where riots had taken place. **P.W. 66** - Abhaysinh Fatabhai Patel was the ASI who recorded the police statement of P.W.27 - Raees Khan. **P.W. 67** - Piyush Purshottamdas Patel was at the relevant time DCP, South Zone and he also arrived at the scene of offence at Best Bakery immediately on 2/3/2002 after Rathod and Baria had reached there. **P.W. 68** - Manaharbai Purshottambhai Waria was the ASI attached at the relevant time to Panigate Police Station who also recorded entries in the Station Diary and received telephonic message from P.W. 58 - Chandrakant and telephonic message from the hospital and the entries made by him in the Station Diary are marked as X-19 and are at Exhibits-273 to 279. **P.W. 69** - Gautam Narendrabhai Chavan was a Videographer who did the video shooting at the Best Bakery on 2/3/2002 and he had come along with police and he has identified number of cassettes which are at Exhibit-283. **P.W. 70** - Jagdishbhai Diwanjibhai. Chaudhari is the PSO attached to Panigate Police Station who made entries in the Station Diary about FIR. **P.W. 71** - Dr. Hiren N. Judal was a resident doctor attached to SSG Hospital and he has proved endorsement at Exhibit-262 which is a letter recording statement of Raees. He has given an opinion that Raees Khan was not fit to give his dying declaration. **P.W. 72** - Himmatsinh Gamabhai Baria was the Investigating Officer attached to Panigate Police Station who has carried out initial investigation from 2/3/2002 to 10/3/2002. **P.W. 73**

- Pankaj Shanker Sharma is a journalist who suo motto appeared before the Trial Court in Mumbai and claimed to have taken interview of Zahirabibi in April 2002. He has produced a CD of the interview taken by him which is marked as Exhibit-389. **P.W. 74** - Popatlal Purshottambhai Kanani was the Investigating Officer and Police Inspector attached to DCB, Crime Branch, Gujarat and who was appointed as Investigating Officer to investigate the said incident from 10/3/2002 to 1/12/2002. **P.W. 75** - R.C. Dave was another PSI attached to DCB, Crime Branch, Gujarat, who was assisting P.W. 74 - Kanani and was a junior Investigating Officer who acted on instructions of Kanani and he drew a panchanama dated 22/3/2002 in respect of vakhars which were burnt in the right and the said panchanam is at Exhibit-22.

25 Defence has examined five witnesses. **D.W.1** - Kumar Swami who was at the relevant time working as Joint Commissioner of Police (Law and Order), Vadodara City. He was examined by the defence for the purpose of proving contradictions in the statements of Yasmin (P.W.29). **D.W. 2** - Deepak Swaroop was the then Commissioner of Police, who was examined for the purpose of lock-up register. **D.W. 3** - Ramjibhai Jagjibhai Pargi was ACP at the relevant time and he was examined for the purpose of proving omissions and contradictions in the statements of Yasmin (P.W.29).

D.W.4 – Mrs Khyati Pandya was working as CEO in News Plus Channel and she has produced a CD which is at Exhibit-38 and the transcript of the CD is at Exhibit-514 collectively.

D.W. 5 – Ajay Jasubhai Patel was a video photographer who had taken shooting and interview of Yasmin (P.W.29) when she had returned to reside at Best Bakery after the accused in Gujarat Trial were acquitted. The said CD is at Exhibit-515. During trial, when the said CD and video tape were shown to the Trial Court, permission was obtained to bring on record the individual photographs of the CD and they have been brought on record at Exhibit-380 collectively.

26 Mr. Adhik Shirodkar, the learned Senior Counsel appearing on behalf of the appellants candidly submitted that the appellants are not challenging the incidents which took place on 1/3/2002 and 2/3/2002 at night or in the morning. He submitted that the appellants, however, have challenged their involvement in the said incidents.

POINTS FOR DETERMINATION:

27. The following points are, therefore, framed for determination:-

- (1) Whether the death of 14 people in the incident which took place at Best Bakery was

homicidal?

(2) Whether in the night of 1/3/2002 and in the morning of 2/3/2002, the incident of riot, arson, looting of the Best Bakery had taken place as alleged by the prosecution?

(3) Whether a mob of 1000 to 1200 people had come to the Best Bakery from all directions and had set the Bakery on fire and had caused death of women and children viz Jainabibi Hasanbhai, Shabnambibi @ Rukhsana Aslam, Sabira Habibulla, Cipli @ Saili Aslam Shaikh, Babli Aslam Shaikh, Mantasha, aged 3 years, daughter of Firoz Aslam Shaikh and Subhan, aged 4 years, son of Firoz Alsam Shaikh, who were inside the room on the first floor and had looted the Bakery and had taken away Ghee, Flour (Maida) and other articles which were in the Bakery and, thereafter, set it on fire?

(4) Whether a mob of 1000 to 1200 people thrown stones, soda water bottles and bottles filled with kerosene which were set on fire and were thrown as missiles on the terrace of the said Bakery.

(5) Whether the victims viz P.W. 26 - Taufel, P.W. 27 - Raees , P.W. 28 - Shehzad, P.W. 29 - Yasmin and P.W. 32 - Sailum and the grandmother of Nafitulla were made to get down from the terrace with the help of a ladder?

(6) Whether, after the victims viz P.W. 26 - Taufel, P.W. 27 - Raees , P.W. 28 - Shehzad, P.W. 29 - Yasmin and P.W. 32 - Sailum and the grandmother of Nafitulla were brought down from the terrace, women folk were taken behind bushes with intention to commit rape on them by the accused?

(7) Whether the hands and feet of P.W. 26 - Taufel, P.W. 27 - Raees, P.W. 28 - Shehzad and P.W. 32 - Sailum and Ramesh, Baliram and Prakash were tied by the accused and kerosene was poured on them and they were set on fire and they were also assaulted with swords, sticks and iron rods?

(8) Whether the appellants/accused were members of unlawful assembly and were

responsible for the death of 14 people viz (1) Jainabibi Hasanbhai, (2) Shabnambibi @ Rukhsana Aslam, (3) Sabira Habibulla, (4) Cipli @ Saili Aslam Shaikh, (5) Babli Aslam Shaikh, (6) Mantasha Firoz Aslam Shaikh, (7) Subhan Firoz Aslam Shaikh, (8) Baliram Shamlal Verma, (9) Prakash Ugroo Dhobi, (10) Raju @ Ramesh Baijnath, (11) Kausarali Shaikh, (12) Arshad @ Lulla Hasanbhai Shaikh, (13) Firoz Pathan and (14) Nasroo Hasan Khan Pathan, and were also responsible for causing grievous injuries to P.W. 26 - Taufel P.W. 27 - Raees, P.W. 28 - Shehzad , P.W. 32 - Sailum, P.W.30 - Nasibulla and P.W. 31 - Nafitulla?

(9) Whether the appellants/accused had committed the said offences which had taken place at night of setting the Best Bakery on fire?

(10) Whether it is proved that the appellants/accused were members of the unlawful assembly and had caused injuries to P.W. 26 - Taufel, P.W.27 - Raees, P.W. 28 - Shehzad, P.W. 32 - Sailum, P.W.30- Nasibulla and P.W. 31 - Nafitulla and had assaulted

Baliram Shamlal Verma, Prakash Ugroo Dhobi
and Raju @ Ramesh Baijnath?

28. We have heard the learned Senior Counsel Mr. Adhik Shirodkar for the appellants/accused and Mrs Manjula Rao, learned Senior Counsel appointed as Special Public Prosecutor appearing for State of Gujarat at length. They have also taken us through the judgment and order of the Trial Court and the notes of evidence. We have also seen the CD which was prepared from the video tape which was photographed by P.W. 69 - Gautam Chavan and also the CD which was produced by P.W. 73 - Pankaj Sharma and also the CD produced by D.W. 4 - Khyati Pandya.

INITIAL OBSERVATIONS OF THE COURT BEFORE APPRECIATION OF EVIDENCE:

29. It is an admitted position that most of the panch witnesses have not identified the accused persons at whose instance the said weapons were recovered and they have only identified the weapons. One or two pancha witnesses have turned hostile. The members of Habibulla family viz , Zahirabibi (P.W. 41), Saherunnisa (P.W.40), Nasibulla (P.W.30), Nafitulla (P.W.31) so also Saherabanu (P.W.35) who had filed Revision Application against the order of acquittal in the Gujarat High Court and who are owners of

the Best Bakery have turned hostile except Yasmin Nafitulla Shaikh (P.W. 29), the wife of Nafitulla. The crucial aspect in this case is regarding identity of the persons who had committed the said offence. The appellants have come up with the case that they were not the persons who were responsible for commission of the said offences. Therefore, the only relevant evidence which needs to be considered in this case is the evidence of four injured witnesses viz P.W. 26 - Taufel, P.W. 27 - Raees , P.W. 28 - Shehzad, P.W. 29 - Yasmin and P.W. 32 - Sailum since these five witnesses are examined as eye witnesses and four of these witnesses were injured in the morning after they were brought down as alleged by the prosecution and they have claimed to have identified the accused - appellants herein in the court for the first time. So far as other evidence is concerned, since appellants have not disputed the occurrence of the incidents on 1/3/2002 and 2/3/2002, it will have to be examined whether the prosecution has proved case against the appellants herein in respect of commission of the said offence which was committed in the night of 1/3/2002 and 2/3/2002 and, therefore, testimony and creditworthiness of these witnesses becomes very relevant.

30. Another crucial aspect which needs to be considered is regarding the testimony given by Yasmin (P.W.29) particularly in view of the applications filed by her in this

Court in which she has stated that she was compelled to give evidence at the instance of certain persons and she has made request in her applications that there may be a fresh re-trial and that her evidence may again be recorded. The tenor of the affidavit and the applications which have been filed on her behalf clearly reveals her intention of resiling from the evidence which has been given by her on oath in the Trial Court in Mumbai. Apart from that, it will have to be also considered whether without taking into consideration the said applications which she has filed in this Court, even otherwise, her evidence is trustworthy since much emphasis has been placed by the learned Senior Counsel appearing on behalf of the appellants on the interview which was allegedly given by her to D.W. 5 - Ajay Jasubhai Patel after she returned to the Best Bakery and started residing there and the interview was taken by all the Channels in which she allegedly exonerated all the appellants and on the basis of the said CD, it was sought to be urged that the said interview which was given prior to her evidence being recorded in the Court assumes importance and her testimony in the Court, therefore, created a doubt regarding her creditworthiness. It has also been strenuously urged that her presence in the Best Bakery in the night of 1/3/2002 and 2/3/2002 was doubtful on account of various circumstances which have been narrated at great length by the learned Senior Counsel Mr. Adhik Shirodkar during the course of his submissions. It

has also been submitted that Zahirabibi (P.W.41) whose statement was recorded as an FIR does not mention the presence of Yasmin (P.W.29) and it has also been urged that P.W.29 in her cross-examination had given the real reason for attack on the Best Bakery. It has been submitted that the real reason was abduction by Nafitulla (P.W.31), the husband of Yasmin of the Hindu girl who was converted and who was residing with Nafitulla and she gave birth to a male child and that was the real reason for the attack on the Best Bakery and it was not as a result of the Godhra incident which had taken place. For all these reasons, it has been urged that her testimony should be discarded. This aspect also will have to be considered at the relevant stage.

31. It has also been urged that all the prosecution witnesses who have deposed against the appellants were tutored and reliance has been placed on the admissions given by these witnesses.

32. The submissions made by the learned Senior Counsel Mr. Adhik Shirodkar and the learned Special Public Prosecutor Smt. Manjula Rao will be considered at length after the evidence of these five witnesses is taken into consideration.

33. The Trial Court has accepted the evidence of these five

witnesses and has not accepted the submissions made by the learned Senior Counsel appearing on behalf of the appellants/accused that that the testimony of these five witnesses is totally unreliable, untrustworthy, incredible more particularly because in their statements to the police they had not given names of any of the accused, nor given description of the accused, nor mentioned description of the weapons which were used. The Trial Court did not accept this submission and proceeded to accept the testimony of these five witnesses by relying on the judgment of the Apex Court in *Baladin vs. State of UP*¹ and on the another judgment of the Apex Court in *Dana Yadav vs. State of Bihar*² and also on the Division Bench Judgment of this Court (Nagpur Bench) in *Prem alias Santosh S/o Jivandas Satija vs. The State of Maharashtra*³ The Trial Court, therefore, on the basis of the said judgments was of the view that it was open for the Court to rely on the testimony which is given by the witnesses for the first time in the court where they have identified the accused in the open Court for the first time though no test identification parade has been held and thereafter it proceeded to examine the testimony of these five witnesses and after having accepted their identification of the accused in the Court, acquitted eight accused viz Mahendra Jadhav (A-2), Harish Gosai (A-3), Yogesh Verma (A-

1 AIR 1956 SC 181

2 AIR 2002 SC 3325

3 1993(2) Bom.C.R. 252

5), Pratapsinh Chauhan (A-10), Yasin Khokhar (A-13), Tulsi Tadvi (A-17), Kamlesh Tadvi (A-19) and Ravi Chauhan (A-21) and convicted nine accused viz Rajubhai Baria (A-1), Pankaj Gosai (A-4), Sanjay Thakkar (A-11), Bahadursinh Chauhan (A-12), Jagdish Rajput (A-14), Dinesh Rajbhar (A-15), Shanabhai Baria (A-16), Shailesh Tadvi (A-18) and Suresh Vasava (A-20). Keeping in view the said background, therefore, after examining testimony of these five witnesses, it will have to be seen whether the reasoning given by the Trial court is proper or not.

34. One other aspect which has been seriously urged by the learned Senior Counsel Mr. Adhik Shirodkar is that the statement of Zahirabibi (P.W.41) was recorded at about 1 P.M. and earliest information which was received by the Police Station was given by Chandrakant Shrivastava (P.W.58) on telephone which was recorded at about 10 a.m. to 10.10 a.m. and further statement was given to Rathod (P.W.63) by three women and also to Baria (P.W.72) and other Police Officers when they went to the scene of offence. It has been further urged that even if the said statements could not be recorded because the Police Officers went to the hospital directly from the scene of offence, in that event, the first statement which was recorded first in point of time was of Raees Khan (P.W. 27). It has been urged that two doctors viz. Meena Robin (P.W. 46) and Dr. Dilip Choksi (P.W.

62) have stated in their evidence that Raees Khan was the only conscious person when he was admitted in the hospital and his statement was recorded by Baria and, therefore, the said statement alone could be treated as an FIR and not the statement of Zahirabibi (P.W.41). This fact has been vehemently opposed by the learned Special Public Prosecutor Mrs. Majula Rao appearing on behalf of the prosecution on various grounds and, therefore, this aspect also needs to be considered.

35. The other grievance which has been made by Mr. Adhik Shirodkar, the learned Senior Counsel appearing on behalf of the appellants/accused is that all his objections which were raised by the defence were overruled by the Trial Court and the Trial Court had, in its judgment and in various orders which have been passed, has made derogatory remarks against the learned Senior Counsel and various observations have been made personally against him in respect of either cross-examination which was conducted or in respect of submissions which were made across the bar and that the objection was also taken by the learned Senior Counsel in respect of Court questions which were asked at the crucial stage during the course of trial. It has been urged, with greatest respect to the Court, that the said observations were clearly uncalled for. The another aspect which was also argued by the learned Senior Counsel

appearing on behalf of the appellants is regarding the procedure which was adopted by the Trial Court in respect of admission of the CD which was produced by the witness who had suddenly appeared before the Court and who was treated as prosecution witness, though no opportunity was given to the prosecution to verify the genuineness of the CD which was produced by him. It has been submitted that the said evidence was inadmissible and could not have been taken on record by the Trial Court.

36. Before we proceed to examine the evidence of these five witnesses and also consider the legal position in respect of evidentiary value or credibility and authenticity of identification of the accused by the witnesses for the first time in Court, it will be necessary to briefly see the observations made by the Apex court in the judgment¹ which was delivered in appeal being filed at the instance of Zahira and NGO - Citizens for Justice and Peace against the order passed by the Trial Court and by the Gujarat High Court. She had also filed complaint before the National Human Rights Commission on the very same ground.

37. It has to be remembered that the said observations have been made by the Apex Court on the basis of the application made by Zahira and on the basis of the affidavit

¹ AIR 2004 SC 3114

filed by Zahira and in her affidavit she has stated that she was coerced and threatened to give false deposition in the Gujarat Trial Court. It is a matter of record that on the basis of the said affidavit which was filed by Zahira, the Apex Court has made these observations and it has to be noted that, subsequently, the very same Zahira (P.W.41) who was examined by the prosecution, turned hostile and did not support the prosecution case and after she turned hostile again an application was made in the Apex Court and the Apex Court took a serious note of the conduct of Zahira (P.W.41) and proceeded to convict her under the provisions of Contempt of Courts Act and sentenced her to suffer simple imprisonment for one year and she has already undergone the said sentence. Keeping this fact in view, the said observations will have to be taken into consideration.

38. The Apex Court, in paras 8 and 9 of its judgment in *Zahira Habibulla H. Sheikh and another vs. State of Gujarat and others*¹ has very succinctly mentioned the reasons given by State of Gujarat and Zahira as to why fresh trial was necessary. Briefly stated, it was urged before the Apex Court that since large number of witnesses had turned hostile, no steps were taken by the Public Prosecutor to protect the star witness who was to be examined on 17/5/2003 particularly because 4 out of 7 injured witnesses

¹ AIR 2004 SC 3114

have turned hostile on 9/5/2003. It was also urged that the Public Prosecutor had not taken further steps of requesting the Trial court for holding the trial in camera. Secondly, it was contended that the Trial Court should have exercised the power under section 311 of the Code and recalled and re-examined the witnesses in order to find out the truth and to properly decide the case. Fourthly, it was urged that the Trial court had not taken advantage of the power vested in it under section 165 of the Evidence Act and it had led to miscarriage of justice. Fifthly, it was urged that the injured witnesses were not examined. Sixthly, it was contended that the statement of Raees Khan was wrongly allowed to be exhibited and treated as an FIR by the Public Prosecutor and, lastly, it was contended that no attempt was made to secure the presence of five injured witnesses viz. P.W. 26 - Taufel, P.W. 27 - Raees , P.W. 28 - Shehzad, P.W. 29 - Yasmin and P.W. 32 - Sailum and the Trial Court without issuing notices and summons, had accepted the pursis of the prosecution dropping them as witnesses. It was also urged that Shehzad Khan was wrongly dropped as eye witness on the ground that he was of unsound mind. It was contended that the Trial court ought to have got the said witness examined from the Civil Surgeon or Doctor from Psychiatric Department, particularly because Dr. Meena had not stated in her evidence that he was mentally unfit. The sum and substance of what was urged before the Apex court was that

there was no fair trial and that the effort was made during trial to see that the accused were acquitted and that the Investigating Agency had helped the accused and that the Court was merely acting as onlooker. The grievance was also made that the High Court had erred in not accepting or taking into consideration the affidavits which were filed by Zahira and others and that though nomenclature of the said affidavits and the grounds taken by the State did not refer to provisions of section 391 or section 311, in fact, the State has made prayers for acceptance of certain evidence under section 391 of the Code read with section 311 of the Code. The High Court had held that under section 386 of the Code, the Court could only peruse the record of the case brought before it in terms of section 385(2) of the Code and the appeal has to be decided on the basis of such record only and no other record can be entertained or taken into consideration while deciding the appeal. In this context, the Apex Court, after taking into consideration the provisions of section 311 and 391 has made the following observations in para 38 and 39 of its judgment which read as under:-

38. This Court has often emphasised that in a criminal case the fate of the proceedings cannot always be left entirely in the hands of the parties, crimes being public wrongs in breach and violation of public rights and duties, which affect the whole community as a community and harmful to the society in

general. The concept of fair trial entails familiar triangulation of interests of the accused, the victim and the society and it is the community that acts through the State and prosecuting agencies. Interests of society is not to be treated completely with disdain and as persona non grata. Courts have always been considered to have an over-riding duty to maintain public confidence in the administration of justice - often referred to as the duty to vindicate and uphold the 'majesty of the law'. Due administration of justice has always been viewed as a continuous process, not confined to determination of the particular case, protecting its ability to function as a Court of law in the future as in the case before it. If a criminal Court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine by becoming a participant in the trial evincing intelligence, active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves. Courts administering criminal justice cannot turn a blind eye to vexatious or oppressive conduct that has occurred in relation to proceedings, even if a fair trial is still possible, except at the risk of undermining the fair name and standing of the judges as impartial and independent adjudicators.

39. The principles of rule of law and due process are closely linked with human rights

protection. Such rights can be protected effectively when a citizen has recourse to the Courts of law. It has to be unmistakably understood that a trial which is primarily aimed at ascertaining truth has to be fair to all concerned. There can be no analytical, all comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz. whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted. It will not be correct to say that it is only the accused who must be fairly dealt with. That would be turning Nelson's eyes to the needs of the society at large and the victims or their family members and relatives. Each one has an inbuilt right to be dealt with fairly in a criminal trial. Denial of a fair trial is as much injustice to the accused as is to the victim and the society. Fair trial obviously would mean a trial before an impartial Judge, a fair prosecutor and atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated. If the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial. The failure to hear material witnesses is certainly denial of fair trial.

Similarly, in paragraphs 41 and 43 of the said judgment the Apex Court has observed as under:-

“41. A criminal trial is a judicial examination of the issues in the case and its purpose is to arrive at a judgment on an issue as a fact or relevant facts which may lead to the discovery of the fact issue and obtain proof of such facts at which the prosecution and the accused have arrived by their pleadings; the controlling question being the guilt or innocence of the accused. Since the object is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not a bout over technicalities, and must be conducted under such rules as will protect the innocent, and punish the guilty. The proof of charge which has to be beyond reasonable doubt must depend upon judicial evaluation of the totality of the evidence, oral and circumstantial and not by an isolated scrutiny.”

“43. The fair trial for a criminal offence consists not only in technical observance of the frame and forms of law, but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice.”

Similarly, in para 64 of the said judgment the Apex Court has observed as under:-

64. In the case of a defective investigation the Court has to be circumspect in evaluating the evidence and may have to adopt an active and analytical role to ensure

that truth is found by having recourse to Section 311 or at a later stage also resorting to Section 391 instead of throwing hands in the air in despair. It would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective. (See Karnel Singh v. State of M.P. (1995 (5) SCC 518).

Further, in para 76 of the said judgment the Apex Court has observed as under:-

“76We are satisfied that it is fit and proper case, in the background of the nature of additional evidence sought to be adduced and the perfunctory manner of trial conducted on the basis of tainted investigation a re-trial is a must and essentially called for in order to save and preserve the justice delivery system unsullied and unscathed by vested interests. We should not be understood to have held that whenever additional evidence is accepted, re-trial is a necessary corollary. The case on hand is without parallel and comparison to any of the cases where even such grievances were sought to be made. It stands on its own as an exemplary one, special of its kind, necessary to prevent its recurrence. It is normally for the Appellate Court to decide whether the adjudication itself by taking into account the additional evidence would be proper or it would be appropriate to direct a fresh trial, though, on

the facts of this case, the direction for re-trial becomes inevitable.”

In para 78 of the said judgment the Apex Court has observed as under:-

“78. “Keeping in view the peculiar circumstances of the case, and the ample evidence on record, glaringly demonstrating subversion of justice delivery system no congeal and conducive atmosphere still prevailing, we direct that the re-trial shall be done by a Court under the jurisdiction of Bombay High Court. The Chief Justice of the said Court is requested to fix up a court of competent jurisdiction.”

The Apex Court in paras 81 and 82 of the said judgment also observed as under:-

“81. Since we have directed re-trial it would be desirable to the investigating agency or those supervising the investigation, to act in terms of Section 173(8) of the Code, as the circumstances seems to or may so warrant. The Director General of Police, Gujarat is directed to monitor re-investigation, if any, to be taken up with the urgency and utmost sincerity, as the circumstances warrant.”

“82 Sub-section (8) of Section 173 of the Code permits further investigation, and even de hors any direction from the Court as such, it is open to the police to conduct proper

investigation, even after the Court took cognizance of any offence on the strength of a police report earlier submitted.”

The Hon'ble Chief Justice, therefore transferred the case to the Sessions Court, Mumbai. It is an admitted position that though the Apex court had in terms held that investigation which was made was tainted and that there were several lapses in the investigation and permission was granted to the Director General of Police, Gujarat to monitor the re-investigation without seeking further permission under section 173(8) of the Code, yet, neither further re-investigation has been made nor any further statements of any other witnesses or of the injured witnesses have been recorded. Surprisingly, the prosecution chose to proceed with the trial on the basis of the material which already existed without further re-investigation or without taking any further steps of recording fresh statements though liberty was expressly granted by the Apex Court.

39. During the trial again, all the members of family of late Habibulla turned hostile and these witnesses were extensively cross-examined by the learned Special Public Prosecutor appearing on behalf of the State. In fact, if the cross-examination of Zahirabibi (P.W. 41) is seen, it will disclose that the cross-examination runs into as many as 540 pages.

40. The record also does not indicate that after the trial resumed in the Trial Court, Mumbai, the Trial Court does not appear to have inquired with the Public Prosecutor as to what steps it wanted to take in view of the directions given by the Apex Court in paras 81 and 82 of its judgment. Normally, once the matter is remanded by the Apex court and certain directions are given by the Apex Court, it is the duty of the Trial Court to enquire whether directions have been complied with by the party. The roznama does not indicate that any such inquiry was made by the Trial Court as to whether Investigating Officer or Director General of Police proposed to start re-investigation under his supervision.

41. Under this background, after the trial commenced again, Zahirabibi (P.W. 41) turned hostile again. Prima facie, in our view, there is no material on record to indicate that as per the directions given by the Apex Court, the State of Maharashtra or State of Gujarat have given any additional security to the eye witnesses or any steps were taken to issue summons to the five injured witnesses viz P.W. 26 - Taufel, P.W. 27 - Raees , P.W. 28 - Shehzad, P.W. 29 - Yasmin and P.W. 32 - Sailum. Since the Apex Court had given specific directions, proper care ought to have been taken to give them complete police protection from all the concerned interested parties. It appears that this was not done. After

Zahirabibi (P.W.41) turned hostile, an application was filed in the Apex Court bringing this fact to the notice of the Apex Court and the Apex Court was distressed by the fact that Zahirabibi (P.W.41) had earlier filed an application in the Apex Court complaining of coercion and since the Apex Court was convinced about the plea taken by her in her affidavit, it had not only set aside the judgment of the Trial Court but also of the Gujarat High Court after passing strictures against the judiciary in Gujarat in general and when this application was filed, the Apex Court in Criminal Misc. Petition Nos. 6658/2004 to 6661/2004 by its judgment and order dated 8/3/2006 directed that a judicial inquiry be made and the parties were permitted to file their statements before the Inquiry Officer. Pursuant to the directions given by the Apex Court in the said case, the inquiry was conducted. The Inquiry Officer came to the conclusion that money had exchanged hands and that was the main inducement responsible which made Zahirabibi (P.W. 41) to state in a particular way in the Trial Court. However, Inquiry Officer held that persons whose names appeared during inquiry could not be directly linked with the change of stand by Zahirabibi (P.W. 41). Zahirabibi (P.W. 41) had filed her objections before the Inquiry Officer. The Apex Court, therefore, came to the conclusion that Zahira had committed contempt of the Apex Court and appeared to have deflected the court of justice by unacceptable methods and sentenced

her to undergo simple imprisonment for one year and to pay fine of Rs 50,000/- and in case of default of payment of fine to undergo further imprisonment of one year. The Apex Court further attached her assets for a period of three months and directed Income Tax Authorities to initiate proceedings asking her to explain sources of acquisition of various assets and the expenses made by her. By the time Apex Court decided Contempt Petition on 8/3/2006, trial in the Sessions Court was already over by judgment and order dated 24/2/2006.

SUBMISSIONS OF THE LEARNED SR. COUNSEL FOR THE APPELLANTS/ACCUSED AND THE LEARNED SPECIAL PUBLIC PROSECUTOR IN THE ABOVE APPEALS.

42. Mr. Adhik Shirodkar, the learned Senior Counsel appearing on behalf of the appellants/accused submitted that neither in the Trial Court nor in the appellate court, the defence challenged the unfortunate incident of burning of Best Bakery premises and other premises or unfortunate death of persons who were inside the Building.

43. Mr. Adhik Shirodkar, the learned Senior Counsel appearing on behalf of the appellants/accused firstly took us through evidence of P.W.1 and P.W.2 viz Ratilal Variya and Chandrakant Patel who had prepared the plan. He submitted that the plan was not properly prepared and the plan did not

mention all that is necessary for appreciating the evidence and that the witnesses had themselves admitted this fact in their cross-examination. It is submitted that this was done deliberately to suppress the fact that witnesses could not have seen any thing from the terrace or from the first floor. He submitted that from the evidence, it could be seen that the plan was not made according to scale and certain important aspect which ought to have been highlighted were deliberately glossed over by the witnesses when the plan was prepared. He submitted that P.W.1 - Ratilal Variya had prepared the plan as per directions of P.W.2 - Chandrant Patel and that P.W.2 - Chandrakant Patel had signed it. He submitted that apart from the fact that the plan was not drawn through scale, P.W.1 has admitted that he had not gone beyond the first floor and he also admitted that measurement of the bakery was approximate and not accurate. The learned Senior Counsel submitted that the witness in cross-examination admitted that it was possible to draw the plan according to scale but he had not done so because more paper and more time would have required and, therefore approximate distance was given and he did not have panchanama with him. He also admitted that he did not know the term 'gradient'. He further submitted that the witness has admitted that there was narrow passage and one had to go side ways to go to the first floor and the passage was so small that only one person could enter. He

also submitted that the witness had admitted that he did not go to the first floor. He submitted that so far as P.W. 2 is concerned he admitted that the police had asked him to draw a plan and that the sketch was made by P.W.1 and he had merely signed it. The learned Senior Counsel submitted that P.W.2 further admitted that he was not from the Survey Department but was from the Revenue Department and he had no experience in drawing plans. He, therefore, submitted that P.W.1 and P.W. 2 had miserably failed in performing their functions.

44. He then invited our attention to the testimony of P.W.9 - Dayaram, P.W. 10 - Kiritbhai and P.W. 11 - Ishwarbhai. He submitted that the these fire fighters also did not state as to whether the room in which all women and children had died was bolted from inside or outside. He submitted that P.W. 10 in his cross-examination has admitted that on the ground floor, timber had been kept and that much heat was generated because of burning of timber and wood and that there was no outlet for the heat and, therefore, the fire had gone to the first floor. He submitted that P.W.10 also admitted that ghee was highly inflammable and when ghee and timber burnt together, there would be some smoke and that the smoke usually goes upward. He submitted that these three witnesses have admitted that it was very hot and they had to take efforts to cool down the place by spraying

water. He submitted that these witnesses have admitted that there was much smoke on account of fire. He further submitted that thereafter application was made before the Trial Court for the purpose of taking site inspection and the application filed by the accused was allowed and the court had thereafter taken the site inspection. It is however submitted that the site inspection could never replace the necessity of producing appropriate and proper site plan. He submitted that the prosecution had deliberately produced improper plan. Reliance was placed on the judgment of the Apex court in *Keism Kumar Singh and another vs. State of Manipur*¹.

45. He then submitted that so far as burden of proof is concerned, it was a salutary principle of criminal jurisprudence that burden of proof lies entirely on the prosecution and that it is absolute and it never shifts. He relied upon the following judgments:

(1) *Tahsildar Singh and another. vs. State of U.P.*²

(2) *Ramdas Srinivas Nayak vs. Abdul Rehman Antulay and another*³

(3) *Yudhishtir vs. The State of Madhya Pradesh*⁴

1 1985 SC 1664

2 1959 Cri.L.J. 1231

3 1993(1) Bom. C.R. 185

4 1971(3) SCC 436

46. He then submitted that five prosecution eye witnesses have turned hostile viz Nasibulla (P.W.30), Nafitulla (P.W.31), Saherabanu (P.W.35), Saherunnisa (P.W.40) and Zahirabibi (P.W.41). He submitted that substantive evidence of hostile witness could be considered if it in any legal manner corroborates the evidence led by the prosecution and the rest of the evidence has to be discarded if it fails to enhance the case of the prosecution. He then submitted that the evidence of hostile witnesses would have to be dealt with strictly by legal principles enunciated in appreciating the evidence of hostile witnesses. Thirdly, it is submitted that it was completely irrelevant as to how and in what manner and for what reason the witnesses had turned hostile for the purpose of substantiating the charges levelled against the accused. He submitted that this Court should ignore the observations made by the Hon'ble Supreme Court while transferring the case to State of Maharashtra since the background and history is not germane to substantiate the case of the prosecution. It is, therefore, submitted that this Court will have to consider whether there is unimpeachable and legal evidence given by the witnesses to inspire confidence about their credibility and that they do not suffer from legal stigma attached to them by their omissions.

5/7/2012 AT 11 A.M.

47. The learned Senior Counsel appearing on behalf of the appellants/accused then submitted that no reliance could be placed on the testimony of hostile witnesses viz. Nasibulla (P.W.30), Nafitulla (P.W.31), Saherunnisa (P.W.40) and Zahirabibi (P.W.41) and Saherabanu (P.W.35). He submitted that Zahirabibi Shaikh (P.W.41) had again turned hostile and had not supported the prosecution case though she had filed an appeal in the Apex Court wherein she had alleged that she was threatened and therefore she had given false evidence. He submitted that there were two possibilities in respect of evidence which was given by them. It was possible that evidence which they had given in court was a truthful account of what actually happened or, in the alternative, it was possible that they had turned hostile on account of external influence. He submitted that the reason why and under what circumstances and who was responsible for witnesses to resile from their earlier statements is not relevant for the purpose of deciding the fate of the appellants herein and those circumstances are not relevant for the purpose of deciding this appeal. He submitted that the case of the defence was that NGO - Citizens for Justice and Peace and its members were responsible for tutoring the witnesses and had threatened them and they had, therefore, approached the independent organization who had given

them protection. He submitted that, in either case, testimony of these witnesses was not reliable and even if certain facts were brought on record in their cross-examination by the prosecution, on account of conduct of these witnesses, the evidence which was given by them in the Court was inherently defective and untrustworthy. He submitted that the Trial Court had erred in permitting the cross-examination of these hostile witnesses upon unwarranted aspect and that the material which was brought on record in their cross-examination was totally irrelevant for the purpose of deciding the case.

48. The learned Senior Counsel for the appellants then submitted that the prosecution had examined five eye witnesses viz Taufel (P.W.26), Raees (P.W. 27), Shehzad (P.W. 28), Yasmin (P.W.29) and Sailum (P.W. 32). He submitted that if the evidence of each of these witnesses is taken into consideration, there were several lacunae and individually and collectively testimony of these witnesses was insufficient and no reliance could be placed on their evidence. Firstly, he submitted that in the statements of P.W.26, P.W. 27, P.W.28, and P.W. 32 which were recorded by police, these witnesses had not given names of the appellants/accused nor their description. They had also improved their statements and had given totally new version in the evidence which was given by them in the Court. He

submitted that the defence had brought on record omissions made by these witnesses which were in the nature of material contradictions and if the omissions and improvements made by these witnesses in the testimony before the Court are taken into consideration, their evidence would only reveal that they were on the terrace through out the incident and, thereafter, they were brought down. He also submitted that their identification of the accused in the Court for the first time could not be relied upon. He further submitted that though these witnesses were available and were in the hospital atleast for 10 to 15 days, no steps were taken for conducting the identification parade by the Investigating Officer. He submitted that neither Baria (P.W.72) nor Kanani (P.W.74) had taken any steps whatsoever for holding the identification parade which was necessary for the purpose of ascertaining whether the accused who were arrested after 24/3/2002 were real assailants and this exercise was necessary for the purpose of lending assurance to the Investigating Officer that the persons who were arrested by him were the same persons who were perpetrators of the crime. He then submitted that these witnesses appeared in the Court under mysterious circumstances. He submitted that in the cross-examination most of these witnesses had admitted that no summons was issued by the Trial Court and they had appeared on their own and they had further admitted that they had met Mrs.

Teesta Setalvad, a member of NGO - Citizens for Justice and Peace. He submitted that, therefore, under these circumstances and in the manner in which the evidence was given by them, it was apparent that they were tutored or atleast there was an ample opportunity for tutoring them. He invited our attention to the relevant questions which were asked to these witnesses on this aspect. He also submitted that Shehzad (P.W.28) was not examined by the Trial Court and the Trial Court had observed that he was of unsound mind. He submitted that in the examination-in-chief, it was specifically asked whether he had seen any document which was presented in the Supreme Court and he answered in the affirmative. He submitted that, however, this document was not produced in the court, nor inspection of the said document was given nor was it annexed to the charge-sheet. He submitted that it was the duty of the prosecution to have examined the doctor or to get the said witness examined either by Psychiatrist or by mental hospital and to obtain certificate that he was mentally unfit to depose in the Court. He submitted that no such steps were taken. He further submitted that the said witness had not given answers to the questions which were asked and he had given irrelevant answers to the pointed questions which were asked by the defence in the cross-examination. He submitted that, therefore, from the answers which were given by this witness it was possible to draw an inference that this witness was

mentally unfit either to understand the questions which were asked to him or to give answers to the to the questions. He also submitted that even Sailum (P.W.32) was not a dumb witness as observed by the Trial Court but from his answers also it was possible to draw an inference that he was not in a proper frame of mind and mentally fit to depose before the Court. He submitted that it is a matter of record that both these witnesses (P.W. 28 and P.W.32) in their evidence have stated that it was taken a long time for them to remember everything and, Sailum (P.W.32), on the other had, it is submitted, had stated that even now he did not recognize number of persons from his village. He submitted that under these circumstances apart from the fact that they had improved the case, it was not possible to rely on their testimony. He further submitted that the manner in which the identification of the accused was permitted to be made in the Court also was far from satisfactory. He submitted that, ordinarily, when the identification parade is held by the Special Executive Magistrate, he has to follow the guidelines which are laid down in the Criminal Manual and if these guidelines are not followed, the Courts have held that the identification parade of the accused in such circumstances becomes doubtful. He submitted that, in the present case, the accused were made to stand in the court, not according to their serial number but they were made to stand together and these witnesses pointed out the accused. He submitted

that, therefore, even otherwise, the said identification of accused made by these witnesses for the first time in Court was improper. He further submitted that the Court at some stages, after examination and cross-examination was over, had intervened and had persuaded the witnesses to give names of the accused. He submitted that having done that further steps for identifying the accused by their names whose names were mentioned were not taken. He, therefore, submitted that merely mentioning the names of accused by the witnesses was not sufficient if they were unable to identify the accused by pointing out that so and so were the accused who were standing in the row XYZ by giving their names. He submitted that viewed from any angle, it was not possible to rely on the testimony of these four witnesses. So far as Yasmin (P.W.29) is concerned, it is submitted that she had, in fact, filed an application and had made a statement on oath that the evidence which was given by her in the court was false since she was pressurized by certain persons whose names have been mentioned in the application and the affidavit which she has filed. He submitted that, therefore, testimony of this witness cannot be relied upon under any circumstances, apart from other discrepancies in her statement including omissions and the improvements which are made by her and the material contradictions which have been brought on record. He further submitted that all these witnesses had given evasive

answers and either not answered to the pointed questions which were asked to them or had given certain excuses for the purpose of justifying their improvements made by them in evidence given by them before the Court. He submitted that therefore there was a method in their madness and this clearly suggested that they were tutored. He submitted that all these witnesses, essentially, were rustic witnesses since they were illiterate, ignorant and in spite of that when, at the relevant time, on a question being asked, they had evaded the answers. He submitted that threefold strategy was adopted by them and after the first witness P.W.26 was examined, subsequent witnesses thereafter had given other answers. He submitted that either they had stated that the statements which were recorded by the police were not read over or that the statements which were recorded in Gujarati were not explained to them. He submitted that, therefore, a deliberate attempt was made to wriggle out of the situation where they had failed to give names and particulars in their statements. He then submitted that Baria (P.W.72) and Kanani (P.W.74) were both cross-examined at length and he submitted that Baria was specifically asked regarding the manner in which the statements of witnesses are to be recorded. He submitted that Baria had admitted that, normally, when statements of witnesses are to be recorded, usually names of the accused would be asked, and if the names were not given, their description would be asked and

if the description was not given further steps would be taken to find out the identity of the accused and the same procedure would be followed in respect of weapons which were used in the assault. He submitted that though this fact was known to Baria, he had not taken any steps to ensure that these witnesses who were injured witnesses who had survived, their statements were properly recorded. He submitted that similar questions were asked to PI Kanani as to whether he felt it necessary to further re-investigate the matter in view of the directions given by the Supreme Court. He submitted that, however, Kanani, in his cross-examination, in terms has stated that he did not feel it necessary to further re-investigate the matter. He submitted that, therefore, since the leave was given by the Apex Court, it was open for Kanani or Baria to record the statements of eye witnesses who were examined in the Sessions Court, Mumbai. Though this opportunity was there to the Investigating Officer, no steps were taken. He submitted that, therefore, reliance could not be placed on the judgment of the Apex Court in *Baladin & Others vs. State of U.P.*¹ He submitted that in Baladin's case (supra) no direction was given by the Apex Court to re-investigate and there was no opportunity for the Investigating Officer to re-investigate and find out the truth. He submitted that, therefore, observations made by the Apex Court in Baladin's

¹ AIR 1956 SC 181

case would not apply to the facts of the present case.

49. Our attention is also invited to the testimony of Piyush Purshottamdas Patel (P.W.67) who was DCP of that area and who had come to the scene of offence. The learned Senior Counsel for the appellants/accused submitted that the said Officer had come their immediately after Rathod (P.W.63) and Baria (P.W.72). His statement was recorded on 24/3/2002 nearly after a lapse of 22 days. He submitted that in the cross-examination this witness had stated that he had on his own asked the Investigating Officer to record his statement. The Counsel for the appellant submitted that, in his statement, for the first time, P.W.73 had mentioned the names of the accused and it was alleged that these names were given to him by the three women who had rushed to meet him. He submitted that this was a very serious lacuna because, ordinarily, if names of the accused were made known to a Senior Officer who was in charge of the Zone, he would promptly direct that the persons whose names were mentioned should be immediately arrested. He submitted that no such directions were given either by Piyush Patel (P.W.67) or by Kanani (P.W.74) or by Baria (P.W.72). He submitted that these witnesses merely stated that they had started combing operation. He submitted that the fact of merely mentioning the names of accused by these witnesses in the statements which were allegedly recorded, could not

be used as corroborative evidence. He further submitted that names of the three women who had allegedly given the names to this witness (P.W.73) also have not been mentioned by him or by any other Police Officer viz Baria (P.W.72) or Kanani (P.W.74).

50. Our attention was also invited to the evidence given by Dr Dilip Choksi (P.W.62) and Dr Meena Robin (P.W.46) in which it has been stated that some of these witnesses regained consciousness in a couple of days and that Raees Khan (P.W.27) was the only person who was conscious when he was admitted in the hospital. The learned Senior Counsel for the appellants then submitted that it was not possible for the witnesses to recognize any one in the mob which attacked the Best Bakery at night. He submitted that it is inconceivable that when a mob of 1000 to 1200 people was throwing stones and soda water bottles and burning missiles of bottles filled with kerosene, any witness would come forward and dare to look down at the crowd and that naturally an attempt would be made to go to safe place and farthest corner of the terrace from which place it was not possible to see or identify any person in the crowd. He submitted that theory of the witnesses being sitting on the cot is made up as an afterthought only in order to give credence to their story that they had seen some of the accused at the time when the mob attacked the Best Bakery.

He then submitted that apart from all the inherent inconsistencies and contradictions in the evidence of these witnesses, these witnesses have identified the accused for the first time before the Court without naming the accused and without giving their description. Their further statements were not recorded by police. There was no identification parade and even names of the accused were not given to the Officers and, therefore, testimony of these witnesses had to be discarded.

51. So far as the video tape which was taken by Gautam Chavan (P.W.69) is concerned, the learned Senior Counsel for the appellants submitted that the CD which was taken from that tape was only of about 13 minutes. He submitted that it could be seen that certain clips were taken from the entire video. He submitted that this was deliberately done in order to remove the clips which were inconvenient for the prosecution. He, therefore, submitted that this CD was doctored. He also submitted that though this CD was produced on the basis of application which was filed on 29/3/2005 and copies of the CDs were made of the said CD which was produced pursuant to the said application, the CDs which were supplied to the defence showed that the original CD was modified on 19th September, 2004. He, therefore, submitted that this clearly indicated that the prosecution already was in possession of this CD and on the

basis of this CD various questions were asked to Zahirabibi (P.W.41) in her cross-examination. He submitted that Zahirabibi's cross-examination was over on 31/1/2005 and in this cross-examination all the questions which were asked could be seen from the CD including inconsequential things such as grandmother of Nafitulla, wife of Habibulla, mother of Nafitulla being brought down along with a goat. He submitted that this was a clear indication that these facts were already known to the prosecution and that they had already seen the CD. He submitted that application for bringing on record this tape was filed belatedly on 29th/30th March, 2005 on account of the statement made by Yasmin (P.W.29) in her evidence that all the facts stated by her could be seen from the video which was taken by the photographer. He submitted when the presence of Yasmin (P.W.29) was questioned by the defence in their cross-examination on account of various circumstances, in order to protect their star witness Yasmin (P.W.29), an attempt was made to bring this video tape on record but this was done only after removal of the portion which could be helpful to the defence. He submitted that, therefore, this CD was doctored.

52. So far as the other photographer Pankaj Sharma (P.W.73) is concerned, the learned Senior Counsel for the appellants/accused submitted that no reliance could be placed on the said CD since the said CD apparently was

doctored and the Trial Court had erred in not following the procedure prescribed in the Criminal Procedure Code which was required to be followed for examination of the said witness. He submitted that the Court had not asked the prosecution to investigate regarding the CD which was produced by this witness and no expert witness had been examined to prove that the CD which was produced by him was genuine. He submitted that, therefore, evidence of this witness has to be discarded in its entirety.

53. The learned Senior Counsel for the appellants/accused also placed reliance on the evidence of defence witnesses Particularly D.W.1 - Kumar Swami, D.W.4 - Khyati Pandya and D.W.5 - Ajay Patel. No reliance was placed on the evidence of D.W.3 - Ramjibhai Pargi. So far as D.W.1 is concerned, Counsel for the appellants submitted that he was examined only in order to prove the contradictions and omissions made by Yasmin (P.W.29) in the inquiry and the statements made by her in the said inquiry. He submitted that pursuant to the directions given by the Supreme Court in the contempt application against Zahirabibi (P.W.41) to conduct inquiry, the said witness Kumar Swami who was IGP at the relevant time, had conducted that inquiry. He submitted that, however, though this was the only reason why this witness was examined and the defence was constrained to examine him because the prosecution has not

either admitted the said statements or rejected them. He submitted that, however, this witness was cross-examined at length by the prosecution and the Court had asked various questions running into about 23 pages. He submitted that so far as D.W.4 and D.W.5 are concerned, they have brought on record the CD which was duly proved which clearly establish that, Yasmin (P.W.29), after she had returned home, had in terms stated that the persons who were in the mohalla were not responsible for the carnage. He submitted that in the cross-examination of Yasmin she had admitted most of these facts.

54. The learned Senior Counsel for the appellants in support of his submissions has relied upon various judgments. He has also tendered written submissions. His detailed submissions would be taken into consideration when evidence of the said five eye witnesses and other witnesses is taken into consideration.

55. Mrs Manjula Rao, the learned Special Public Prosecutor appearing on behalf of the prosecution firstly submitted that contention of the defence that motive behind the burning of the Best Bakery was an affair between Nafitulla (P.W.31) and Kailas @ Heena is not correct. She invited our attention to the evidence of Kanani (P.W.74), the Investigating Officer. She submitted that his evidence regarding origin of the riots

which had erupted in Gujarat and in Vadodara after Godhra carnage was unchallenged. She submitted that Prakash Pathak (P.W.64) ASI, Special Branch had issued Notifications which are at Exhibits-253, 254 and 255 immediately after Godhra incident. She submitted that evidence of P.W.64 that preventive measures were taken on account of the said riots which were erupted after Godhra incident was not challenged. She submitted that number of witnesses had, in terms, mentioned about the Godhra incident and also given motive for the riot which had erupted at Best Bakery. Our attention was invited to the evidence of P.W.29 - para 4, P.W.31 - para 5, P.W.33 - para 15, P.W. 41 - para 4, P.W.42 - para 11, P.W. 58 - para 2, P.W. 61 - para 3, P.W. 63 - para 2, P.W. 67 - para 13, P.W. 72 - para 3 and P.W. 74 - para 4. She submitted that 58 cases of ghastly riots were registered at Panigate Police Station and a curfew was imposed. She further submitted that 80 messages were received by the Control Room regarding damage caused to the properties of muslims by Hindu mob. She submitted that, therefore, submission made by Mr. Shirodkar, the learned Senior Counsel appearing on behalf of the defence that incident which had taken place in the Best Bakery was not account of retaliation after Godhra incident but was on account of marriage of Nafitulla (P.W.31) with Kailas @ Heena is not correct. The learned Special Public Prosecutor urged that the prosecution had established its case beyond reasonable

doubt against the appellants and no appeal against the order of acquittal passed by the Sessions Court was filed since the prosecution felt that there was no reliable evidence against those accused who were acquitted. She submitted that the prosecution had already acted in fair and impartial manner and had not acted in a vindictive manner and this fact was evident because no appeal against acquittal was filed against the judgment and order passed by the Trial Court. She submitted that the prosecution would establish the case against the appellants/accused not only from the evidence of four injured witnesses and P.W. 29 (Yasmin) but also by relying on the testimony of hostile witnesses in respect of those statements and admissions which were given by the hostile witnesses which had an effect of corroborating evidence of five eye witnesses which were examined for the first time in the Court. She submitted that the evidence of these five eye witnesses who were examined in the Sessions Court was corroborated not only by admissions given by the hostile witnesses but also from other evidence which was brought on record viz video tape which was produced by Gautam Chavan (P.W.69) which clearly showed the manner in which the offence had been committed and which further corroborated the testimony of the eye witnesses and also from the evidence of Pankaj Sharma (P.W.73) who had produced a video tape which was taken immediately after the riots in which Nafitulla (P.W.31) and others were

interviewed and they had taken the names of the accused and had attributed role to each of the accused. She submitted that the said interview which was taken immediately after the incident further corroborated the testimony of the eye witnesses though Nafitulla (P.W.31) had turned hostile on account of being pressurized and coerced by the accused to give false evidence. She submitted that evidence of Piyush Patel (P.W.67) also clearly indicated that names of the accused were immediately given to him when he visited the site and, therefore, reliance could be placed on his testimony which would tend to corroborate the evidence of the eye witnesses. She further submitted that the Trial Court was justified in relying on the FIR which was a statement of Zahirabibi (P.W.41) recorded by the police. She submitted that cogent reasons were given by the Trial court for the purpose of relying on those statements and also by relying on section 6 of the Evidence Act for the purpose of accepting the testimony of the witnesses.

56. Mrs. Manjula Rao, the learned Special Public Prosecutor strenuously urged that it was not possible for the prosecution to hold the test identification parade because eye witnesses P.W.26 - Taufel, P.W. 27 - Raees, P.W. 28 - Shehzad and P.W. 32 - Sailum had left Vadodara after they were discharged from the hospital and they went to their native place and though efforts were taken by the Investigating Officer to

trace these witnesses, their whereabouts were not known and, therefore, neither their further statements could be recorded nor they could be called for the purpose of holding of identification parade. She submitted that, however, merely because the identification parade was not held, their testimony in the Court and particularly their identification of the accused in the Court could not be discarded on that ground. Reliance has been placed in support of the said submission on the following judgments:-

*(1) Mehtab Singh and others vs. The State of M.P.*¹

*(2) State of U.P. vs. Dan Singh and others*²

*(3) Ronny alias Ronald James Alwaris etc. vs. State of Maharashtra*³

*(4) Sheo Shankar Singh vs State of Jharkhand and anr*⁴

She then submitted that the Court had to take into consideration the peculiar circumstances of the case and particularly time at which the incident had taken place. She submitted that there were 22 cases recorded at Panigate Police Station and there was insufficient police force available at the Panigate Police Station and, therefore, it was not possible for the Investigating Officer to investigate the

1 1975 CRI.L.J. 290

2 AIR 1997 SC 1654

3 AIR 1998 SC 1251(1)

4 (2011) 3 SCC 654

case as is done in the normal criminal case. Secondly, she submitted that the Court had to take into consideration physical and mental condition of these witnesses who were in a state of shock not only because of the incident but also on account of injuries which were inflicted by the accused. She submitted that though doctors had opined that Raees Khan (P.W.27) was conscious when he was admitted in the hospital that would not mean that he was fully fit and conscious to remember minute details about the incident. She submitted that Raees Khan (P.W.27) was, in fact, discharged on 16/3/2002 which clearly indicated that his condition was very serious and if the witness was really fit he would have been immediately discharged. She submitted that, therefore, though doctors have opined that some of these witnesses have regained consciousness or that Raees Khan (P.W.27) was conscious when he was admitted in the hospital, the said consciousness had to be understood in the context of the condition in which they were admitted. She further submitted that Baria (P.W.72) also had other important things to do apart from recording statements of the witnesses since there were several other incidents which had taken place. She submitted that Baria (P.W.72) had from time to time made inquiries with the doctors and some of the witnesses were unconscious for number of days. She submitted that, therefore, merely because the names of the accused and their description and description of the weapons

is not mentioned in the police statements, their testimony in the Court could not be discarded on that ground alone. She submitted that the Apex Court in several cases has observed that identification of the accused by witnesses in the Court is a substantive piece of evidence and merely because the test identification parade is not held, on that ground their substantive evidence of identification of the accused in the Court cannot be discarded. Reliance was placed on the judgment of the Apex Court in *Dana Yadav vs State of Bihar*¹ and on the judgment of the Division Bench of this Court (Nagpur Bench) in *Prem alias Santosh S/o Jivandas Satija vs. The State of Maharashtra*²

57. The learned Special Public Prosecutor then contended that submission of the learned Senior Counsel appearing on behalf of the appellants that the tape was doctored is incorrect. She submitted that after the CD was made out of the video tape and since sufficient number of copies were to be provided to defence, the said copies were made on the computer, the battery of which was slow and, therefore, there was some difference in the date which was later on found in the CD. She submitted that there is no substance in the submissions made by the learned Counsel for the appellants about the tape/CD being doctored.

1 AIR 2002 SC 3325

2 1993(2) Bom.C.R. 252

58. The learned Public Prosecutor then submitted that D.W. 1 - Kumar Swami was cross-examined at length because he had been examined by the defence to give sanctity to the video cassette which was prepared by D.W. 4 - khyati Pandya and D.W. 5 - Ajay Patel. She submitted that, therefore, in this context the learned Trial Court had deemed it necessary to put questions to the witness under section 165 of the Evidence Act. Further detailed submissions of the learned Special Public Prosecutor would be considered and referred to when the evidence of these witnesses are taken into consideration.

59. Before taking into consideration the rival submissions made by both the Senior Counsel appearing on behalf of the defence and the prosecution, in our view, it would be relevant to first deal with the applications which have been filed by P.W. 29 - Yasmin Shaikh (name of this witness is shown in the applications as Yasmeen Banu Ismail Sheikh) and Mrs. Teesta Setalvad.

SUBMISSIONS ON THE APPLICATION NOS 571/11, 572/11 AND 573/11 FILED BY YASMIN SHAIKH.

60 P.W. 29 - Yasmin Shaikh has filed three applications; one application each in three appeals which have been filed

before us and in the said applications she has filed her affidavit, copy of which has been sent to the Hon'ble Chief Justice of the Bombay High Court and in these applications she has prayed that there should be re-trial in view of the averments made in the applications under section 391 of the Criminal Procedure Code. In the applications she has made various allegations against Smt. Teesta Setalvad and has stated that she was compelled to give evidence. In the said applications, affidavit of one Raees Khan is also annexed in which the said Raees Khan also made allegations against Mrs. Teesta Setalvad, alleging that, at her instance, an amount of Rs 50,000/- each was deposited in the Bank Account of four eye witnesses who were examined in the Trial Court, Mumbai and that all these eye witnesses were tutored. Certain reference also has been made to the learned Senior Counsel Mrs. Majula Rao, alleging that she had also tutored the witnesses. Mr. Mahesh Jethmalani, the learned Senior Counsel who is appearing on behalf of Yasmin, at the outset, submitted that he did not wish to press the allegations which were made in the applications against Mrs. Manjula Rao and further he submitted that, in any case, if the applications are perused, there is no direct allegation made as such against the learned Special Public Prosecutor.

**REASONS FOR DISMISSING APPLICATION NOS. 571/11,
572/11 AND 573/11 FILED BY YASMIN SHAIKH.**

61. We have heard Mr. Mahesh Jethmalani, the learned Senior Counsel appearing on behalf of the applicant - Yasmin, Mr. Mihir Desai, learned Senior Counsel appearing on behalf of applicant - Mrs. Teesta Setalvad, Mr. Adhik Shirodkar the learned Senior Counsel appearing on behalf of the respondents/accused and Mrs. Manjula Rao, the learned Special Public Prosecutor appearing on behalf of the State of Gujarat.

62. In our view these applications for re-trial cannot be entertained. In the first place, there is gross delay on the part of Yasmin in filing these applications. Her evidence was recorded in the Trial Court in 2004 and her cross-examination was over on 29th November, 2004. The appeals against the judgment and order passed by the Sessions Court were admitted by this Court in 2006. These appeals have been pending in this Court almost for a period of six years and only when the matter was fixed for final hearing, at that time, these applications have been filed.

63. The Apex Court in *Zahira Habibulla H. Sheikh and another vs. State of Gujarat and others*¹ has taken into consideration the provisions of section 311 and section 391

¹ AIR 2004 SC 3114

of the Criminal Procedure Code and has also taken into consideration the settled position in law in respect of the said provisions and has observed that the Court cannot act as a silent spectator if certain facts are brought before the court which would show that the trial is not conducted in a fair and impartial manner. It has to be remembered that the said observations were made on account of an affidavit and appeal being filed by Zahira Sheikh who has been examined as P.W.41 in this case who stated on oath before the Apex Court that she had given evidence in the Trial Court in Gujarat under coercion. In this context, the Apex Court felt that the Trial Court and the High Court should have taken adequate steps when it noticed that important witnesses were turning hostile. Thereafter, the matter was transferred to the Mumbai Criminal Court and the Trial was conducted in Mumbai and now these applications have been filed after a lapse of six years. There cannot be any dispute regarding the ratio laid down by the Supreme Court and by this Court from time to time in respect of the scope of power of the appellate court while deciding the applications which are filed under section 311 and 391 of the Criminal Procedure Code. However, the Court also cannot lose sight of the fact that if such type of applications are allowed then there would not be any finality to any proceedings and various parties at various stages, either in civil or criminal proceedings, would then take a 'U' turn and try to resile from the evidence which

is given by them on oath. The most disturbing feature of these applications is that the witness had deposed against the accused in the Trial Court. The witness was very well aware that Zahira who is her sister-in-law was convicted by the Supreme Court for committing the contempt of the Supreme Court because she had resiled from the statement which was given by her on oath. She was also aware that Zahira and others were convicted for perjury by the Trial Court and in spite of knowing these facts, she has filed these applications along with affidavit obviously with an intention of again changing her evidence which she had given on oath. It is difficult to find out the reason and the circumstances under which these applications have been filed. The Court is not oblivious of the ground realities more particularly about the fate of witnesses who have to live day-to-day life and face the Society at large and the accused and others. The State has not framed any rules or prepared any Scheme for the purpose of giving protection to the witnesses, though directions have been given by this Court from time to time. The Apex Court, in fact, has made a recommendation to the Central Government to bifurcate the cases and prepare a separate machinery for the purpose of investigation of cases and for prosecution of the accused by different set of Investigating Officers and Public Prosecutors in order to ensure that they are not influenced from any quarters and they can act independently and fairly and impartially both in

the interest of the accused as well as victims. It cannot be forgotten that, in this case, the victims particularly members of Habibulla family, not only lost their near and dear relatives in the riot and in the carnage that took place after Godhra incident, but later on, their property and their business and they could not stay in the premises for a very long period of time and even thereafter, Yasmin, after she returned back to stay there, is now being faced with various difficulties including we are told applications being filed by various persons including second wife of Nafitulla claiming right over the said property. This Court, therefore, is not expected to venture into this area of finding out the circumstances under which these applications have been filed.

64. This case which should have been treated as routine criminal case where the horrific incident of burning of bakery by rioters had to be considered by the Court, yet, judicial notice can be taken of other incriminating factors which have transpired after the incident and, obviously, advantage was sought to be taken by various forums including the media as a result of which, result of criminal trial in this case became important for various interested parties including media. In this context, therefore, it would be relevant to take into consideration the observations made in the 200th Report of Law Commission of India on "Trial by Media: Free Speech Vs. Fair Trial under Criminal Procedure (Amendments to the

Contempt of Court Act, 1971)" delivered by Justice M. Jagannadha Rao dated 31st August, 2006. The Law Commission has made several observations in respect of media trial and has observed that though rights of victims are most important, yet, in the adversarial system which is followed in India, rights of the accused are also equally important and both these rights have to be balanced in order to ensure that there is a free and impartial trial not only protecting the rights of the victims but also for the protection of rights of the accused. We cannot forget that in India since we follow the adversarial system, accused is presumed to be innocent till he is proved to be guilty by the competent court of law. This being the position, the burden of establishing the case beyond the reasonable doubt rests solely on the prosecution and this burden at no time shifts from the prosecution to the accused unless there is statutory presumption. Even in cases where there is statutory presumption raised, initial burden to establish the fact still continues to be on the prosecution. In inquisitorial system of criminal jurisprudence which is followed in France and in some other countries some of the burden is still on the accused and, therefore, to that extent, prosecution is relieved from that burden. However, since in India we follow the adversarial system trial should be fair and impartial both from the point of view of the accused and the victim.

At one Stage, William Blackstone in his Commentaries on the Laws of England (1769) has observed that “the law holds that it is better that ten guilty persons escape, than that one innocent suffer.” The said doctrine has been seriously criticized by Banthem in his subsequent Commentaries. More or less in the countries where anglo saxon law is followed this doctrine still holds the field. It is no doubt true that number of criminals which was initially 10, later on increased over a period of time from 10 to 100. We have to understand the rationale behind this doctrine which is that the innocent man should not be convicted and duty therefore is cast on the Court which is an independent body which is supposed to scrutinize the evidence which has been placed before it in a fair and impartial manner.

65. In our view, it will not be proper to order further judicial inquiry in view of the allegations which are made in the applications and affidavit filed by Yasmin. In a case like this, there is always a possibility of allegations and counter allegations being made. Some of the witnesses who have been examined by the Mumbai Trial Court have made allegations that certain Organization in Gujarat had paid money to them and that they were under their protection. Some of them have stated that certain other Organization/NGO had given protection. The judicial inquiry, in our view, particularly in the facts and circumstances of the

present case, is not warranted since it will be an endless affair which would not be fruitful and no purpose will be served into ordering such judicial inquiry. It has to be noted here that even after the Apex Court convicted Zahira and sentenced her to suffer simple imprisonment for one year, even thereafter this witness Yasmin has ventured to file these applications and affidavit. We do not, therefore, think it right, proper and just to order any further inquiry much less to order re-trial or re-examination of this witness Yasmin. The Court, however, cannot lose sight of the fact of applications being made by Yasmin seeking re-trial for the reasons stated in the affidavit and this Court may consider it as one of the circumstances while considering the testimony of this witness independently after independently assessing the probative and evidentiary value of the deposition given by this witness before the Trial court.

66. All the three Applications filed by Yasmin Sheikh are therefore dismissed. It is made clear that there is no substance in the allegations made by her particularly against the learned Special Public Prosecutor Mrs. Manjula Rao in this case before this Court and before the Trial Court.

67. This Court also will have, before going to the appreciation of evidence in this case, to consider the three applications; one application each filed by Mrs. Teesta

Setalvad in three appeals, seeking leave of this Court to intervene in the matter. She has stated that she may be permitted to intervene in the hearing of the trial particularly in view of the applications which have been filed by P.W. 29 Yasmin.

SUBMISSIONS ON THE APPLICATION NOS 198/12, 199/12 AND 200/12 FILED BY MRS TEESTA SETALVAD.

68. Mr. Mihir Desai, the learned Senior Counsel appearing on behalf of the applicant - Mrs. Teesta Setalvad submitted that if the allegations made against the applicant - Mrs. Teesta Setalvad are taken into consideration, an opportunity will have to be given to the applicant to respond to the allegations made against her in the said applications. He submitted that the applicant is a member of NGO - Citizens for Justice and Peace and has never denied the fact that she had filed an appeal in the Apex Court on behalf of the victims only with an intention to sub-serve the interest of justice and to ensure that these witnesses are given some kind of protection and the victims get a chance of fair and impartial trial.

REASONS FOR DISMISSING APPLICATION NOS 198/12, 199/12 AND 200/12 FILED BY MRS TEESTA SETALVAD.

69. In our view, question of granting leave to the applicant - Mrs. Teesta Setalvad to intervene either in the applications

filed by Yasmin (P.W.29) or in appeals does not arise. It is a settled position in law that third parties have no locus standie for intervening in criminal trial. If one peruses the scheme of the Code of Criminal Procedure, it will be abundantly clear that third parties do not have any right to intervene either in the trial or at appellate stage in the High Court. So far as the Apex Court is concerned, the Apex Court has the jurisdiction and the authority under Article 142 of the Constitution of India. However, this Court or Trial Court do not have benefit of any such constitutional provision and, as such, third parties do not have any right whatsoever to intervene in these proceedings.

70. The legislature, recently, has recognized the rights of victim by amending Criminal Procedure Code by Amendment Act No. 5 of 2009, and various provisions under the Criminal Procedure Code have been amended. The word 'victim' has been defined in clause (wa) of Section 2 of the Amendment Act. A provision has been made under section 357 giving compensation to victims and State Governments have been directed to create fund for payment of compensation to victims. This provision has been made in order to ensure that even if the accused are not convicted even then irrespective of the result of the case, discretion is vested in Court to award compensation to the victims. Similarly, an independent right has been given to a victim to file an

independent appeal directly against the order of acquittal passed by the Trial Court under three categories of cases. However, it has to be noted that during trial stage, even the victim is not given a right to interfere in the trial. The reason is very obvious. If the victim is permitted to interfere in the trial, there is every possibility that the trial could not be conducted in a fair and impartial manner and the victim may try to dabble in the prosecution and for the purpose of settling personal score, several persons may be implicated as accused. The scheme of the Code of Criminal Procedure is such that the investigation and the prosecution is to be done by the State machinery so that the prosecution is fair and impartial both to the victims and to the accused. Therefore, at the trial stage, the only right which is given even to the victim is to permit him to engage an advocate who would, at the best, assist the Public Prosecutor appearing in the case and would do a role which is ordinarily known as a role of "watching counsel". The intention of legislature from this scheme is very clear. The legislature, therefore, though has given some rights to the victims at the appellate stage, has not given any right to the victims to dabble in the investigation or with the prosecution and the discretion wholly vests with the Public Prosecutor because ultimately Public Prosecutor is an Officer of this Court and whose duty is to assist the Court in arriving at truth and not to take a view either in favour of accused or victim. Similar is the position in

respect of Investigating Officer. This Court and Apex Court, from time to time, have laid down in number of cases that the prosecution is not supposed to adduce evidence only with an intention of getting the order of conviction but rather to find out the truth and bring true culprits before the Court. Taking into consideration the settled legal position discussed hereinabove, the question of permitting the third party - Mrs Teesta Setalvad, in spite of the best intention expressed by the said applicant, does not arise and she cannot be permitted to intervene either in the hearing of the applications taken out by P.W. 29 - Yasmin or criminal appeals. All these three applications taken out by Mrs Teesta Setalvad are, therefore, dismissed.

REASONS:

71. After having heard both, the learned Senior Counsel appearing on behalf of the appellants and the learned Special Public Prosecutor appearing on behalf of the prosecution and having perused the record and proceedings, we are of the view that the point as to whether death of 14 people was homicidal or not is not disputed and, as such, in view of the evidence of doctors who have performed the postmortem and have given opinion on the death of these victims, it is clear that their death was homicidal and unnatural. This fact has not been seriously disputed by the

defence also. The said point is, therefore, answered accordingly.

72. The second point is regarding occurrence of the offence in the evening of 1/3/2002 at about 8 P.M. to 8.30 P.M and which finally ended after Police arrived at the scene at 10.40 A.M. in the morning on 2/3/2002. Shri Adhik Shirodkar, the learned Senior Counsel appearing on behalf of the appellants/accused fairly contended that the defence has not disputed the unfortunate and ghastly incident which had taken place on the said day and, as such, in our view, it has been established by the prosecution by examining various witnesses that after the incident of burning of kar sevaks who were travelling in one of the coaches of Sabarmati Express on 27/2/2002 there was spread of riots throughout the Gujarat State and throughout the City of Vadodara and on 1/3/2002 in the evening at about 8 P.M. to 8.30 P.M a unruly mob of 1000 to 1200 people rushed towards the Best Bakery armed with torches (mashals) and lethal weapons such as swords, guptis, iron rods, sticks and set on fire the warehouse of one Lal Mohammad and vakhar which were near the Best Bakery and Best Bakery itself and also residential house of the members of the Habibulla family. It is not seriously disputed that in all 14 people viz (1) Jainabibi Hasanbhai, (2) Shabnambibi @ Rukhsana Aslam, (3) Sabira Habibulla, (4) Cipli @ Saili Aslam Shaikh, (5) Babli Aslam

Shaikh, (6) Mantasha Firoz Aslam Shaikh, (7) Subhan Firoz Aslam Shaikh, (8) Baliram Shamlal Verma, (9) Prakash Ugroo Dhobi, (10) Raju @ Ramesh Baijnath, (11) Kausarali Shaikh, (12) Arshad @ Lulla Hasanbhai Shaikh, (13) Firoz Pathan and (14) Nasroo Hasan Khan Pathan, died in the said incident. It is not in dispute that three women viz. Jainabibi Hasanbhai, Shabnambibi @ Rukhsana Aslam, Sabira Habibulla, and four children viz Cipli @ Saili Aslam Shaikh, Babli Aslam Shaikh, Mantasha Firoz Aslam Shaikh, Subhan Firoz Aslam Shaikh, died on the first floor of the residential house of the family members of late Habibulla. Out of these 7, a wife and two children of Aslam Khan were there and wife of Firoze and his two children and Sister of Zahirabibi viz Sabira also died. On the next day, all the people who were on the terrace and survived the attack by the mob who were throwing stones and other missiles were asked to come down after the assurance was given to them that they would be let off after little beating was given to them and thereafter women members were taken towards the bushes and the hands and legs of the men were tied and they were assaulted with sword and sticks on their heads and an attempt was made to set them on fire. Prosecution, in our view, has established this fact. The second point is answered accordingly.

73. Two dead bodies were found in the bushes at a little distance from the Best Bakery. Their hands and legs were

tied and they were practically burnt. The bodies of Kausarali Shaikh and Arshad @ Lulla Hasanbhai Shaikh were not found, though the bones were found. It could not be proved that these bones were of Kausarali Shaikh and Arshad @ Lulla Hasanbhai Shaikh. The bodies of Firoz Pathan and Nasroo Hasan Khan Pathan were also found on the backside of the Best Bakery. They were found in the burnt condition. Amongst the people who were brought down, Prakash Ugroo Dhobi, Baliram Shamlal Verma and Raju @ Ramesh Baijnath were dead and Baliram died before he was admitted in the hospital. Prosecution, in our view, has established this fact.

74. Prosecution has also established that P.W. 26 - Taufel, P.W. 27 - Raees , P.W. 28 - Shehzad, P.W. 30 - Nasibulla, P.W.31 - Nafitulla and P.W. 32 - Sailum had received grievous injuries. Dr Meena Robin (P.W.46) has stated in her evidence about the injuries received by these witnesses and other persons as follows:-

So far as P.W. 27 - Raees is concerned, P.W. 46 - Dr. Meena has stated that on examination, the patient was found to be conscious and following injuries were noted:-

- i)** First to second degree burns on right upper limb, left arm and on back,
- ii)** C.L.W. (Contused Lacerated Wound) on right

parieto occipital region, size 10cm X 2cm X scalp deep,

iii) 2 C.L.W.s on occipital region - out of these, one was 5cm X 0.5cm X 0.5 cm and the other was 2 cm X 0.5 cm X 0.5 cm,

She has stated that the patient was admitted in the hospital and X-Rays were taken. Antero Posterior and lateral view of left elbow and skull was taken. She has stated that there was no evidence of any fracture and the diagnosis was of head injury with first and second degree flame burns. She has stated that the patient was discharged on 16/03/2002 at 11.30 a.m. She has stated that the injuries were simple if there were no complications.

P.W. 46 - Dr Meena then stated that she examined Sailun Hasan Khan Pathan (P.W.32) and she has stated that the patient was found to be unconscious and she noted the following injuries on his person:-

i) Incise Wound (I.W.) on left parietal region, size was 10 cm X 2 cm X scalp deep,

ii) 2 C.L.W. On left parietal - the first of 2 cm X 0.5 cm X 0.5 cm and the second of 1cm X 0.5cm X 0.5 cm,

iii) C.L.W. On the left ear, size was 1 cm X

0.5cm X 0.5 cm.

She has stated that the diagnosis was of head injury with small haemorrhagic contusion in left temporal region with sub-arachnoid haemorrhage. She has stated that the patient was discharged on 01/04/2002 and the patient became conscious on 12th March, 2002.

P.W. 46 – Dr Meena has then stated that she examined Shehzad Khan Hasan Khan Pathan (P.W.28), aged 25 years and noted the following injuries on his person:-

- i)** I.W. on left fronto parietal, size 10cm X 2cm X 1cm,
- ii)** I.W on left post auricular region, size 5 cm X 1 cm X 0.5 cm,
- iii)** I.W on behind injury at sr. no. ii) above, size 2 cm X 1 cm X 0.5 cm,
- iv)** I.W behind injury at sr. no. iii) above, size 2 cm X 0.5cm X 0.5cm,
- v)** 2 C.L.W.s on right temporal occipital region, size 2 cm X 1cm X 0.5 cm,
- vi)** C.L.W on chin, size 2 cm X 0.5cm X 0.5 cm.

She has stated that the diagnosis was head injury and C.T. Scan of left side head, multiple linear fracture on the left side

of skull. She has stated that the patient became conscious on 03/03/2002 at 4.00 P.M. and he was discharged on 16/03/2002.

P.W.46 - Dr. Meena then stated that she examined Nasibulla Habibulla Shaikh (P.W.30), aged about 25 years and she has stated that the patient was found to be unconscious. He has a head injury and 3 I.W.s on left occipital parietal region which were as follows:-

- i) Size - 15cm X 2 cm X scalp deep,
- ii) Size - 10cm X 2 cm X scalp deep,
- iii) Size - 8cm X 2 cm X scalp deep

She has further stated that the patient had burn injuries on both lower limbs. She has further stated that the patient was unconscious till 3.00 P.M. The diagnosis was head injury with depressed occipital fracture with 6 to 8 percent second to third degree flame burns on both lower legs. She has stated that the patient was discharged on 30/03/2002.

P.W. 46 - Dr. Meena then examined Taufel Ahmed (P.W.26). She has stated that in the EPR, the history was of 'assault by unknown object by public at 10.00 a.m at bakery' and he was found unconscious. She has stated that the following injuries were found on his person:-

- i)** I.W. on left occipital region, size 10cm X 2 cm X 0.5cm,
- ii)** I.W on parietal occipital region - ie the back of the head -, size 15cm X 2 cm X 0.5cm,
- iii)** Burns on both lower limbs.

She has stated that the patient became conscious at 1.00 P.M. She has stated that X-Rays were taken of cervical spine but no abnormality was detected. She has also stated that C.T. Scan was taken. She has stated that the patient was discharged on 19/03/2002.

P.W. 46 - Dr. Meena also examined Nafitulla (P.W.31). The EPR history was given as 'assault by unknown weapon (very sharp cutting) by unknown persons at 10.00 a.m at Daboi Road Bakery.' She has stated that on examination the patient was found unconscious and following injuries were noted on his person:-

- i)** I.W. from left side occipital to the mandibular region, size 15cm X 2cm X 1cm,
- ii)** I.W. on occipital region, size 4cm X 2cm X 0.5cm,
- iii)** I.W. on right leg, size 3cm X 1 cm X 0.5cm.

She has stated that the patient was discharged on 08/03/2002 at 5.00 P.M. She has stated that injuries were found to be simple and the patient was conscious at 1.00 P.M. on the same day.

75. From the evidence of Dr Meena (P.W.46), therefore, the prosecution has established that these witnesses P.W.26, P.W.28, P.W.32, P.W.30 and P.W. 31 had suffered grievous injuries as a result of assault with lethal weapons.

76. The prosecution has examined residents of the Best Bakery who were close relatives of late Habibulla. All these witnesses, however, turned hostile viz. P.W. 30 Nasibulla, P.W. 31 - Nafitulla, P.W. 35 - Saherabanu and P.W. 41 - Zahirabibi Shaikh. It has been submitted by Mrs. Manjula Rao, the learned Special Public Prosecutor appearing on behalf of the prosecution that though these witnesses have turned hostile, admissions given by them in the cross-examination and in examination-in-chief would still be relevant and can be relied upon by the Court. All these five witnesses have been extensively cross-examined by the prosecution and all the omissions and contradictions have been brought on record after they were proved.

77. Mrs. Manjula Rao, the learned Special Public Prosecutor

submitted that the following statements of P.W. 30 - Nasibulla, P.W. 31 - Nafitulla and P.W. 40 - Saherunnisa would be relevant and could be relied upon for the purpose of corroborating the testimony of injured eye witnesses. In respect of P.W. 30 - Nasibulla who was declared as hostile witness, she has given a written note in respect of the admissions given by him and the said written note reads as under:-

"1. PW-30-Nasibulla -Admissions of Hostile witness (Page Nos.1887-1888 and 1852-1858)

- a. It is correct that out of the said two accounts, in the one which is in my individual name, during the period from 11/11/2003 to 20/02/2004, amounts of

Rs.21,000/- (Rupees twenty one thousand only),
Rs.40,000/- (Rupees forty thousand only),
Rs.15,000/- (Rupees fifteen thousand only),
Rs.20,000/- (Rupees twenty thousand only),
Rs.20,000/- (Rupees twenty thousand only), and
Rs.15,000/- (Rupees fifteen thousand only), by
cash have been deposited from time to time.

- b. I have not deposited an amount of Rs.50,000/-

(Rupees fifty thousand only), by cash in Zahira's account in Syndicate Bank during the period from 01/01/2004 to 04/03/2004.

- c. I do not remember whether as on today, in both these accounts together, there is credit balance of Rs.1,80,000/- (Rupees one lac eighty thousand only). It is correct that during the period when the amount have been credited in these bank accounts, I was earning Rs.500/- (Rupees five hundred only) a week. My total income per month during the relevant period was Rs.4500/- and this amount of Rs.500/- referred to by me, used to be given to me by my Seth 'Rajubhai' on every Sunday. It is not correct to say that the amount credited in the said account was received by us for giving false evidence.

1 Ans.- When I was injured on the head, I fell unconscious. In the hospital, I realized that I had suffered a burn injury to the leg.

12. When the riots were going on , Sabira was in the room on the first floor. Aslam's wife and his children had also gone into the same room. I do not know whether

anybody else was also there in that room at that time.

Ques:- Where is Sabira?

Ans.- She is no more. She died in the riots.

Ques.- Do you know how she died?

Ans.- How can I know? I was on the terrace. She was in the room below.

We went to the terrace because the rioters were coming in a big number. The entire area surrounding our house was filled with rioters. The rioters first set fire to Lalmohammed's 'wakhar'. Then they went to Aslam's room and set fire to that room also. Then they came to our house and set fire to the wood that was kept below. Then rioters started throwing stones. The stones were coming to the terrace of our building. [witness volunteers, "we pulled the mattresses which were there, over heads, so that the stones would not hit us']. The mattresses had been kept there, as our servants used to sleep on the terrace. I do not know who others were injured in the incident. [Witness volunteers, 'I had pulled 'rajai' over my body. It was dark and there was smoke']. Burning glass bottle were being thrown towards the terrace.

2. I know one Thakkar who stays in our locality and who was my father's friend I knew father of Thakkar.
3. (X-23 for identification) Whatever is recorded in this portion is correct. However, I did not state so to the police.

So far as P.W. 31 – Nafitulla is concerned, she has relied on the following statements in his evidence as given in the note submitted by her and which are as under:-

“II. PW -31, Nafitulla, (Pg. Nos. 1910,1911, 1913, 1924, 1941, 1956, 1957-1958, 1977, 1978, 1981, 2005, 2009)

1. My maternal uncle- Kausar- was called by us to look after the bakery. The servants working in the bakery at that time were Sailum, Shehzad, Taufel, Raees, Prakash, Baliram and Rajesh.

We had gone to reside in our house at Hauman Takdi, about 6 months prior to the time of riots.

The riots took place because of the incident of train

burning at Godhra.

2. It was burnt on 01/03/2002. It was burnt by a mob of thousands of people. It was burnt at 9.00 p.m. when the rioters were burning the bakery, we were hiding ourselves on the terrace. By 'we', I mean Raees, Taufel, Prakash, Baliram. Rajesh, Shehzad, Sailum and members of my family - i. e. my mother, my 2 sisters and my brother.

Ques.- How did you sustain injuries?

3. Ans.- Because ["kyon ki"] we were hiding ourselves and from below, stone etc., were being thrown.
4. I went to madar mohalla, in Vadodara.
I married Heena @ Kailas, one year after the riots. We married at my native place. I was not residing with Heena @ Kailas, at any time, prior to my marriage with her. Heena used to reside in Ganeshnagar.
I came to know her after the riots, and not before that.
5. Our family got the compensation from the government, for the loss caused to us on

account of the riots. I do not know whether we also received any compensation from our community ['jamat'].

6. This injury must have suffered by me on account of the bottles which were being thrown on the terrace, from below. This injury was caused to me after I had lost consciousness.
7. It did happen that the mob was coming from Ganeshnagar Zopadpatti but the mob was coming not only from that direction and was coming from other direction also. The mob was coming from all the 4 direction. I cannot say whether the mob consisted of Hindu persons. The mob was shouting, "Jalao, Jalao". I do not know whether the persons in the mob were shouting "Maaro Maaro".
8. In this case the F.I.R. Was lodged by Zahira.
9. I learnt about Zaheera having filed the F.I.R. after about 1 to 1.1/2 months, from the day on which she had lodged it.
10. I had seen the accused person in this case, when I had gone to the Court in Vadodara, for giving evidence.

11. I had no quarrel or dispute with any of the persons residing in the neighbourhood of our house adjacent to the Best Bakery, at any time. Even after my marriage with Kailas, there was no dispute or quarrel between me and any of the persons residing in the neighbourhood, in connection with my marriage with Kailas.

Ques.- Tell the Court, what you saw and what you heard when the C.D. was played over to you now?

12. Ans.- I saw that I was saying what was tutored to me. I am seen saying about Jayanti Chaiwala, Sanhay, Santosh, Mafatia, Shana, Painter, etc. I was told to speak a danger story, That's all."

So far as P.W. 40 – Saherunnisa is concerned, she has relied upon her following statements in her evidence as given in the note submitted by her and which are as under:-

“III. PW-40 Saherunnisa Habibulla Shaikh (Pg. 2632, 2693 to 2695)

- a. It was morning time. It was about 11.00 a.m.

throughout the night, I was on the terrace only. It is because there was much smoke. Nobody from the members of our family, tried to get down from the terrace, in the night.

- b. "He was saying regarding the change of our statement ("zaban palte na, uske bare mein bol raha tha"). I told that I had no strength for fighting ("mere me ladne ki taaqat nahin hai, mere koi aage peeche nahin hai, mereko case mein matlab nahin hai"), but he said that I would have to fight. He said that I would have to fight for the community".

Ques.- You said, 'humne zabaani palte' whom do you mean by 'humne'?

Ans.- My family.

Ques.- What do you mean by your family?

Ans.- I, Nafitulla, Zaheera, Sahera and Nasibulla. it is correct that I am talking about 'changing the testimony' (Zabaani palte). I am talking about 'changing the testimony' in the Court at Vadodara.

Question by the court:- That means you have

changed your testimony in the Vadodara Court
("Matalab Vadodra court mein aapne apni zabaani
palti thi?")

Ans.- What else could be done? "Mere aage
peeche koi nahin tha. Mera aadmi nahin
tha, ladki nahin thi, Jab kamaanewala nahim
tha, to kya case karen, kis par case karen."

Ques.- since there was nobody to back you up
['tumhare aage koi nahin tha, peeche koi
nahin tha'], you changed your testimony out
of fear?

Ans.- No, not out of fear. I did not want to fight
the case at all.

[Witness volunteers, "Judgesahab, jab wahin
rehena tha to dushmani kya leni kisi se?"]

Ques.- With whom you did not want enmity?

Ans.- I did not want enmity with anyone; neither
with 'Gujaratwalas' nor with 'mumbaiwalas'.

31. After our bakery and the house was burnt; I had
been there only once. It was recently - i.e. about 10 to

15 days back.

Ques.- Can you explain what was the reason for not going to your house at Hanuman Tekdi prior to that?

Ans.- we were running here and there out of fear. I was afraid of everybody. I was afraid of myself also. I was afraid that somebody would be after me.”

78. So far as P.W. 41 - Zahirabibi is concerned, she again turned hostile and apart from bringing on record the contradictions with reference to her previous statements, the witness was asked certain other questions. This witness in her cross-examination has stated that she was forced by one Raees Khan at the instance of Mrs Teesta Setalvad to implicate the accused. She has also stated that she was practically kept under house arrest and she was not allowed to go away. She has stated that some people of Mrs Teesta Setalvad had threatened her with revolver and was told that she would be shot dead if she did not state before the Court what they wanted her to say in the evidence. She stated that under these circumstances, she came back to Vadodara and took the help of one Organization viz Janadhikar Samiti who gave her protection and she, therefore, gave a press conference. She has denied all suggestions which were put to her by the learned Public Prosecutor. P.W. 35 - Saherabanu has turned hostile and did not support the prosecution case

in any manner.

79. Mr. Adhik Shirodkar, the learned Senior Counsel appearing on behalf of the appellants/accused submitted that evidence of all these witnesses had to be discarded. He submitted that the witnesses who have turned hostile and had given evidence in court were telling the truth and had refused to cower under the pressure which was put on them by Mrs Teesta Setalvad. He, therefore, submitted that the testimony of P.W. 41 - Zahirabibi and particularly her statement in the cross-examination clearly established that other injured witnesses were also tutored by the members of the said NGO including Mrs Teesta Setalvad.

80. Before taking into consideration the rival submissions in respect of these hostile witnesses, it will be necessary to briefly take into consideration the settled legal position.

81. The law on the point, is quite well settled. If the prosecution witness turns hostile and if permission is taken by the prosecution for cross-examining the witness after declaring him as hostile and omissions and contradictions with reference to his previous statements are brought on record, the testimony of the witness has to be discarded because he is proved to be uncreditworthy since he has resiled from the previous statements. It has,

however, been held that in the event in cross-examination, the witness sticks to his earlier version then, to that extent, the Court can rely on that part of his testimony and also on the admission which has come in the cross-examination wherein he reiterates what he has stated in his previous statement.

82. The learned Special Public Prosecutor has tendered a copy of the statements of hostile witnesses showing a particular portion on which reliance is sought to be placed by the prosecution. Perusal of the said statements, in our view, does not in any manner further the case of the prosecution and, apart from that, it cannot be said that these statements are in the form of admissions. These statements are not concerning the identity of the accused in commission of the said offence and, therefore, even assuming that they are admissions, they do not support the case of the prosecution. P.W. 40 - Saherunnisa has admitted that certain amounts were received. This particular admission also does not establish that the amount was paid at the instance of the accused and the circumstances and the reasons why the witnesses turned hostile is totally irrelevant for the purpose of determining the identity of the accused who had alleged to have committed heinous offence. Similarly, P.W. 41 - Zahirabibi has been cross-examined at length. In fact, her cross-examination runs into almost 540 pages. In the cross-

examination, the witness has been grilled regarding the role played by Janadhikar Samiti. It has been urged that this clearly established that this Organization was responsible for persuading the witnesses to turn hostile.

83. It is not possible to accept the said submission made by the learned Special Public Prosecutor appearing on behalf of the prosecution. The evidence of Zahirabibi (P.W. 41) will have to be discarded in its entirety. Firstly, her conduct does not inspire any confidence. It is a matter of record that Zahirabibi turned hostile in the trial before the Gujarat Trial Court. She filed an appeal and application in the Apex Court and in the affidavit which was filed in the said application, she had stated that she was threatened and coerced to turn hostile and several other allegations were made by her against the Trial Court as also Gujarat High Court and, therefore, relying on her sole affidavit, the Apex Court was pleased to set aside the judgment and order of the Trial Court and also of Gujarat High Court and had passed strictures both against Gujarat Trial Court and Gujarat High Court and the Supreme Court was constrained to make these observations since it relied on the statement of Zahirabibi Shaikh (P.W.41). The application and the appeal filed by Zahirabibi Shaikh was allowed only on account of the sole affidavit filed by her and the Supreme Court was, therefore, on the basis of the said affidavit came to the conclusion that

the prosecution had failed to provide protection to her and also blamed the Trial Court, Gujarat and Gujarat High Court for not ordering re-trial when revision application was filed by Saherabanu (P.W.35) and affidavit was also filed by her. The Supreme Court, relying on the affidavit of Zahirabibi felt that under these circumstances application filed by the State praying for re-examination of witnesses under section 311 and 389 of the Cr.P.C ought to have been taken into consideration and should have been allowed instead of not considering those affidavits and dismissing those applications. The very same Zahirabibi, however, again turned hostile when the matter was transferred to the Sessions Court, Mumbai and had shown audacity of giving a press conference in Vadodara during pendency of trial before the Trial Court, Mumbai. On account of the false affidavit which was filed by her in the Supreme Court she was convicted by the Supreme Court and sentenced to suffer simple imprisonment for one year and fine of Rs 50,000/- was also imposed upon her and it was further observed that in default of payment of fine within two months, she would undergo simple imprisonment for one more year. The Trial Court also took a serious view of the witness turning hostile and convicted her for the offence of perjury. Taking into consideration the past conduct of this witness, it is not possible, even otherwise, to rely on any of her statements which are given by her in her cross-examination. Secondly, it

has to be borne in mind that even in respect of unrelated issues which were asked in the cross-examination, it is not possible to pick and choose certain sentences from the testimony and it has to be read as a whole. The submission of Mrs Manjula Rao, the learned Special Public Prosecutor that her testimony that this NGO - Janadhikar Samiti was responsible cannot be accepted since, even otherwise, she has initially stated that Mrs Teesta Setalvad and her men had threatened her with dire consequences and on account of that she had to come to this Samiti to seek protection. Therefore, it will not be possible for the Court to pick and choose certain statements made by her. In our view, therefore, entire testimony of Zahirabibi Shaikh will have to be discarded since the said witness is not entirely trustworthy. It is not open for this court to order any judicial inquiry to find out as to how and under which circumstances the said witness had turned hostile and who was responsible since the said inquiry would not be germane for the purpose of deciding these appeals. In our humble view, the Court while examining the evidence on record has to draw a line regarding the length at which it can go while deciding a case, no matter how important and exceptional it may be. The entire testimony of Zahirabibi Shaikh will have to be discarded and same would be the case of all the other hostile witnesses.

84. Before we consider the testimony of the injured witnesses, in our view, there are certain other aspects which need to be looked into. The first question which needs to be decided is whether the evidence of Pankaj Shankar Sharma (P.W.73) is admissible. It is an admitted position that name of this witness was not mentioned in the charge-sheet either before the Gujarat Trial Court or the charge-sheet filed before the Mumbai Trial Court. This witness suddenly popped up his head in the midst of the trial and told the Court that he had material evidence in support of the prosecution case which would establish the guilt of the accused. He filed an application at Exhibit-386. The said application was filed on 10/5/2005. In the said application he has stated that he is a journalist working with DD News as Assignment Editor and he would like to bring to the attention of the Court a matter of urgency relating to re-trial in the Best Bakery case. He further stated that he has taken interviews of Zahira Shaikh and other members of her family soon after the incident at Vadodara. He has stated that interviews were taken at Vadodara on 18/04/2002. He has stated that these interviews were very crucial since they related directly to the trial. He has further stated that interviews were telecast on March 19 and 20, 2005 and he has stated that he wanted to produce the original cassette of the interviews along with video CD of the programme "Zahira Ki Sacchai". This application was filed on 10/5/2005. The Trial Court has

recorded the said fact in the roznama dated 11/5/2005 and observed that the application should be exhibited as Exhibit-386 and copy of the application be furnished to the Special Public Prosecutor and copy of the cassette was also directed to be given to the Special Public Prosecutor. Trial Court further stated that she should view the cassette and then decide whether the person should be examined as witness and whether the cassette should be taken on record. The learned Special Public Prosecutor, thereafter, informed the Court that the witness was a material witness and the Prosecution would like to get the said witness examined. A direction was, therefore, given by the Court for handing over the cassette to the Special Public Prosecutor and the Trial Court permitted the said witness to be examined as prosecution witness. The order was passed on the next day i.e. on 12/5/2005 and the Court observed that no prejudice was likely to be caused to the accused by his examination since opportunity would be given to cross-examine the witness. The Court, therefore, in para 12 of its order observed as under:-

“12. Under these circumstances, instead of examining the applicant as court witness and as the prosecution wants that he should be examined, applicant is allowed to be examined as prosecution witness.”

Pursuant to the said order, Pankaj Sharma was permitted to be examined as prosecution witness as P.W.73.

85. When a query was made by this Court to the learned Senior Counsel Mr. Adhik Shirodkar appearing on behalf of the appellants/accused as to whether they had taken any objection for examination of this witness, he submitted that they had taken a formal objection. He, however, submitted that they stopped taking objections by that time since almost all the objections which were taken by the defence were overruled by the learned Trial Court and, therefore, he submitted that defence by that time had become completely helpless and had stopped taking any objections.

86. Before we take into consideration the evidence of this witness, it has to be seen whether the Trial Court was justified in permitting the said witness to be examined in such a manner as a prosecution witness.

87. The Code of Criminal Procedure has elaborately laid down the scheme in respect of investigation which is being carried out after the First Information Report is registered in respect of commission of the cognizable offence. The said provisions are self-contained Code in respect of the steps which can be taken by the Investigating Officer which

culminates into filing of the charge-sheet under section 173(1) of the Criminal Procedure Code. As mentioned hereinabove, the said provisions have been made in order to ensure that the investigation is carried out by the Investigating Officer in a fair and impartial manner so that people who are interested in supporting the case of the victims for obtaining conviction or implicating accused are not allowed to dabble in that process. While doing so, care has been taken to ensure and retain the power of the Court over the proceedings so that ultimate control of the court is not lost over the entire proceedings and, therefore, under section 165 of the Evidence Act, the Court has power to ask questions to any of the witnesses after examination-in-chief and cross-examination is over or even in between in order to illicit truth from the witness. Similarly, the Court, if it feels that certain witness is relevant and necessary for purpose of finding out the truth, can examine any one as court witness. Section 311 of the Criminal Procedure Code reads as follows:-

“311. Power to summon material witness, or examine person present.-

Any Court may, at any stage of any inquiry, trial or other proceeding under the Code, summon, any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his

evidence appears to it to be essential to the just decision of the case.”

The said provision, therefore, clearly reveals that residuary power is vested in Court ultimately to summon any person as a witness or examine any person in attendance, though not summoned as a witness which can be done at any stage of any inquiry, trial or other proceedings under the Code. The section also mentions that the Court can do so only if his evidence appears to it to be essential to the just decision of the case. The Apex Court in several cases has held that discretion vested in Court has to be exercised judiciously and not arbitrarily. In the present case, in our view, after the application was made by Pankaj Shankar Sharma (P.W.73) stating therein that he was in possession of a cassette in which interviews taken by him of the hostile witness are recorded and they were telecast on Doordarshan, the Trial Court should have either ensured that the said version is true or not after asking the Investigating Officer to record his statement and to make inquiry regarding the genuineness or otherwise of the cassette or if the Court wanted to examine this witness as court witness, it should have first examined this aspect and then examined him as a court witness. Alternatively, if the Court felt that the prosecution should examine him as a witness, it should have given discretion to the prosecution to record his statement and then to decide

whether it wants to examine him as a witness or not. In this case, the court has adopted a strange procedure of directing the prosecution to examine him as witness without first ascertaining whether he is a genuine witness and whether the contents of the CD are genuine or not. Such a course of action, as adopted by the Trial Court, if permitted can lead to disastrous consequences. In the present age of media trial, there are number of people who are interested and who would like to take part in the trial on account of wide publicity which it receives in the media. When the witness is examined by the prosecution, Investigating Officer has a chance to first thoroughly investigate the offence, examine his statement, decide the genuineness and then take a decision whether it is necessary and in the best interest of the case to examine him or not. If such type of applications are allowed in a casual manner, it can lead to serious miscarriage of justice. We would, therefore, like to point out that the procedure followed by the Trial Court in respect of this witness (P.W.73) is in derogation of the sound principles laid down by the Apex Court in respect of the provisions of section 311. Apart from that, the said action has been taken in a most half-hazard and hasty manner.

88. Taking into consideration the above background, it will have to be seen whether the testimony given by this witness (P.W.73) is reliable or not.

89. P.W. 73 – Pankaj Shankar Sharma has stated that he is a journalist by profession and he was working with Doordarshan News as Assignment Consultant and he was working since last 4 months and prior to that he was working as a Freelance Journalist and he used to prepare documentaries for private T.C. Channels. He has further stated that in connection with Gujarat riots, he had prepared two documentaries – one titled as ‘In the name of faith’ and the other titled as ‘Gujarat burnt alive’ – in the year 2002. He has further stated that in connection with those documentaries, he had gone to meet Zahira Shaikh, her mother and both her brothers and had taken their interviews on 18/04/2002. The said interviews were taken in the Vadodara City. He has stated that all the four persons viz Zahira Shaikh, her mother and her two brothers were ready to talk and willingly spoke to him and he asked them as to how the incident had taken place. He has stated that Nafitulla said that he knew everyone and he could recognize all these persons. The same thing was repeated by his mother and further it was stated, as remembered by this witness, that those who were assaulting were less and those who were pointing out were more. He has stated that video recording of the said interviews was done by him and recording was of about 18 to 20 minutes duration. He has stated that from 18/4/2002 till 11/5/2005 the cassette was in

his possession. He has further stated that other cassettes concerning Gujarat riots have a total footage of about 60 hours and this cassette was only one of the several cassettes. He has further stated that the cassette was telecast by Doordarshan and that he was not in a position to give the date on which it was telecast by Doordarshan since, for that purpose, he would have to refer to the paper which was in his possession. After referring to the date, he has stated that the cassette was telecast on 30/03/2005 at 10.00 a.m. and again it was re-telecast on 02/04/2005 at 9.30 a.m. He has further stated that whenever a programme is to be edited, the whole footage has to be dumped in the 'Edit Suite'. The C.D. which was tendered by him was marked as Exhibit 389/A.

90. Though this evidence of P.W.73 has come on record, the learned Special Public Prosecutor appearing on behalf of the prosecution did not lay much stress on this evidence which was brought on record in view of the directions given by the learned Trial Court.

91. On the other hand, the learned Senior Counsel Mr. Adhik Shirodkar appearing on behalf of the appellants/accused has taken us through the cross-examination of this witness and submitted that the said witness was deliberately introduced by the third party after the above witnesses had turned

hostile to lend support to the prosecution case. He submitted that from the cross-examination of this witness (P.W.73), it could be seen that the CD was doctored and it was not taken immediately after the riots but was taken later on. In the written submissions tendered by the defence several reasons have been given by the defence as to why the said testimony of the said witness is not reliable.

92. In our view, since no emphasis has been put by the prosecution on the evidence of this witness (P.W. 73), no reliance can be placed on the contents of the CD which has been produced by this witness. Even otherwise, admittedly, even according to P.W. 73 - Pankaj Shanker Sharma, he had taken the said interviews after the incident. That being the position, the said interviews are not relevant for the purpose of deciding the points which fall for consideration before this Court in this case. We have already observed that the Trial Court should have been more circumspect and cautious before directing the prosecution to examine the witness as prosecution witness, particularly when the prosecution itself was very reluctant to treat him as their own witness. The Trial Court, in fact, has clearly erred in permitting this witness who is obviously a person from media who has tried to use the court as a forum for the purpose of advocating his views which should not have been permitted by the Trial Court without first ascertaining the authenticity of the

cassette and without finding out the antecedents and intention of this person.

9/7/2012 AT 11 A.M.

93. The learned Special Public Prosecutor had also relied on the statements of some of the neighbours in support of the prosecution case. She submitted that though some of these witnesses have turned hostile, testimony of these witnesses corroborate the testimony of the injured eye witnesses. She has relied on the statements of P.W. 43 - Jyotsnaben Bhatt, P.W. 44 - Kanchanbhai Mali, P.W. 45 - Veersingh Zala and also on the testimony of P.W. 36 - Lal Mohammed Khudabaksh Shaikh and P.W. 33 - Mohammad Shaikh.

94. So far as P.W. 43 - Jyotsnaben Bhatt is concerned, she was declared hostile witness and she was permitted to be cross-examined by the Trial Court. In her examination-in-chief she has stated that communal riots had taken place near the Hanuman Tekdi and the mob had gone there and she had heard noise of the riots and, thereafter, she closed the doors and she heard various slogans. She has stated that her house is situated in front of Best Bakery. She has stated in her examination-in-chief that she learned about the things which have transpired at the Best Bakery. The witness was declared as hostile witness and even in cross-examination, the witness has not resiled from her earlier

testimony. She has admitted that from her residence she cannot see the Best Bakery. She has stated that her house is situated opposite the Best Bakery. She has stated that she had provided help to Yasmin by providing food and money for medical expenses. Testimony of this witness, therefore, does not assist the prosecution case in any manner whatsoever.

95. P.W. 44 - Kanchanbhai Punjabhai Mali has stated that he has been residing in the said locality since last 12 years and that one Jyotsnaben and one Pratap were his neighbours and the Best Bakery building was situated opposite his house at a distance of about 40 ft. He has given description about the Best Bakery and the persons who owned it and has also narrated the incident which took place on 1/3/2002 at 8.30 to 9.00 P.M. He has stated that a mob of 1000 to 1200 persons had assembled and it was moving slowly towards the Bakery and persons from the mob were shouting slogans and that these slogans could be heard. He has stated that hearing these slogans, he was frightened. He went inside the house alongwith the children. He has stated that some stones had been thrown on the tin of his roof also. He has stated that he heard that persons who were in the bakery building were throwing stones, soda-war bottles etc from the upstairs. He has stated that police came there and the members of the mob dispersed. He has further stated that after police van

went away, at about 12.00 midnight to 1.00 a.m., the mob again assembled there. He has stated that he did not personally see anything. He, however, came to know on the next day what had happened. At this stage, the witness was declared as hostile and cross-examined. In the cross-examination also, no admissions were given by the witness and, as such, his testimony does not assist the prosecution case so far as identity of the accused is concerned since actual incident has not been seriously challenged. The evidence of this witness that a mob of 1000 to 1200 persons going towards the Bakery and what happened thereafter, does not, therefore, help the prosecution in establishing the identity of the accused.

96. Prosecution has examined P.W. 45 - Veersingh Chandrasingh Zala. He has stated that he is a Tempo Driver and he drives a 3 wheeler tempo since about last four years and he is residing in the said locality for about 40 years. He has, however, stated that he came home on the date of incident at about 11.00 P.M. and went to sleep and woke up in the morning at about 10.00 to 10.30 A.M. He has stated that he had asked one Bharatbhai to make a telephone call to police and that after some time after Bharatbhai had telephoned to police, police came and, thereafter, Fire Brigade and ambulance had also arrived at the scene. This witness was also declared as hostile witness after some time.

The learned Special Public Prosecutor was permitted to cross-examine this witness. This witness also, therefore, does not help the prosecution for establishing the identity of the accused and, therefore, no reliance can be placed on his testimony. P.W. 45 in his cross-examination has admitted that from his house, Best Bakery cannot be seen and that there is no terrace to his house as it has a tin sheet roof and that his house is not situated on the main road but in the lane which is inside from where Best Bakery cannot be seen. He has stated that even if one were to come on the main road, it would not be possible to see the Bakery. This witness, therefore, does not take the case of the prosecution any further so far as establishing the identity of the accused is concerned.

97. The prosecution has also examined P.W. 36 - Lal Mohammad Khudabaksh Shaikh. He has stated that he is residing in Vadodara since last about 17 to 18 years at Hanuman Tekdi area. He has narrated the incident which had transpired after the incident of burning of the railway coach at Godhra. He has stated that his godwon was burnt and the bakery was also burnt. He has stated that he and his family members escaped from the rear door of their house at 12.30 midnight. He has further stated that he then went ahead when Munna and his mother took them to their house and they were there till 5.30 A.M. He has stated that he

along with his five sons and two daughters, two daughters-in-law, three grandchildren, his nephew, one Sohrab - partner of his son and one Habib - they all stayed in Munna's house till 5.30 A.M. He has stated that his son went and brought a car of Rahimtulla and brought all of them at Ekta Nagar and there they stayed with one Husseinbhai. He has further stated that in Shraddha Bakery which is situated in the neighbourhood and run by one Iqbalbhai, there were 25 Muslim persons in that night and Ashraf and Aslam - who had their house by the side of the Best Bakery - had come to Shraddha Bakery for meeting Iqbalbhai and were trapped and they also went along with him to Ektanagar. He has stated that on the next day it was learnt that his godown was burnt, Best Bakery was burnt and that several persons had died and were injured in the Best Bakery. He has further stated that after the curfew was relaxed, he went to see his godown on 9/3/2002 and he noticed that everything was burnt and nothing was left. He has further stated in his evidence that he has seen Dinesh, son of Phulchand who were owners of Mamata Bakery. He has stated that all the accused in the dock were from their locality and he has further admitted that Munna and his family protected all of them throughout the night and his mother had given milk to his grandchildren and that the rioters had not come towards Munna's house. He has stated that from the accused present before the Court, neither Jayanti, nor his son - Rinku

- nor his nephew Mafat nor Munna attacked him or the persons with him. Testimony of this witness, at the highest, mentions about the presence of Dinesh Phulchand Rajbhar (accused No.15) at the scene of offence. No role has been attributed by him to Dinesh Phulchand Rajbhar. Surprisingly, he has stated that Munna who is accused No.9 in this case who is now absconding, in fact, had helped him and his family members and other Muslim persons by protecting them in his house and his mother also had served his grandchildren and had given them food. This witness is not of any assistance to the prosecution for identifying all other accused, nor has he attributed any role to the accused in commission of the said offence. Since Munna was absconding during trial, effect of testimony of this witness so far as the role played by Munna, therefore, is of no consequence so far as these accused are concerned.

98. P.W. 33 - Mohammed Ashraf Mohammed Haroon Shaikh has stated that at the time of riots, he was residing at Hanuman Tekdi, Vadodara and he has his own house besides Best Bakery. He has stated that his brothers Aslam, Arshad, his sister-in-law Shabnam, Sibli and her sister Babli - Aslam's children, one Firoz, Firoz's wife and their two children, all were residing with him in the same house with him. He has given details of Habibulla family. He has mentioned the names of members of late Habibulla family

and workers who were working in the Best Bakery who were known to him. He has stated that he has left Vadodara because his own family was killed. He has stated that on the date of the incident, he had seen rioters with swords, rods etc and he realized that if he went to Best Bakery, he would be killed. He has stated that, therefore, he escaped from a lane and went to Sharda Bakery and telephoned the police and informed them about the incident. He has stated that he stayed in Sharda Bakery and at 10.00 a.m, he came out and noticed that rioters were going towards Ganeshnagar from Hanuman Tekdi and, thereafter, he and his brother went to Ektanagar by auto rickshaw when he learnt that the dead bodies of his bhabhi and the children and also the dead bodies of Firoz and Guddu's sister were brought there. He has stated that, thereafter, when the bodies reached Ektanagar, they performed the burial of these bodies and then he went to his native place. He has given the description of the seven dead bodies and further stated that, after the incident, he did not meet Kausar and Lulla. He has stated that their dead bodies were not found. He has stated that houses of Shana, Pratap, Hareh, Dinesh, Ravi and Lala were situated near his house and they were residing by the side of their Mohalla. He has given a brief description about the incident which transpired at night on 1/3/2002. He has, however, not given description or names of the members of the mob. He has further stated that, initially, no inquiry was

made by the police with him and his statement was not recorded. He has stated that, however, after the case in Vadodara was over, police from Panigate Police Station had recorded his statement. To the question asked by the Court as to how many statements were recorded by the police, he mentioned that only three statements were recorded. The learned Senior Counsel for the appellant/accused asked the Public Prosecutor to produce the three statements of the witness recorded by the police. However, the Special Public Prosecutor stated that only one statement was recorded. In his cross-examination, P.W. 33 has admitted that he has not mentioned to the Police that Sanju Thakkar and Dinesh Thakkar were at the Police Station. In our view, testimony of this witness (P.W.33) does not assist the prosecution case in any manner whatsoever, apart from stating that Sanju was not there but his elder brother Dinesh was there and he has not attributed any role whatsoever to them. In the cross-examination, he has admitted that he has not mentioned to the Police that Dinesh was also present there.

99. Since the defence has disputed the identity of the accused in respect of commission of the offence, it is not necessary to go through the evidence of Panch witnesses who have proved various panchanamas such as inquest panchanama, seizure panchanama, recovery panchanama and CA reports in respect of opinion given by the experts on

the bones and other relevant matters.

100. The crucial aspect, therefore, is : whether the injured eye witnesses who have been examined by the prosecution have proved beyond doubt the identity of the accused and whether the appellants/accused who have filed these appeals are the persons who have been identified by the eye witnesses or whether reliance can be placed on their testimony.

101. Keeping in view the well settled position as laid down by various judgments of the Apex Court, it is necessary to examine the statements of the injured eye witnesses viz P.W. 26 - Taufel, P.W. 27 - Raees, P.W. 32 - Sailum so also the eye witness P.W. 29 - Yasmin who was not injured.

102. P.W. 30 - Nasibulla and P.W. 31 - Nafitulla are also injured witnesses. However, both these witnesses have turned hostile and, therefore, in our view, their testimony is not relevant for the purpose of establishing the identity of the accused. The detailed reasons as to why evidence of these witnesses cannot be taken into consideration will be considered at a subsequent stage.

103. Though P.W. 29 - Yasmin Nafitulla Habibulla Shaikh, was not an injured witness, she was on the terrace

alongwith other witnesses and she has alleged that she had seen the incident, particularly the incident in the morning and she has identified number of assailants. In our view, so far as evidence of P.W. 29 is concerned, it will not be possible to rely on her testimony. Her testimony will be taken into consideration if necessary, after the evidence of the four injured eye witnesses is taken into consideration. P.W. 29 has filed applications in these appeals and she has annexed an affidavit wherein she has stated that she had given evidence in Trial Court, Mumbai under coercion and, she has stated that she may be permitted to give fresh evidence. We have indicated that the circumstance of this witness filing an affidavit which is contrary to the statements given by her on oath, will be considered as one of the circumstances after her evidence is taken into consideration later on. Her testimony, therefore, would be taken into consideration at a subsequent stage.

104. P.W. 26 - Taufel Ahmed Habibulla Siddiqui has stated in his evidence that he came from U.P and he was residing in Village - Navgadh, District Siddharth Nagar, U.P and he came to Vadodara and he was working in Best Bakery and he was also residing there. He has stated that the riots started on 28/02/2002. He has further stated that he was residing in Vadodara since about one and half years to two years before the riots had taken place. He has stated that

on the date of incident, after his dinner, he was sitting on a cot ('Charpaae') in front of the Bakery and Shehzad, Raees, Sairul, Baliram and Ramesh who were with him in the Best Bakery, were also sitting with him at that time. He has stated that one Kausarali was also with them so was one Prakash. He has narrated the incident and has stated that rioters came there holding mashals, swords and they were giving slogans. According to him, rioters were about 400 to 500. He has stated that he and others started going upstairs. However, Kausarali and Lulla remained behind and these two were assaulted by swords and they fell down. He has stated that he and others lifted them and they were taken to the first floor of the house. He then stated that rioters set the house of one Aslam on fire and, thereafter, they set on fire 3 vehicles belonging to the Bakery, 2 auto rickshaws and 1 motor-cycle. They have also set on fire the Wakhar which was in front of the Best Bakery, belonging to one Lal Mohammed. He has stated that house of their Seth was also set on fire. He has further stated that below the house, there was timber and the bakery was of tin sheets and the house of their Seth was situated by the side of the bakery and it was on pillars and it was ground plus one floor and the timber was below the pillars. He has stated that after keeping Kausarbai on the first floor, they went to terrace and Shehzad, Raees, Sairul, Baliram and Prakash were also with them. He has stated that Zahira, her elder

sister Saira and her mother, one Raju and Nafitulla were also on the terrace. He has stated that the rioters had set fire to the ground floor and Kausar and Lulla were made to sleep in one room on the first floor. He has stated that three women and four children were also on the first floor. He has stated that they thereafter remained on the terrace throughout the night since fire had been set by the rioters on the ground floor. He has further stated that rioters had come at about 8.00 to 8.30 p.m. and they were throwing bottles filled with kerosene towards them on the terrace.

105. P.W.26 - Taufel then stated that in the morning, rioters asked them to come down and they promised that they would allow him and others to go. He has then stated that there were about 500 to 600 rioters and he has further stated that the rioters tied two wooden ladders together so as to make the ladder reach upto the terrace and they got down from that ladder. According to him, first the women got down and they were Zahira, her mother and the mother's mother and rioters tied the hands of these women and they were taken in a room. He has then stated that Shehzad also got down with him and Sailum also got down with him. He has stated that, thereafter, Baliram then Prakash and then Guddu @ Nafitulla got down and, thereafter, Nafitulla's brother Raju got down. He has stated that rioters tied their hands behind and also tied their legs

and they started assaulting them. He has stated that they started assaulting him and also Prakash, Shehzad, Sailum, Baliram and Raees and they also started assaulting Guddu @ Nafitulla and his brother Raju. He has stated that thereafter rioters put wooden sticks over their bodies, poured kerosene over that wood and set them on fire.

106. P.W. 26 - Taufel has stated that he sustained injuries on the backside of his head, on both the sides of the chest and left arm and his right leg was burnt. He has stated that a blow of sword was given on his left leg and he then stated that he would be in a position to identify the sword and he had seen some of the persons who were known to him and that he could identify those persons. He has then stated that he did not know the names of these persons. Further, he has stated that he can identify the persons who had assaulted him and asked him to come down. He has stated that he knew some of them well but he did not know their names. He then stated that he would be in a position to identify the sword with which he was assaulted. He then identified the two swords.

107. The Court, thereafter, asked the accused persons to stand in a row at random and not according to the serial numbers given to them. P.W. 26 - Taufel was then allowed to leave the witness box and to identify and point out if he

could, any of the accused persons as the assailant/assailants. P.W. 26 - Taufel pointed out 7 accused out of the 17 accused before the Court. He pointed out to original accused No.11 - Sanjay Ratilal Thakkar as a person who was seen by him in the morning. He has attributed role to him and he has stated that he was a person who had asked them to come down from the terrace and, thereafter, had tied hands and legs. P.W. 26 - Taufel then pointed out to original accused No. 21 - Ravi Rajaram Chauhan. He has stated that this person had also asked them to come down from the terrace. He then pointed out to original accused No. 15 - Dinesh Phulchand Rajbhar. He has stated that he was holding a sword and Mashal in his hands and he was giving slogans. Then he pointed out to original accused No.12 - Bahadursinh @ Jitu Chandrasinh Chauhan and stated that he was running towards the bakery by holding Mashal and a sword in his hands. Then, he pointed out to original Accused No. 16 - Shanabhai Chimanbhai Baria as a person who had asked them to get down from the terrace and was tying hands and legs of the persons and started assaulting. He then pointed out to accused No.19 - Kamlesh Bhikhabhai Tadvhi whom he had seen near the Bakery when he was just standing. He then pointed out to accused No.20 - Suresh @ Lalo Devjibhai Vasava as a person who was seen running towards the Bakery holding mashal and sword. Then he stated that wooden sticks were put over their bodies and

kerosene was poured and they were set on fire and, thereafter, they were taken to the hospital after the police came and others were also admitted in the hospital along with him. He has stated that when police contacted him in the hospital, they made inquiries with him and he gave information to the police. He then gave the description of the bakery; number of rooms on each floor and he has given description of the people who died in the fire. He has then stated that after he was discharged from the hospital, he went to his native place in U.P. He came back within 10 to 15 days.

108. It has to be noted that this witness (P.W.26 - Taufel) has not named any of the accused but only pointed out to them when they were made to stand in a row at random and not according to the serial numbers given to them in the charge-sheet and has attributed a role to the accused whom he has identified not by name but by pointing out.

109. This witness (P.W. 26 - Taufel) has been extensively cross-examined and it has been brought on record that the witness has made number of improvements and contradictions in his statements. It has been established by the defence, after the omissions and contradictions were proved by examining the Investigating Officer, that neither

this witness nor the other three injured eye witnesses had given names of any of the accused to the police nor their description was given nor they had given description of the swords or other weapons which were used by the assailants. The defence also has established that theory of these witnesses sitting on a cot ('Charpae') is an improvement which has been brought on record after the Investigating Officer was examined and it is established that these witnesses have tried to introduce a case that they were sitting on a cot ('Charpae') when rioters approached them. The defence also has established that though the Investigating Officer had an ample opportunity to record the further statements of these witnesses, no explanation has been given by the prosecution or by the Investigating Officers Baria (P.W.72) and Kanani (P.W.74) as to why further statements were not recorded particularly in respect of identity of the accused or in respect of description of the accused since the witness had an ample opportunity to see the assailants and, as a natural conduct of the Investigating Officers, they should have recorded the names of the assailants or the appellants/accused, their description and also the description of the weapons used by them. Following omissions and contradictions have been brought on record by the defence in respect of this witness (P.W.26 - Taufel).

152
 APEAL 583/2006, 584/2006 & 585/2006
 WITH APPA 571/2011, 572/2011 & 573/2011
 WITH APPA 198/2012, 199/2012 & 200/2012

Taufel (P.W.26)			
Sr. No.	Subject	Om/Contr	Exhibit No.
1	Bakery's work -contd on 28 th , closed in the evening.	Om	
2	He & others - sitting upstairs & chit chatting	Contr	357
3	Mob -1000 - 2000	Contr	358
4	Sitting on a cot (Charpayee) on 28th	Om	
5	Kausarali sitting on cot with us	Om	
6	Rioters holding Mashal & sword	Om	
7	Kausarali & Lulla (K & L) remained behind	Om	
8	K & L were assaulted by sword	Om	
9	K & L - fell down - we lifted - took them to first floor	Om	
10	After keeping K & L on 1 st floor, we went to terrace	Om	
11	Zahira had already lodged complaint - did not state	Contr	359
12	K & L - made to sleep in a room on 1 st floor	Om	
13	Morning - rioters asked us to come down - took oaths - they would allow us to go	Om	
14	Rioters made us get down from terrace by putting a ladder	Om	
15	First women - Zahira, her mother and mother's mother got down	Om	
16	Rioters tied hands of women	Om	
17	Women were taken to the direction of the room	Om	
18	Blow of sword - on my leg	Om	

19	Rioters - put wooden sticks over our bodies - poured kerosene over that wood and set us on fire	Om	
20	Description of the persons known to me.	Om	
21	Lalmohammad's wakhar being set on fire by the rioters	Om	
22	Whether names of Dinesh, Shana, Ravi & Jitu - given	Om	

This witness (P.W.26 - Taufel) was extensively cross-examined as to how they had taken bodies of Kausarali and Lulla to the first floor and the witness has admitted that these two persons had sustained very serious injuries and they were already dead when he and others lifted them and took them in house and blood was coming out from their bodies and they were not bleeding profusely. He has stated that the blood coming out from their bodies had, naturally, come in contact with their clothes. This witness has stated in the cross-examination that his statement which was recorded by the Police was never read over to him by the police. He has also admitted that the swords which were identified by him were seen by him for the first time in Court. He has also stated that he had identified the said two swords on the basis of similarity in their appearance in view of the swords seen by him at the time of incident. He has further stated that he had seen three accused in the night and four in the morning. He has admitted that he could not describe

features of the accused persons without looking at them and also he could not state about their built, height etc without looking at them and also could not give their complexion without looking at them. He has further stated that he did not know whether the police at the time of recording his statement had asked him to state whatever had happened. Further, he has stated that he does not remember whether he had given description of the accused. He has further admitted that since he could not give description of those persons he must not have given their description to the police. After cross-examination of this witness was over, it was observed by the Trial Court that when Shri Shirodkar the learned Senior Advocate was concluding the cross-examination by putting his case, the witness wanted to say something and that the witness, in fact, said something to the Interpreter of the Court. The Court, therefore, asked the witness what he wanted to state and when this question was asked, he told the Court that he knew names of four of the 7 accused persons identified by him prior to the incident. However, due to fear, he did not disclose this earlier. When the Court asked question as to whether he wishes to say anything more, to which he answered in the negative. The learned Special Public Prosecutor then stated that in view of the statement made by the witness, the Court should question him as to who were those four persons. This was vehemently opposed by the learned Senior Counsel

appearing on behalf of the defence on various grounds. The Court, however, overruled the said objections and asked this witness (P.W.26 - Taufel) whether he knew the names of four of 7 accused since prior to the incident and could he state who they were and he gave names of four persons viz. Dinesh, Shana, Ravi and Jitu. The Court has asked him why he did not identify them by their names and he stated that this was due to fear and since he was less frightened now, he had disclosed their names. The Court then permitted the defence to cross-examine the witness. When he was asked in the cross-examination whether he had given false statement to the Court, the witness admitted and stated that due to fear he had made that statement. He also agreed that he had spoken lie to that effect but it was due to fear. He also admitted in the cross-examination that he did not give names of four persons when his statement was recorded by the Police since due to injury on his head it did not occur to him what he stated and he has further stated that he might have given names but police might not have recorded the names.

110. The effect of evidentiary value of the testimony of this witness (P.W. 26 - Taufel) will be taken into consideration alongwith the testimony of three remaining injured eye witnesses.

111. P.W. 27 - Raees Khan Nankau Khan has stated in his evidence that he came to Mumbai about 15 to 20 days and he was residing at Mumbai Central. He has stated that one Rahimbhai brought him to Mumbai and he knew Rahimbhai since his daughter was given in marriage in their village. He has further stated that Rahimbhai told him that his case had started in Mumbai and he should give evidence. He has then stated about the work he used to do in late Habibulla's bakery. He has given the particulars of family members of late Habibulla and the particulars of workers who were working with him in the bakery. He has then stated about the incident. He has stated that at about 8.30 to 9.30 p.m., he and other workers of the bakery were sitting on a cot (Kahtal) in front of the bakery and that time 15 to 20 persons came there and started throwing stones on them. After police came there, those persons ran away. He has stated that he went to the terrace and Kausarbhai was coming down. According to him, at that time, he peeped outside from the 'Jaali' and saw that some persons had assembled there with Mashals and swords in their hands and he saw that Kausar and Lulla were talking to those persons. However, rioters put fire to the bakery and to the vehicles and they also set fire to the wood that was in the bakery and they also set Aslam's room on fire. He has stated that rioters were about 1000 to 2000. He has stated that workers of the bakery and Habibulla's sons, his two daughters, his wife,

Guddu's wife, Guddu's grandmother were on the terrace and three women and four children were in the room below. He has also stated the names of the workers viz Taufel, Nasru, Sailum, Prakash and Shehzad. Then he has stated that rioters were throwing glass bottles towards the terrace and they were also throwing stones towards the terrace. They were also throwing glass bottles containing kerosene and after setting fire to those bottles and, throughout the night, they continued to do this and harassed them. He has then stated that the rioters again came in the morning at about 9.00 to 10.00 a.m. and asked them to get down. He has practically repeated what P.W. 26 - Taufel has stated in his examination-in-chief, though this portion is proved to be an omission by the defence Counsel. He has then stated that their hands and legs were tied and the ladies were taken to bushes and, thereafter, rioters started assaulting them with swords and sticks and then they put timber on their persons and set them on fire. He has stated that he received injuries on the backside of his head and both his hands were burnt and his back was also burnt. He has stated that he could identify the persons who assaulted him and set him on fire. He has stated that he sustained injuries on his head as he was assaulted by the sword and he would be able to identify the sword. He has then stated that the sword with which he was assaulted was similar to the sword which was shown to him by pointing out the sword marked as Article R/23. He has

stated that he was assaulted by the sword similar to Article R/21. He then stated that he was assaulted by wooden stick which he identified by pointing out to wooden stick - Article R/20. Thereafter, the Court, like previous witness (P.W.26), asked the accused persons to stand in a row at random and not according to the serial numbers and the witness (P.W. 27) was allowed to leave the witness box and to identify and point out, if he could, any of the accused persons as the assailant/assailants. This witness then pointed out to original Accused No. 18 - Shailesh Anupbhai Tadvii and stated that this was the person who had tied hands and legs. Then he pointed out accused No.20 - Suresh @ Lalo Devjibhai Vasava and stated that he was having a sword in his hand. He then pointed out to Accused No.15 - Dinesh Phulchand Rajbhar and stated that this person was having a sword and was assaulting. Then he pointed out to original Accused No.16 - Shanabhai Chimanbhai Baria and stated that he was present there and he was having a sword in his hand. He then pointed out to Accused No.4 - Pankaj Virendragir Gosai and stated that he was also there.

112. He (P.W.27) has then stated that others viz Shehzad, Sailum, Taufel, Baliram, Guddu, Raju, Kausarbhai and Lulla were also assaulted.

113. He (P.W.27) has then categorically stated that he

does not know the names of the accused persons whom he had identified.

114. He (P.W. 27) has then stated that he was taken to the hospital and he was admitted in the hospital for about 15 to 20 days and the police had come to meet him in the hospital and they have asked him the name, address etc., and also obtained his thumb impression and they had come to him on 4/3/2002 also and he had told them whatever was true. He, however, stated that whatever was recorded was not read over to him. He then stated that after he was discharged, he went to his native place.

115. This witness (P.W. 27) was also cross-examined at length and the defence has successfully brought on record several omissions and contradictions in the evidence of this witness. The following omissions and contradictions have been brought on record by the defence.

Raees (P.W.27)			
Sr. No.	Subject	Om/Contr	Exhibit No.
1	When 15-20 persons came, we were on upstairs portion	Om	264/4

160
 APEAL 583/2006, 584/2006 & 585/2006
 WITH APPA 571/2011, 572/2011 & 573/2011
 WITH APPA 198/2012, 199/2012 & 200/2012

2	Went up - saw - Kausar & Lulla (K & L) talking to rioters - Rioters put fire to bakery	Om	266
3	Set fire to vehicles, wood, Aslam's room	Om	267
4	Who were on terrace & in the room on the first floor	Om	268
5	Rioters - thoda bahut marenghe - we begged - made us get down - 2 ladders - women and then we also got down - Guddu's grandmother - on terrace	Om	269
6	Hands & legs tied - ladies - bushes - then assault by swords & sticks - timber on person - set on fire	Om	270
7	Did not happen - on 2/3/2002 - when thumb impression obtained - I was fully conscious	Contr	264/3
8	Description of some of the rioters (I can identify the persons who assaulted me)	Om	
9	15-20 persons - Hindu like - came - pelted stones - set bakery on fire - when police vehicles used to come - people used to flee	Contr	265/5
10	Did not happen - 15-20 persons set bakery on fire	Contr	
11	"this is my statement" & thereafter gave thumb impression - Never said so.	Contr	
12	8.30 - 9.30 pm - we were sitting on a "kahtal" in front of bakery. 15-20 persons came - stone throwing - police came etc. Portion "N"	Om	
13	Peeped out of 'Jali' - saw - persons assembled with Mashals and swords	Om	

14	Habibulla's 2 daughters & his wife were on terrace	Om	
15	3 women & 4 children in the room below	Om	
16	A ladder made by joining 2 ladders	Om	
17	Description of some of the rioters (I can identify the persons who assaulted me)	Om	
18	Did not state - 1000-1200 persons from Ganesh Nagar Zopadpatti	Contr	Exh 360
19	Sticks	Om	
20	Rioters put timber on our persons and set us on fire	Om	
21	Did not state - Rioters poured kerosene and petrol in the room where ladies and children were sleeping and put the room on fire	Contr	
22	"This is my statement"	Contr	Exh 362

116. From the cross examination P.W. 27 - Raees Khan Nankau Khan, it can be seen that entire testimony of this witness regarding sitting on 'Kahtal' after meal in the evening alongwith others and the fact that no names were given to police by him has been clearly brought on record. It is also brought on record in cross-examination that he had neither given any description of the accused nor description of the weapons. He has admitted that he did not know the names of the persons seen by him in a mob of rioters and, even today, he does not know the names of any of the

accused pointed out by him today in Court. The witness, however, has stated during his cross-examination that no other questions were put to him by the police at that time and volunteered that at that time he was not in a condition to say anything. He has stated that he was conscious but not fully. In the cross-examination, the witness has admitted that 'Ghee' used to be kept in the rooms below and that there used to be about 50 to 60 tins of 'Ghee' and each tin might be of about 20 to 25 kgs. Further, he has given description about iron gate which was bolted from outside and deposed that it used to be kept bolted except while taking the goods inside. He has also stated that there was a passage to go upstairs by the side of the gate and stair case was estimated to be about 2.1/2 feet in width. He has further given description about the furnace on the ground floor and narrated this in his cross-examination.

117. The learned Senior Counsel Mr. Adhik Shirodkar wanted to bring omission on record in respect of aspect of the witness sitting on the 'Kahtal' in front of the bakery. However, the permission was not granted by the Court to bring the said omission on record and an observation is made that since the witness (P.W. 27) has stated that the witness was upstairs and since the proposed omission having no separate existence was not necessary to be brought on record since the contradiction has already been brought on

record and, therefore, the question was disallowed. It has also been brought on record that certain statements which were made by him in Court were not recorded by the police. All these omissions have been brought on record. He has also admitted that if two ladders had not been tied together, they could not have come down from terrace and he also admitted that the fact of joining the ladders was significant and he did state it before the police on 04/03/2002. However, he has stated that he does not know why it was not recorded. He further admitted that what was recorded was not read over to him. He has stated that since his condition was very bad, he had no recollection of what he had stated and what he did not on that day to the police. He then stated that he was badly injured. He has also admitted that he has seen accused persons whom he has identified for the first time in Court and he had no occasion to see any of them after the incident. This witness was asked, after he had stated that he would not forget the faces of the assailants, that if he had not forgotten the faces of the assailants, whether he could give description of the assailants without looking at them and this witness has stated that he would not be in a position to give description without looking at them. He has stated that how he could give their description without looking at them and when he was asked as to how descriptions of the rioters were not found in his statement, he has stated that it is possible that

he had given the descriptions but the same were not recorded by the police. He then stated that he was assaulted from behind and he had identified two swords in the Court from the four swords shown to him.

118. The witness (P.W.27) was then examined as to how he had appeared in the Trial Court in Mumbai. The witness has stated that his father and one Rahimbhai were with him when he came to Mumbai and he was residing with the said Rahimbhai in his house. He has stated that Rahimbhai has told him that he had read in newspapers about this case. He further admitted that he was working in Country Bar at Ulhasnagar for about 5 to 6 or 7 to 8 months. He was then asked details about what he used to do in Country Bar at Ulhasnagar and these details were given by him. He then stated that he did not receive any summons to appear as a witness in Court. He also stated that he came to know about the date on which he was to appear in the Court and give evidence from Teesta Madam and he identified her when she was sitting in Court. He has further admitted that he knew Teesta Madam for 10 to 12 days and she was introduced to him by Rahimbhai and that she had helped him in bringing him to court. He has further admitted that he used to meet her in her office and they used to have talks about this case.

119. In the further cross-examination this witness (P.W.

27) admitted that bakery was set on fire by rioters but he did not know who were the persons who set the bakery on fire nor the mode or manner in which the bakery was set on fire. He has stated that he did not know who were the persons who set the vehicles on fire and the manner and mode in which they were set on fire. He has further stated that he did not see any human being being burnt there with his eyes and he did not see any human being, being set on fire in that portion of the residential premises. He also admitted that he did not see anybody setting on fire the said three women and four children. He further volunteered that they were in the room and they were fully trapped. He further admitted that nobody could enter inside the room and nobody could come out from there. He then admitted that he met Teesta Madam on one or two occasions only in her office and the taxi driver used to take him to the said destination and then take him back.

120. Like other witness, from the cross-examination of this witness, it can be seen that this witness has made lot of improvements and that he has not given names or description of the accused to the police when his statement was recorded and the explanation which is given by him is that he was injured. A suggestion has been made to this witness (P.W. 27) that he was brought to Bombay at the instance of Mrs Teesta Setalvad and attempt is also made to

show that there was ample opportunity of tutoring this witness by the said Mrs. Teesta Setalvad.

121. It has also been argued that Raees Khan (P.W. 27) was the only witness who was fully conscious on that day and his statement was recorded first in point of time. The evidence of Dr. Meena (P.W.46) and Dr. Choksi (P.W.62) was also read over in support of the said submission.

122. P.W. 28 - Shehzad Khan Hasan Khan Pathan has stated that he came to Mumbai with one Raees Khan of Ahmedabad. He further stated that he was staying in Vadodara since last about 15 years and he was working in Janata Bakery for about 12 months and, thereafter, started working in Best Bakery at Anusaya Nagar, Hanuman Tekdi which was opened by Habibulla. He has stated that Habibulla had one wife and three daughters and there was one 'Nani'. He has stated that Sailum, Raees, Taufel, Kausarbhai, Baliram and also Guddu and Raju were working with him in the Best Bakery. He has stated that, however, he did not know the names of three Hindus who had died. He has then stated that he used to sleep on the terrace and the Bakery and residential house are adjoining to each other. He then stated that the incident in question took place on 1st which was a Friday and they were having food and sitting in front of the bakery on a cot ['Palang'] and Sailum, Baliram,

Kausarbhai, Lulla, Guddubhai, Raju were all sitting on cot with him. He was asked "who else was there with you?". An objection was raised. However, it was overruled and then the witness mentioned the name of Taufel also when he was asked again. Then he has narrated as to how rioters came there with swords and mashals and they were shouting slogans 'kill the muslims'. He has stated that there were number of rioters and he has mentioned that Kausarbhai and Lulla were trying to pacify the crowd when they were assaulted by rioters with swords and that he, Taufel and Baliram brought Kausarbhai and Lulla and made them sleep in the room and then they had gone to the terrace. He has stated that rioters set fire to the bakery and to the wakhar of Lal Mohammed and also Aslam's house and they set on fire the vehicles of the bakery. Tempo and two vehicles were set on fire. He has also stated that rioters were throwing on the terrace bricks, stones, kerosene and petrol and he has given names of persons who were on the terrace and of the persons who were on the first floor.

123. He (P.W. 28) has then stated that, in the morning, he begged those persons with folded hands and asked them to allow him to go away. He then narrated what transpired in the morning as has been stated by other witnesses - P.W. 26 and P.W. 27. He has stated that in the morning, all of them were made to get down; first, the women and then

men. This witness then has stated as under.

“Thereafter, Sanju tied my hands and even took away the amount of Rs 5,000/- that was with me. The hands of others were also tied. I can identify that Sanju now. I knew Sanju since prior to the incident. It is because he is a big man and stays opposite Shraddha Bakery.”

The witness (P.W.28) identified Sanju by pointing out the accused who was in the dock. He then pointed out to the original accused No. 12 - Bahadursinh @ Jitu Chandrasinh Chauhan and said “He is Jitu”. He also identified original accused No. 16 - Shanabhai Chimanbhai Baria and said that “He is Shana”. He then pointed out other nine accused who were standing in the dock. He then identified original Accused No. 15 - Dinesh Phulchand Rajbhar and said that he knew Dinesh also by name. He then pointed out original Accused No. 20 - Suresh Devjibhai Vasava. He, however, stated that “I know the name of this person, but I do not remember it now.” He then pointed out to other accused who were in the dock viz Accused No.1 - Raju Dhamirbhai Baria, Accused No 2 - Mahendra Vishwasrao Jadhav, Accused No. 4 - Pankaj Virendragir Gosai, Accused No. 14 - Jagdish Chunilal Rajput, Accused No.18 - Shailesh Anupbhai Tadvi,

Accused No. 19 - Kamlesh Bhikabhai Tadvi and Accused No.21 - Ravi Rajaram Chauhan. He has then attributed a role to these accused. He has stated that Dinesh assaulted him by a sword. Sanju took away his money. All the five Accused viz Accused Nos. 11, 12, 15, 16 and 20 were having swords with them at the time of the riot, so the other accused whose names he did not know were having a danda with them, a curved shaped sword and he sustained injury by the sword on his head and also on the back of left shoulder. He has stated that he had seen the accused in the night and in the morning also. He has stated that he did not know the names of Accused Nos. 1, 2, 4, 14, 18, 19 and 21. Then he has stated the injuries which were sustained by him by the swords. He has stated that he received injury on his face near the left ear and on his back and has also sustained burn injuries on his right leg. He has stated that he sustained these injuries on Saturday the 2nd and that he had fallen unconscious and burn injuries were sustained when rioters had placed wood on his leg and set fire to it. He then stated that after he sustained injuries by sword, in order to save his brother Sailum, he threw his body over his body and then he was taken to hospital and he was there for about a month. He has stated that he regained consciousness after four days and when the police made inquiry with him he has stated whatever had happened to the police. He has also stated that he would be in a position to identify the weapons which

rioters were carrying if the said weapons were shown to him. He identified three weapons viz R-18, R-29 and R-21.

124. He (P.W.28) then stated that he was called as witness in the Court of Vadodara. He has stated that he had been called there for giving evidence and he was to give evidence regarding assault on him and the injuries sustained by him. However, it was declared that he was of unsound mind and asked to go away. He then stated that he had come to Mumbai about an year ago alongwith Raees Khan and Akbar Seth and he went to meet 'Didi', who asked his name and his thumb impression was taken on a piece of paper in which it was written that he was declared as of unsound mind. He was asked "Whatever was written was correct?" and he answered in the affirmative.

125. The witness (P.W. 28) in cross-examination was asked whether events were fresh in his mind, when he had informed that whatever happened was told by him to the Court. He, however, stated that whatever was stated in the police statement might have been wrongly recorded and he could not say whether there was any conflict between him and the Police Officer. He, however, stated that he was not fully conscious at that time. When he was asked as to whether he told the Police that he was not fully conscious, he answered in the negative and stated that he did not say so.

He then stated that the Police asked him as to what had happened. He has stated certain things and the police recorded it and went away.

126. The defence brought on record the omissions from evidence of this witness (P.W.28) in respect of sitting on cot ('Palang') and also other omissions and contradictions which are as under:-

Shehzad (P.W.28)			
Sr. No.	Subject	Om/Contr	Exhibit No.
1	Did not state "these are my facts"	Contr	363
2	Rioters shouting "Musalmanone mari nakho"	Om	
3	Did not happen - "on 1-3-02, after meals we went to first floor and were sitting	Contr	364
4	Hit on head by a stone and fell unconscious	Contr	365

127. This witness (P.W.28) was asked whether stone throwing was going on only in the night and not in the morning and he answered this question in the affirmative. He was then asked whether he fell unconscious because he was hit on his head by stone. The witness, however, stated that he was hit on head by a sword and thereafter had fallen unconscious. Then the witness was shown the statement

which was recorded by police which stated that he became unconscious since the stone hit him on his head. He has stated that this portion was not correctly recorded. He has also stated that he had seen the weapons for the first time in the Court after he had seen them on the date of the incident. He has also admitted that he could not have given the description of the weapons even at the time when his statement was recorded by the police or he could not give any speciality or special identification marks in respect of any of the weapons identified by him in the Court. He was then cross-examined in respect of accused he had identified and was asked whether he could give full names of the four accused. He, however, stated that he could not give full name of Jitu, or full name of Sanju or that of Dinesh. He, however, stated that Dinesh used to stay in Mamata Bakery. So far as Dinesh is concerned, he has further stated that he knew his father owned a bakery and he knew him since childhood and he also knew that Dinesh was his son and the name of bakery of Dinesh's father was Mamata Bakery. A question was then asked to him that since he knew Dinesh since his childhood and when he saw him at the time of the riots in the mob, did he realize that he was Dinesh known to him and the witness answered that he did not know Dinesh and then the Court explained to him about his previous answer. The witness, however, stated that he could not say when he came to know that his name was Dinesh, whether

one month or two months prior to the incident. He, however, stated that he knew the name of Dinesh since prior to the riots. So far as Sanju is concerned, when he was asked in the cross-examination, he reiterated that he knew him prior to the riots. He also told the same thing about accused No.12. So far as accused No.16 is concerned, when he was asked since when prior to the incident he knew Accused No.16 as Shana, the witness answered that his house was just by the side of the bakery and he knew him since prior to the riots, though he could not say how many days prior to the riots. The witness (P.W.28) admitted that he did not state to the police about Dinesh, Shana and Jitu being in the mob of rioters or that some of the rioters were from the same locality. The witness also admitted that he had not given description of the accused and the witness and when he was asked the same question, he has stated that he could not have given description of those persons to the police and, even today, he could not give description without looking at them. In the cross-examination, a question which was asked to this witness is as under:-

“Q: Where did you start staying in Vadodara?”

The witness had given the following answer:-

Ans: I started residing there. Police came to

me. I was told that I will have to give evidence in a Court of Law. In the Court, there were many persons. There was one hefty person. I was told to say that I was assaulted from behind and that, thereafter, I had fallen down. I was asked to state that I had not seen anyone. I was asked to place my hand on my forehead and not to speak anything. I did accordingly. People started laughing. I was declared mad ['Paagal']. The Judge said that I would be treated and then my statement would be recorded."

The Court observed that witness had not given answer to the question which was asked. The witness was asked some questions again and then he gave a reply that he started residing with Akbar Seth in his bakery after he returned to Vadodara.

128. The witness (P.W. 28), thereafter, was asked as to how he came to Mumbai and the witness answered that he was sent to Mumbai by Akbar Seth and he was residing at Bandra and he had been sent to Mumbai for meeting 'Didi' and that he was introduced to 'Didi' by Raees Khan. He then stated that 'Didi' had read over something that had been written to him and that his thumb impression was obtained

on that writing. It was in connection with the fact that he was declared of unsound mind and the writing was sent to Delhi. The witness has stated that he did not know the name of 'Didi' but admitted that the name of 'Didi' was Teesta Madam and he also informed the Court that she used to be in the Court-hall. When a question, however, was asked where he was staying for about 15 days, he gave answer that he was residing with persons from his native place at Bandra but he could not give their names or locality or part of Bandra where he was residing or name of building where he was residing or place where he was residing.

129. So far as this witness (P.W.28) is concerned, again, omissions and contradictions have been brought on record. It was inter alia urged that the witness was not in a position to understand the question and the question had to be repeated. It has been submitted that though this witness was declared as a person of unsound mind in Vadodara Court, prosecution has not examined any expert from medical field to prove that he was in fit mental condition to give deposition in this Court. It has been also submitted that the witness had been tutored at the instance of Teesta Setalvad and his evidence, even otherwise, is not reliable in view of various omissions and contradictions which have been brought on record. He submitted that his evidence is liable to be discarded since he had not given names or

description of the accused to the police and even his further statement was not recorded. It has been submitted that even after the matter was sent back by the Supreme Court and there was an opportunity to the Investigating Officer to record his statement, his statement was not recorded and, therefore, testimony of this witness for the first time in Court is not reliable and the said testimony is a tutored testimony.

130. It has to be noted that out of these four witnesses, two witnesses viz P.W. 28 - Shehzad Khan Hasan Khan Pathan and P.W. 32 - Sailum Hasan Khan Pathan have identified the accused by name. P.W. 27 - Raees Khan Nankau Khan, however, has not given names of accused Nos. 1 to 4, 15, 20, 19 and 21 and he has identified by pointing out to the Court the following accused viz Accused No. 18 - Shailesh Anupbhai Tadvi, accused No.20 - Suresh @ Lalo Devjibhai Vasava, Accused No.15 - Dinesh Phulchand Rajbhar Accused No.16 - Shanabhai Chimanbhai Baria and Accused No.4 - Pankaj Virendragir Gosai and he did not give their names and he has also attributed role to these accused. P.W. 32 has also identified the accused by giving their names. P.W. 32 has identified Sanju i.e. Sanjay Thakkar - Accused No.11, Dinesh - Accused No.15, Lalo - Accused No. 20 and has attributed role to Accused No.12 - Bahadursinh @ Jitu Chandrasinh Chauhan and has given his address as Gajrawadi. The other two injured eye witnesses viz P.W. 27

177
APEAL 583/2006, 584/2006 & 585/2006
WITH APPA 571/2011, 572/2011 & 573/2011
WITH APPA 198/2012, 199/2012 & 200/2012

and P.W. 28 have only pointed out the accused and have identified them in the Court.

131. The chart showing the identification of Accused Nos.11, 15, 12, 16, 1, 18, 4, 14 and 20 by P.W. Nos. 26, 27, 28, 29 and 32 and also showing the role attributed to them is as under:-

Accused Nos.	Identified by	Role attributed
A-11 Sanjay Thakkar	P.W.26	Tied hands and legs.
	P.W.27	No role
	P.W.28	Took Rs 5000/- with sword and tied hands
	P.W.29	No role
	P.W.32	Knew his name
A-15 Dinesh Rajbhar	P.W.26	Seen at night with sword and mashal, shouting and giving slogans
	P.W.27	Person having sword and assembling.
	P.W.28	Had a sword and knew name.
	P.W.29	Identified him, seen in morning.
	P.W.32	Gives name of Dinesh (A-15)

178
 APEAL 583/2006, 584/2006 & 585/2006
 WITH APPA 571/2011, 572/2011 & 573/2011
 WITH APPA 198/2012, 199/2012 & 200/2012

Accused Nos.	Identified by	Role attributed
A-12 - Bahadursinh @ Jitu Chandrasinh Chauhan	P.W.26	Seen him running towards bakery with mashal and sword.
	P.W.27	Nil
	P.W.28	Identified him with sword.
	P.W.29	Seen in morning.
	P.W.32	Attributed role to Jitu and gives his address at Gajrawadi
A-16 Shanabhai Bariya	P.W.26	Made them get down from terrace. Tied hands and legs and assaulted.
	P.W.27	Present there with sword. Does not name the accused.
	P.W.28	Named the accused and said that he had a sword.
	P.W.29	Identifies accused. Seen in morning.
	P.W.32	Nil.

Accused Nos.	Identified by	Role attributed
A-1 - Rajubhai Baria	P.W.26	Nil
	P.W.27	Nil
	P.W.28	Does not know name but points out the accused.
	P.W.29	Present there with sword. Does not name the accused.
	P.W.32	Nil

179
APEAL 583/2006, 584/2006 & 585/2006
WITH APPA 571/2011, 572/2011 & 573/2011
WITH APPA 198/2012, 199/2012 & 200/2012

A-18 Shailesh Tadvi	P.W.26	Nil
	P.W.27	Identifies the accused as person who tied hands and legs.
	P.W.28	Points out the accused. Does not know the name.
	P.W.29	Identifies the accused.
	P.W.32	Nil
A-4 Pankaj Gosai	P.W.26	Nil
	P.W.27	Present there. Does not name the accused.
	P.W.28	Does not name, but points out the accused.
	P.W.29	Identifies the accused.
	P.W.32	Nil.

Accused Nos.	Identified by	Role attributed
A-14 - Jagdish Rajput	P.W.26	Nil
	P.W.27	Nil
	P.W.28	Does not name but points out finger. No role attributed.
	P.W.29	Identifies him.
	P.W.32	Nil.
A-20 Suresh @ Lalo Devjibhai Vasava	P.W.26	Nil.
	P.W.27	Nil

	P.W.28	Does not remember the name but points out.
	P.W.29	Nil.
	P.W.32	Gives names but no role is attributed.

132. So far as the legal position in respect of identification is concerned, it has been held in number of judgments, particularly in the Judgments of the Apex Court in *Simon & Ors vs. State of Karnataka*¹, *Malkhansingh and Others vs. State of M.P.*² and in *Munshi Singh Gautam (Dead) and others vs. State of M.P.*³ that if the assailants are known to the witnesses, it is not necessary to hold identification parade. The same view has been reiterated in *Dana Yadav vs. State of Bihar*⁴ and in *Sajjan Singh vs. Emperor*⁵.

133. If the judgments of the Supreme Court right from its inception on the question of identification are taken into consideration, it will be apparent that though, initially, in respect of the accused who are not previously known to the witnesses are not identified by the witnesses in the test identification parade, the Court has not accepted their testimony when they identified the accused for the first time

1 2004 SCC (Cri) 646
2 (2003) 5 SCC 746
3 2005 SCC (Cri) 1269
4 AIR 2002 SC 3325
5 1945 Lahore 48

in Court except under exceptional circumstances. Over a period of time, however, strict view was taken by the Apex Court i.e. if no identification parade was held, testimony of the witness was to be discarded. This view was diluted and over a period of time the Apex Court has held that, under exceptional circumstances, and if the accused are known to the witnesses then identification is not necessary. This is evident from the observations made by the Apex Court in the following cases viz *Simon & Ors vs. State of Karnataka*¹, *Malkhansingh and Others vs. State of M.P.*² and in *Munshi Singh Gautam (Dead) and others vs. State of M.P.*³

134. So far as these four witnesses are concerned (P.W.26, 27, 28 and 32), these witnesses were grievously injured as a result of the assault by the assailants in the morning. Their testimony regarding injuries received by them has been corroborated by the doctors who have examined them viz. Mrs. Meena (P.W.46) and Mr. Choksi (P.W.62) who have stated about the injuries received by these witnesses as shown below:-

**Injuries received by P.W.26 - Taufel
Ahmed Habibulla Siddiqui.**

1 2004 SCC (Cri) 646
2 (2003) 5 SCC 746
3 2005 SCC (Cri) 1269

- “i) I.W. on left occipital region, size 10cm X 2 cm X 0.5cm,
- ii) I.W on parietal occipital region - ie the back of the head -, size 15cm X 2 cm X 0.5cm,
- iii) Burns on both lower limbs.”

Injuries received by P.W. 27 - Raees Khan Nankau Khan.

- “i) First to second degree burns on right upper limb, left arm and on back,
- ii) C.L.W. (Contused Lacerated Wound) on right parieto occipital region, size 10cm X 2cm X scalp deep,
- iii) 2 C.L.W.s on occipital region - out of these, one was 5cm X 0.5cm X 0.5 cm and the other was 2 cm X 0.5 cm X 0.5 cm,”

Injuries sustained by P.W. 28 - Shehzad Khan Hasan Khan Pathan

- “i) I.W. on left fronto parietal, size 10cm X 2cm X 1cm,
- ii) I.W on left post auricular region, size 5 cm X 1 cm X 0.5 cm,
- iii) I.W on behind injury at sr. no. ii) above, size 2 cm X 1 cm X 0.5 cm,

- iv)** I.W behind injury at sr. no. iii) above, size 2 cm X 0.5cm X 0.5cm,
- v)** 2 C.L.W.s on right temporal occipital region, size 2 cm X 1cm X 0.5 cm,
- vi)** C.L.W on chin, size 2 cm X 0.5cm X 0.5 cm.”

Injuries sustained by P.W. 32 - Sailum Hasan Khan Pathan.

- “i)** Incise Wound (I.W.) on left parietal region, size was 10 cm X 2 cm X scalp deep,
- ii)** 2 C.L.W. On left parietal - the first of 2 cm X 0.5 cm X 0.5 cm and the second of 1cm X 0.5cm X 0.5 cm,
- iii)** C.L.W. On the left ear, size was 1 cm X 0.5cm X 0.5 cm.”

Dr. Choksi (P.W.62) also has referred to the injuries and that, in fact, he has examined these witnesses. The oral and ocular testimony of these witnesses so far as injuries sustained by them is concerned, the same has been corroborated by the evidence given by the doctors regarding injuries received by them. Apart from that, these witnesses have stated that they have been residing in the locality for about one and half to two years and P.W. 26 - Taufel and P.W. 27 Raees have stated that faces of the accused were

familiar to them whereas P.W. 28 - Shehzad Khan and P.W. 32 - Sailum have stated that they knew these accused since they were residing in the locality near the Best Bakery and some of them used to come to Bakery for purchasing biscuits, toasts and other articles and have also given description and addresses of some of the accused. All the witnesses have corroborated each other's testimony in respect of the assault by four of the accused viz. Accused No.11 - Sanjay Thakkar, Accused No.15 - Dinesh Rajbhar, Accused No.12 - Bahadursinh @ Jitu Chandrasinh Chauhan and Accused No.16 - Shanabhai Baria, though in respect of others viz Accused No.1 - Rajubhai Baria, Accused No.18 - Shailesh Anupbhai Tadvi, Accused No. 4 - Pankaj Virendragir Gosai, Accused No. 14 - Jagdish Chunilal Rajput and Accused No.20 - Suresh @ Lalo Devjibhai Vasava, the said corroboration is not complete and some of the witnesses have only mentioned their presence at the place without attributing any role to them but so far as A-11, A-15, A-12 and A-16 are concerned all these witnesses have corroborated each other's testimony to a very large extent in respect of the role attributed to them and also in respect of their presence and their active role in the morning after the witnesses were asked to come down. The defence has not seriously challenged the incident which took place at night or in the morning and has mainly stressed on the identification by these witnesses of the appellants/accused

for the first time in Court and it has been urged that these witnesses have not given names of any of the accused to the police and they have given these names for the first time in Court at the instance of third parties who brought them to Mumbai and had kept them there and, therefore, they have been tutored.

135. So far as A-11 - Sanjay Thakkar is concerned P.W. 26 - Taufel has stated that he tied his hands and legs in the morning. P.W. 27 - Raees has not attributed any particular role to this accused. P.W. 28 - Shehzad has stated that he took Rs 5000/- from him and he was carrying a sword and he tied his hands. P.W.29 has not attributed any role to this accused. P.W. 32 - Sailum has stated that he knew the name of this accused and he identified Sanju i.e. A-11 and Dinesh - A-15 by name and Lala i.e. A-20 - Suresh @ Lalo Devjibhai Vasava. When a question was put to him (P.W. 32) as to whether he knew the persons who made them get down in the morning, he answered that he would be in a position to identify them and then he informed the Court the names of Sanju and Dinesh. So far as others are concerned, he has stated that he does not know their names. Thereafter, he pointed out to A-20 and stated that he was Lala. In his examination-in-chief, P.W. 32 has stated that the persons who made them get down tied their hands and they were assaulted with sword and he here has stated that all men

who were there were injured by the sword. Then he has given injuries which were caused to them. In this context, therefore, he has attributed specific role to Sanju and Dinesh and he has stated that they were assaulting with sword after tying hands. He has also stated that Sanju had taken his brother's money.

136. So far as A-15 - Dinesh Rajbhar is concerned, P.W. 26 - Taufel has stated that he was seen at night with sword and mashal and was shouting and giving slogans. P.W. 27 - Raees has stated that he was a person having a sword. P.W. 28 - Shehzad has stated that he had a sword and knew his name. P.W. 29 had identified him and stated that she had seen him in the morning. P.W. 32 - Sailum had identified him and attributed a role to him.

137. So far as A-12 - Bahadursinh @ Jitu Chandrasinh Chauhan is concerned, P.W. 26 - Taufel has stated that he has seen him running towards the bakery with mashal and sword. P.W. 27 - Raees has identified him. P.W. 28 - Shehzad has identified him with sword and also identified him by name. P.W. 29 has stated that she had seen him in the morning. P.W. 32 attributes role to Jitu and gives his address as Gajrawadi.

138. So far as A- 16 - Shanabhai Baria is concerned,

P.W. 26 - Taufel has stated in his evidence that he made them get down from terrace, tied their hands and legs and assaulted. P.W. 27 - Raees has stated that he was a person present there with sword but he has not identified the accused by giving his name. P.W. 28 Shehzad, however, named the accused and stated that he had a sword. P.W. 29 identified the accused and has stated that she had seen him in the morning. P.W. 32, however, did not identify, name or point out towards this accused.

139. So far as these four accused viz. A-11, A-15, A-12 and A-16 are concerned, therefore, there is inter se corroboration about their presence, their role in assaulting and/or their role in tying up hands and legs in the morning and they have been either identified by name by some of them or they were pointed out while identifying them in the Court.

140. Apart from corroboration to the injuries which are caused to the injured eye witnesses by examining doctors who had examined the said four injured eye witnesses, all these four witnesses have given graphic account of the entire episode which had taken place right from the evening of 1/3/2002 from 8 P.M. to 8.30 P.M. onwards and have given sequence of events. So, practically, on all aspects regarding occurrence of event, there is corroboration by each of these

witnesses.

141. It has to be noted that entire incident will have to be divided in two parts; one which took place at night and the other which took place in the morning. In respect of the incident which took place at night, it is alleged that mob of 1000 to 1200 people came there from all directions, burnt Best Bakery and also put timber which was lying on the ground floor on fire and rioters also burnt wakhar of Lal Mohammed and vehicles which were in compound and other houses. All of them have stated that they were throwing soda water bottles and the bottles filled with kerosene set on fire and that they were throwing stones and they were also shouting slogans. It has been vehemently urged by the learned Counsel appearing on behalf of the appellants/accused that if the topography of the Best Bakery is taken into consideration and sequence of events as narrated by the witnesses is considered then, in such circumstances, it was physically impossible for these witnesses to have seen the faces of the assailants. It has been submitted that it was brought on record that the story put up by these witnesses that they were sitting on cot ('Charpae') after their meal was over, is an improvement and has been done so as an afterthought so that it could be said that they had an occasion to see the faces of the assailants in the mob. It has also been submitted that if

stones are thrown continuously on the the ground floor, the natural conduct of any person would be to go to the safest place on the terrace and it would not be possible to peep either from jally or from the terrace wall to see the faces of accused. There is much substance in the said submission. If the evidence of P.W. 1 - Ratilal Variya, P.W. 2 - Chandrakant Patel and the evidence of P.W. 69 - Gautam Chavan who is the videographer, as also CD which showed the aftermath of the incident where residential quarters of late Habibulla and the adjoining Bakery are clearly visible, is taken into consideration it can be seen that once the person goes on the terrace, the only way to look down would be to bent over the terrace wall which, in our view, is certainly impossible.

142. Taking into consideration the testimony of those witnesses who have stated that there was a crowd of 1000 to 1200 people who were throwing stones , soda-water bottles and the bottles filed with kerosene and which were put on fire and used as missiles, the testimony of the witnesses who have stated that they were sitting on a cot therefore will have to be discarded as an afterthought. It is also not probable that these witnesses have also brought Kausarali and Lulla on the first floor after they were assaulted because had their story been true, their clothes would have been stained with blood. It is an admitted position that blood-stained clothes of these injured witnesses were not seized by

police nor were they sent to CA. The story of these witnesses having seen the assault on Kausarali and Lulla, therefore, cannot be believed and, in all probability, soon after hearing shouts of the mob which was approaching the Best Bakery, they all went to terrace and were there till morning.

143. However, there cannot be any dispute about the incident which took place in the morning in broad day light and they were asked to come down on a ladder and all of them have consistently stated that, initially, women folk were brought down and, thereafter, they were brought down and after they were brought down their hands and feet were tied and they were assaulted with sticks and swords and this happened sometime between 8. a.m to 8.30 a.m in the morning and, therefore, they were in a position to closely observe the assailants and, therefore, they were in a position to identify the assailants. It has been strenuously urged that the testimony of these four witnesses has to be discarded in toto on account of omissions and contradictions which have been brought on record. It has been submitted that in view of the improvements which have been made by these witnesses their creditworthiness has been successfully assailed and, therefore, their testimony needed to be completely discarded. It has also been submitted that these witnesses were rustic witnesses and in view of their consistent improvements, it has been established that they

had deliberately made false statements and in such cases therefore their entire testimony has to be discarded. Reliance has been placed on the judgment of the Apex Court in *Baladin vs. State of UP*¹. It has also been submitted that these witnesses had not given names of the accused to the police nor their description. They had also not described weapons. It has been submitted that the Investigating Officers both, Mr. Baria (P.W.72) as well as Mr Kanani (P.W.74) had an opportunity to record the further statements of these witnesses. However, this has not been done. It has also been submitted that even after the Apex Court had remanded the matter and after opportunity was given by the Apex Court to re-investigate the case, both the Investigating Officers had not taken any steps in respect of re-investigation. It has been submitted that it was open for them to have recorded the statements of these witnesses so that lacunae, if any, in their statements would have been easily wiped out. It has been submitted that purpose of recording statement of the witnesses by the police at the earliest point of time is to ensure that when they give evidence for the first time in Court, their testimony can be tested in the light of the version given by them to the police at the earliest point of time. It has been submitted that if the said statement is not given to the Police at the earliest point of time, it would create a serious doubt about truthfulness of

1 AIR 1956 SC 181

the statement made by the witness in the Court. It has been submitted that if witnesses are allowed to identify the accused for the first time in Court without naming them before the police, would be nothing but giving them a license of stating whatever they wanted to say for the first time in Court. It has been submitted that the fact that for the first time all these statements have been made by these witnesses who were not summoned by the prosecution but appeared on their own, probably at the behest of some third parties and at the behest of Teesta Setalvad, clearly indicated that they were tutored and, therefore, they had given this testimony for the first time in court. It has been submitted that under these circumstances, the entire testimony of these witnesses, therefore, is liable to be discarded. It has also been urged that on one or two occasions, the Trial Court had exceeded its authority or power vested in it under section 165 of the Evidence Act in asking the witnesses to give names of the assailants and only after the Court had asked this question the names of four persons were mentioned. It has been submitted that even after names of these persons were given by P.W. 26 - Taufel, prosecution had not taken permission of the Court to permit the witness to identify these four persons whose names were given. It has been submitted that, therefore, even if those names were given by P.W. 26, it would not be of any consequence and, therefore, the said disclosure of

names would not help the prosecution. The learned Senior Counsel for the appellants/accused submitted that this witness (P.W.26) has, in terms, stated in his examination-in-chief and in cross-examination that he did not know names of any person. It has been further submitted that, Kanani (P.W.74), when asked by the defence Counsel as to whether he thought it necessary to carry out further investigation, had given a reply that he did not think it necessary to further carry out any investigation. It has been, therefore, submitted that under these circumstances no reliance could be placed on the testimony of these four eye witnesses.

144. In our view, submissions made by the learned Senior Counsel Mr. Adhik Shirodkar cannot be accepted. It has to be borne in mind that the incident had taken place in the night of 1/3/2002 and in the morning of 2/3/2002 and all these witnesses have received serious incise wounds on their head and other part of the body. All of them were immediately taken to the hospital. Except Raees (P.W.27), all others were unconscious and regained consciousness at various points of time. Even Raees, though he has been said to be conscious by the two doctors, he had received serious injuries on his head and other parts of his body. The other witnesses regained consciousness after some time. Even P.W. 27 - Raees though he is said to be conscious when he was admitted in the hospital, was in the hospital till

16/3/2002. The other witnesses were also kept in the hospital between 10 to 20 days. Under these circumstances, taking into consideration the injuries which were received by these witnesses, it cannot be said that they were in a position to give complete details of the incident when their statements were recorded. In our view, it was the duty of the police to have recorded their further statements after ascertaining whether they were in a fit condition to give their statements. It is a matter of record that all these witnesses originally belonged to UP and immediately after they were discharged they went to their native place. Another fact which cannot be overlooked is that it is possible that all these witnesses, though they were in the hospital were in a state of fear and shock and possibly were keen in recuperating and going back to their native place. Under these circumstances, therefore, in our view taking into consideration the exceptional circumstances of the case, they cannot be faulted for not having given the names or description of the accused or role played by them. It was the duty of the police to have ensured that their proper statements are recorded. In fact, all these witnesses in their evidence have stated that what was told by them to the police was not read over to them. This is a fault on the part of the Investigating Agency and these witnesses cannot be blamed for that purpose. In fact, it was the duty of the police to have ensured after the opportunity was given by the Apex

Court to re-investigate and permission which is normally required to be taken formally for further investigation under section 173(8) was done away with by the Apex Court and an opportunity was given to them to further investigate, if necessary. In spite of that Mr. Kanani (P.W.74) chose to state in the cross-examination that he did not think it fit or necessary to carry out any further investigation. It is possible that whoever was in charge of the investigation after the matter was remanded, was confident that Zahirabibi Shaikh (P.W.41) and other members of Habibulla family who had complained about coercion before the Gujarat Trial Court, would not turn hostile and would support the prosecution case and under this super overconfidence, they chose not to carry out any further investigation. Whatever may be the reason for their overconfidence, in our view, this is a serious lapse on the part of whoever was in charge of the investigation and care should have been taken to ensure that there are no further lapses in the investigation. However, only because names of accused have not been mentioned in statements of witnesses recorded by the police and that their description is not given, the evidence of these four eye witnesses cannot be discarded in toto on that ground as has been held by the Apex Court in several cases mentioned hereinabove and

particularly in *Simon & Ors*¹ (*supra*), *Malkhansingh*² (*supra*) and *Munshi Singh Gautam (Dead)*³ (*supra*). Unfortunately Baria (P.W.72) also was not asked as to whether he had read over the statements which were given by these four eye witnesses after they were recorded and no explanation was sought from Baria as to whether their statements were read over or not and, if not, for what purpose. It is possible that after seeing that these witnesses were not in a position to give any further statements the same might not have been recorded at that point of time looking at their condition. But, in any case, it was the duty of the Investigating Officer to have kept a watch on these witnesses so that before they were discharged from the hospital, their further statements could have been recorded. However, merely because there was a lapse on the part of Investigating Officer in not taking further statements of these witnesses, their testimony in the Court which is a substantive evidence cannot be ignored or discarded even if they have made certain improvements and there are certain major contradictions in their testimony. The trial Court has discarded omissions and contradictions which are brought on recorded by the defence as minor omissions and contradictions. In our view, it cannot be said that these are minor omissions and contradictions and it does appear that an attempt had been made by the

1 2004 SCC (Cri) 646
2 (2003) 5 SCC 746
3 2005 SCC (Cri) 1269

prosecution to improve the prosecution case through these witnesses. It cannot be forgotten that these witnesses have practically survived by the skin and their teeth and were lucky to escape the clutches of death. If the nature of injuries suffered by them is taken into consideration and also the ordeal they have undergone throughout the night is looked at, it is a miracle that these witnesses survived and went back to their native place and thereafter came straight to Mumbai for the purpose of giving evidence. It has to be remembered that, normally, a person who is seriously injured after the assault of this nature, would be slow in implicating the people falsely and he would definitely name true assailants or identify them in Court. In this case, if the testimony of these four witnesses is taken into consideration, if at all they wanted to falsely implicate the accused, they would have taken names of all the accused and attributed role to all of them. The fact that all these four eye witnesses have directly or indirectly mentioned the names of these four accused viz. A-11, A-15, A-12 and A-16 clearly indicate that the version given by them is truthful and the Court will have to accept their testimony so far as these four accused are concerned.

145. So far as the other accused are concerned, either it is alleged that these accused were seen at night or were only present in the morning when incident took place and no

specific role has been attributed to them and, therefore, benefit of doubt will have to be given to all these accused.

146. So far as Accused No.1 - Rajubhai Baria is concerned, P.W. 26 - Taufel has not named him nor pointed him out in identification. P.W. 27 - Raees also does not mention his name. P.W. 28 - Shehzad also does not mention his name but only points out the accused and does not describe his role. P.W. 29 has stated that he was present there with the sword but she has not named the accused. P.W. 32 - Sailum also does not mention his name. This accused has been identified only by pointing out finger at him by P.W. 28. It is, therefore, not possible to convict this accused merely on the testimony of P.W.28 who merely without attributing any role points out to him in the witness box when he was asked to identify the accused. This accused is, therefore, entitled to benefit of doubt.

147. So far as Accused No. 18 - Shailesh Tadvı is concerned, P.W. 26 - Taufel does not identify him and name him. P.W. 27 - Raees identifies him as person who tied his hands and legs. P.W. 28 - Shehzad points out the accused but does not know his name. P.W. 29 has identified the accused and she has not attributed any role to this accused. P.W. 32 - Sailum does not mention his name. The evidence of P.W. 27 and 28 so far as this accused is concerned does

not inspire any confidence, particularly when P.W. 28 only points out at the accused and does not mention his role and P.W. 27 also does not name him but only says that he is a person who tied hands and legs. It is, therefore, under these circumstances, difficult to accept testimony of these two witnesses (P.W. 27 and P.W. 28) for the purpose of convicting him and he is entitled to benefit of doubt.

148. So far as accused No.4 - Pankaj Gosai is concerned, P.W. 26 - Taufel and P.W. 32 - Sailum do not identify him or name him. P.W. 27 - Raees says that he was present there. He does not attribute any role whatsoever to him and does not name the accused. Even P.W. 28 - Shehzad does not name the accused though he has named the other four accused and only points out the accused and says that he was present in the morning. P.W.29 has identified the accused but she has not attributed any role to this accused. Accused No. 4 is, therefore, entitled to get the benefit of doubt.

149. So far as Accused No. 14 - Jagdish Chunilal Rajput is concerned, P.W. 26 - Taufel, P.W. 27 - Raees and P.W. 32 - Sailum do not identify him, do not mention his name and also do not attribute any role to him or give his description. P.W.28 - Shehzad does not name but points out finger at this accused. He does not, however, attribute any role to this

accused. It has to be remembered that P.W. 28 has remembered names of certain accused and has identified them and he has also attributed role to certain accused towards whom he has pointed out the finger in the identification. P.W. 29 has identified the accused but she has not attributed any role to this accused. [So far as this accused is concerned, he does not attribute any role to him.] That being the position accused No.14 is entitled to get benefit of doubt.

150. So far as Accused No. 20 - Suresh @ Lalo Devjibhai Vasava is concerned, P.W. 26 - Taufel, P.W. 27 - Raees do not identify him. P.W. 32 - Sailum gives his name but does not attribute any role to him. P.W. 28 - Shehzad only points out at the accused as a person who was present and he does not remember his name. P.W.29 has not stated anything about this accused. Thus, since no role has been attributed to this accused and merely he has been shown to be present without mentioning his name, benefit of doubt will have to be given to this accused.

151. In our view, therefore testimony of these four injured eye witnesses is trustworthy so far as A-11, A-15, A-12 and A-16 are concerned and they have corroborated practically each other's testimony on all material particulars. Though there has been omissions and improvements in their

testimony and also contradictions on some of the major particulars, that by itself cannot be a ground for discarding their evidence in its entirety and it cannot be said that they have been tutored by the third party, particularly Mrs Teesta Setalvad. It cannot be forgotten that when an appeal was filed by Zahira in the Supreme Court against the judgment and order of Gujarat High Court and in the said appeal Mrs Teesta Setalvad who was a member of the NGO - Citizens for Justice and Peace, was also a party. The Supreme Court entertained the said appeal, accepted the affidavit of Zahira and others, permitted Mrs Teesta Setalvad to intervene in the matter and, thereafter, the matter was transferred to the Bombay High Court and request was made to the Hon'ble Chief Justice to assign the case to the competent trial court. That being the position, Supreme Court having passed the said direction, possibly Mrs Teesta Setalvad wanted to ensure that these witnesses are produced before the Court and, therefore, in our view, it will not be proper to attribute any other motive to her. The said submission, therefore, is not accepted.

152. Mr. Adhik Shirodkar, the learned Senior Counsel appearing on behalf of the appellants. has strenuously urged that no test identification parade was held and, therefore, identification of the accused by the witnesses in the Court could not be relied upon. He has also strenuously urged that

since the witnesses have not stated the names of the accused to the Investigating Officer when their statements were recorded, their identification of the accused in the Court was a clear material omission and contradiction and on that ground also, their testimony was liable to be discarded. He submitted that the Trial Court erred in relying on the judgment of the Apex Court in *Baladin vs. State of UP*¹. He submitted that the ratio of the said judgment is not applicable to the facts of the present case. He has given a detailed note as to why the said judgment could be distinguished.

153. In our view the said submission cannot be accepted. It is a settled position in law that merely because the test identification parade is not held by the Investigating Officer, the substantive evidence of identification does not become inadmissible and, in the facts of each case, the Court is entitled to rely on that evidence. This has been consistently held by the Apex Court in several judgments. In *Simon & Ors vs. State of Karnataka*², the Apex Court has observed in paras 8, 12 and 14 as under:-

“8. Whether the identification of an accused for the first time in court in absence of any test

1 AIR 1956 SC 181
2 2004 SCC (Cri) 646

identification parade can be made the basis of the conviction depends upon the facts and circumstances of the case. No hard-and-fast rule can be laid down. We have been taken through the testimony of PW 63 (Achutananda). The main criticism that has been levelled by Mr. Gonsalves to the deposition of PW 63 who was working in the Special Task Force and was travelling in the second bus and who identified Accused 18, 30 and 31 is that these accused even as per the testimony of PW 63 were pointed out to him at the place of occurrence by another witness PW 89 (Alageshan) who was working at the relevant time as a Forest Guard and had claimed that he knew the accused. It is further pointed out that PW 63 does not claim that he knew these accused earlier. Further submission of learned counsel is that at best PW 63 only had the opportunity of getting a fleeting glimpse of the accused from a distance and that too when the accused were running away and the said glimpse was also only of the side face. Similar criticism has been made of PW 64 who identified Accused 30 and 31. This witness was travelling in the first bus and had

received injuries. PW 65 who was travelling in the second bus also identified Accused 18 and 31. He was also a member of the Special Task Force. The learned counsel has on similar grounds assailed the testimony of all the witnesses who have identified the appellants. Appellant Simon has been identified by sixteen witnesses, Gnana Prakash has been identified by four witnesses, Madhiah has been identified by nine witnesses and Bilavendra has been identified by one witness. We may, however, note that it is not the quantity which matters but the quality of witnesses that matters. Further, learned counsel for the appellants submits that PW 89 who at the relevant time was working as the Forest Guard had wrongly identified all the appellants except Simon. It is contended that this star witness of the prosecution who is alleged to have pointed out and shown the appellants to the other witnesses who identified them in court having himself wrongly identified all accused except Simon, the testimony of other witnesses deserves to be discarded on this ground itself and this is said to be fatal to the case of the prosecution. The conviction, it is contended,

based on identification of such witnesses cannot be sustained.”

“12. The next contention urged is that not holding of test identification parade for identifying the accused is fatal to the case of the prosecution in the present case. The submission is that by very nature, the identification of the accused for the first time in court is a weak piece of evidence and cannot be made the basis of conviction. Reliance has been placed on State of Maharashtra v. Sukhdev Singh [(1992) 3 SCC 700 : 1992 SCC (Cri) 705] in support of the contention that in absence of test identification parade, it would be extremely risky to place implicit reliance on identification made for the first time in court after a long lapse of time. But it has to be kept in mind that this principle will apply to the case of total strangers. In this contention, it has to be kept in view that PW 97 knew the accused as stated hereinbefore. The question of identification arises when the accused are not known. Since the appellants were known in the manner abovestated, the holding of a test identification parade on the

facts of the case would have been wholly unnecessary. Regarding the contention about the names of the appellants not being mentioned in the FIR, it has been explained that FIR was not recorded on the information of PW 97. PW 97 had already been shifted to the hospital before recording FIR and, therefore, non-mentioning of the names of the accused in the FIR is of no consequence. On facts of the case, the lapse of the time between the date of the incident and the date of identification by PW 97 is also of no consequence. As already noticed, out of fifty accused, PW 97 deposed only about presence of four appellants who were earlier known to him.”

“14. Relying upon *Budhsen v. State of U.P.* [(1970) 2 SCC 128 : 1970 SCC (cri) 343, it was contended that evidence as to identification deserves to be subjected to a close and careful scrutiny by the court. The decision in *Sk. Umar Ahmed Shaikh v. State of Maharashtra* [(1998) 5 SCC 103 : 1998 SCC (Cri) 1276] was relied for the proposition that when the accused were already shown to the witnesses, their

identification in court by witnesses was meaningless and such identification lost all its value and could not be made the basis for rendering conviction. The legal position on the aspect of identification is well settled. Under Section 9 of the Indian Evidence Act, 1872, the identity of the accused persons is a relevant fact. We have no difficulty in accepting the contention that evidence or mere identification of an accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification is to test and strengthen the trustworthiness of that evidence. Courts generally look for corroboration of the sole testimony of the witnesses in court so as to fix the identity of the accused who are strangers to them in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. It has also to be borne in mind that the aspect of identification parade belongs to the stage of investigation, and there is no provision in the Code of

Criminal Procedure which obliges the investigating agency to hold, or confers a right upon the accused to claim, a test identification parade. Mere failure to hold a test identification parade would not make inadmissible the evidence of identification in court. What weight is to be attached to such identification is a matter for the courts of fact to examine. In appropriate cases, it may accept the evidence of identification even without insisting on corroboration (see *Malkhansingh v. State of M.P.* [(2003) 5 SCC 746 : 2003 SCC (Cri) 1247]). These well-settled principles, however, have no applicability to facts of the instant case. This is a case where the appellants were known to PW 97 and he has identified them in court and other witnesses, as we would presently notice, corroborated the testimony of PW 97, though, in our view, conviction could be sustained on the sole testimony of PW 97.”

Similarly, in *Malkhansingh and Others vs. State of M.P.*¹, the Apex Court has made the following observations in para 7 which read as under:-

¹ (2003) 5 SCC 746 : AIR 2003 SC 2669

“7. It is trite to say that the substantive evidence is the evidence of identification in Court. Apart from the clear provisions of Section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the accused persons, are relevant under Section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in Court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the Court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration.

The identification parades belong to the stage of investigation and there is no provision in the Code of Criminal Procedure, which obliges the investigating agency to hold, or confers a right upon the accused to claim, a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code of Criminal Procedure. Failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the Courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration (See *Kanta Prashad v. Delhi Administration*, AIR 1958 SC 350; *Vaikuntam Chandrappa and others v. State of Andhra Pradesh*, AIR 1960 SC 1340; *Budhsen and another v. State of U.P.*, AIR 1970 SC 1321 and *Rameshwar Singh v. State of Jammu and Kashmir*, (1971) 2 SCC 715.”

The Apex Court in the said case, thereafter, after referring to its judgments in *Jadunath Singh and another vs. The State of*

*Uttar Pradesh*¹, *Harhajan Singh vs. State of Jammu and Kashmir*², *Ram Nath Mahto vs. State of Bihar*³, *Suresh Chandra Bahri vs. State of Bihar*⁴, *State of Uttar Pradesh vs. Boota Singh and others*⁵ and in *Ramanbhai Naranbhai Patel and others vs. State of Gujarat*⁶, has observed in para 16 as under:-

“16. It is well settled that the substantive evidence is the evidence of identification in Court and the test identification parade provides corroboration to the identification of the witness in Court, if required.....”

Similarly in *Munshi Singh Gautam (Dead) and others vs. State of M.P.*⁷, the Apex Court in para 17 has observed as under:-

“17 It is trite to say that the substantive evidence is the evidence of identification in court. Apart from the clear provisions of Section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of

1 AIR 1971 SC 363 : 1971 Cr.L.J. 305 Para 14
2 AIR 1975 SC 1814 : 1975 Cri LJ 1553
3 (1996) 8 SCC 630
4 1995 Supp (1) SCC 80
5 (1979) 1 SCC 31
6 (2000) 1 SCC 358
7 2005 SCC (Cri) 1269

this Court. The facts, which establish the identity of the accused persons, are relevant under Section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is, accordingly, considered as safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the stage of investigation, and there is no provision in the Code which obliges the investigating agency to hold or confers a right upon the accused to claim a est identification parade. They do not constitute

substantive evidence and these parades are essentially governed by Section 162 of the Code. Failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration. (See *Kanta Prashad v. Delhi Admn* [AIR 1958 SC 350 : 1958 CriLJ 698], *Vaikuntam Chandrappa v. State of A.P.* [AIR 1960 SC 1340 : 1960 CriLJ 1681], *Budhsen v. State of U.P.* [(1970) 2 SCC 128 : 1970 SCC (Cri) 343 : AIR 1970 SC 1321] and *Rameshwar Singh v. State of J & K* [(1971) 2 SCC 715 : 1971 SCC (Cri) 638 : AIR 1972 SC 102]”

154. In the present case, we have already observed that four witnesses viz P.W. 26 - Taufel , P.W. 27 - Raees , P.W. 28 - Shehzad and P.W. 32 - Sailum were grievously injured and were admitted in the hospital and only Raees Khan (P.W.27) was conscious when he was admitted and the rest regained consciousness after a long time and, thereafter, they were recuperating in the hospital and after they were

discharged, they immediately went to their native place in the State of U.P. Merely because test identification parade was not held, it cannot be said that their evidence has to be discarded. Apart from that, two other witnesses have stated that they knew the accused by name viz. P.W. 28 - Shehzad and P.W. 32 - Sailum. Since they knew the accused by name, the question of test identification does not arise. Even the other two witnesses viz P.W. 26 - Taufel and P.W. 27 - Raees have stated in their evidence that they had seen the accused and they were known to them, though they did not name some of them. The said submission of Mr. Adhik Shirodkar, the learned Senior Counsel appearing on behalf of the appellants/accused, therefore, cannot be accepted.

155. It has been then urged by the learned Senior Counsel for the appellants/accused that the Trial Court had erred in coming to the conclusion that the omissions and contradictions which were brought on record are not material contradictions. It has also been urged that these four eye witnesses had not given the names of the accused or their description and, as such, their identification of the accused for the first time in court could not be relied upon. It has also been urged that the Trial Court had erred in relying on judgment in *Baladin vs. State of UP*¹. This submission also cannot be accepted. It is an admitted position that the

¹ AIR 1956 SC 181

witnesses have not stated the names of the accused or their description and they have identified the accused for the first time in Court. However, the Apex Court in *Baladin* (supra) has held that merely because the names of the accused are not mentioned by the police in the statements recorded by them, that alone cannot be a ground for discarding their testimony. The Apex Court has held that in exceptional circumstances if their evidence is trustworthy, the Court can rely on their testimony given in Court. The Trial Court, in our view, has correctly relied on the ratio of the said judgment in *Baladin* (supra). However, the observation of the Trial Court that the omissions and contradictions are not material contradictions, in our view, is incorrect in view of the ratio of the judgment of the Apex Court in *Masalti vs. State of Uttar Pradesh*¹

156. It is well settled that mere presence in assembly does not make a person member of an unlawful assembly, unless it is shown that he has done something or omitted to do something which would make him a member of an unlawful assembly or unless the case falls under section 142 of the Indian Penal Code. In the present case except the four accused viz A-11, A-15, A-12 and A-16, the other accused cannot be said to be the members of an unlawful assembly and we have satisfied ourselves that the evidence of

¹ 1965(1) Cri.L.J. 226

witnesses so far as viz. A-1, A-18, A-4, A-14 and A-20 are concerned is not sufficient either to prove their presence or even if their presence is established to substantiate that they had played any role. Even if it is established that they were present, we have examined the case of each individual accused to see whether they were mere spectators who had not joined the assembly and who were unaware of its motive.

(At this stage the Court declared its verdict of convicting four accused viz A-11, A-15, A-12 and A-16 and acquitting the other accused viz. A-1, A-18, A-4, A-14 and A-20 and the matter was posted on next day ie 10/7/2012 for completing the judgment)

10/7/2012 AT 11 A.M.

157 So far as the evidence of P.W. 29 - Yasmin Nafitulla Habibulla Shaikh is concerned, in our view, even if the said evidence is considered independently without taking into consideration her applications which have been filed by her in this Court wherein she has sought to resile from the testimony which is given on oath and keeping them aside for a moment, it will be difficult to rely on her testimony for the following reasons.

158. P.W. 29 - Yasmin in the first place was not

examined by the prosecution in the Trial Court in Gujarat. She has also not given names of any of the accused in her statement which was recorded by the police. In her evidence she has stated that she got married to Nafitulla on 19/11/2000 and she had one daughter from the marriage. After giving names of her family members of late Habibulla, she has also mentioned the names of workers viz Taufel, Raees, Shehzad, Sailum, Baliram, Raju and Prakash and has further stated that her husband's maternal uncle - Kausarali and one Nasru were also staying there. She has stated the reason why the riots took place in Vadodara after the incident of train burning at Godhra. She has stated that the incident took place at about 9.00 p.m. on 0/1/03/2002 and she was prepared to go to sleep and their servants were sitting below on a cot and, at that time, they noticed number of persons coming from all directions and the said mob was carrying swords, rods and mashals and they were giving slogans that muslims should be killed. She has stated that there were about 1200 to 1500 rioters. She has further stated that she saw the mob assaulting Kausarali and Lulla by swords. According to her, all of them went to the terrace and, at that time, Aslambhai's family viz his wife, his brother - Firoz, Firoz's wife and four children also were in the house. She has given their names. She has also stated as to who were there on the terrace alongwith her. Then she has stated that rioters were throwing stones towards them and

they were also throwing bottles and bulbs filled with kerosene. She has stated that they set fire to the bakery and the fire was set at the place where wood had been stored for the bakery and also to the whole building. Then she has stated that rioters had dragged away Kausarali and Lulla from the first floor and they were thrown in the fire. She has stated that rioters were there throughout the night and she knew some of the persons who were in the mob of rioters in the night and she also knew their names. She has stated the names of Sanjay Thakkar (A-11), Jayanti Chaiwala (A-6), and Painter (A-5). According to her, these persons were leading the mob and telling them to set the fire by pointing out the locations. Further, she has stated that, in the morning, she alongwith others pleaded with rioters that they should be allowed to go and they apologized to them. She has stated that the rioters told them that they may come down and they would be allowed to go after giving them a little beating. Accordingly, the rioters brought a bamboo ladder and they were asked to get down from that ladder. The rioters first allowed the women to get down and then the men. They, thereafter, tied hands and legs of the men and dragged ladies towards the bushes and, at that time, according to her, she saw rioters assaulting men with swords. According to her, at that time, police came and after noticing the police, rioters ran away. She has stated that she saw rioters assaulting her husband Nafitulla, and also to Raju, Taufel,

Baliram, Raees, Nasibulla, Prakash, Shehzad and Sailum. She has stated that Firoz's wife, Aslam's wife and four children and her sister-in-law Sabira were burnt in the night when they were on the first floor. She has then stated that they saw the condition of the injured persons. She has stated that she knew Sanjay Thakkar, Jayanti Chaiwala and Painter who were residing at that time. She has stated that Sanjay Thakkar was residing in Ganeshnagar, Jayanti Chaiwala was residing behind their house near Dudhiya Talao and Painter was residing in the line of their house, in front of the shop of one Sindhi. She has stated that apart from this, she has also seen some other persons alongwith rioters and that she knew names of some of them and she also knew the faces of all these persons. Then she has stated that among the persons who were making them get down from the terrace in the morning were Dinesh and Shanabhai and Dinesh was having a sword and Shanabhai was tying hands and legs. She has further stated that Jitu and Jagdish were threatening to rape women and Jagdish and Jitu were saying that they would rape women one by one. She has stated that she knew Ravi and she has further stated that he had snatched the chain which she was wearing around her neck. She has stated that she knew Mafat and Munna. She has further stated that they were also involved in rape and Jitu, Jagdish, Mafat and Munna were discussing among themselves as to who should rape the women first. She has then stated that

Rinku - Jayantibhai's son, Harish and Pankaj were setting fire to the wood inside the bakery and Shailesh and Raju were involved in the act of catching hands, when the men were assaulted. She has stated that even women were injured and she has sustained an injury on her leg and Zahira had an injury on her face near forehead. She has further stated that her daughter was of 4 months and she had sustained an injury on her waist, on being hit by a stone. She has further stated that apart from burning Best Bakery, rioters had also set fire to the Wakhar of Lal Mohammed and also burnt 2 tempos, 1 'Suzuki', 1 scooter and 1 'Sunny'. She has further stated that she could identify the persons whom she named as persons who were among the rioters. Thereafter, the Court asked the accused to stand in row but not in accordance with the serial order but in random and this witness pointed out to Accused No.11 and identified him as Sanjay Thakkar. She identified Accused No.4 as Pankaj, whose full name is Pankaj Virendragir Gosai. She then identified Jagdish by pointing out to him who is Accused No.14 - Jagdish Chunilal Rajput. She then pointed out to Accused No.16 and said that he was Shanabhai whose full name is Shanabhai Chimanbhai Baria. Then she pointed out to Accused No.18 and said that he was Shailesh, whose full name is Shailesh Anupbhai Tadvil and then she pointed out to Accused No.21 and said that he was Ravi, whose full name is Ravi Rajaram Chauhan. She however stated that she did not

know the name of the accused who was standing next to Ravi on his left. She stated that she knew him as he was residing in the lane in front of their house. She then pointed out to Accused No.1 and said that he was Raju, whose full name is Rajubhai Dhamirbhai Baria. She then stated that the accused on his left side was Dinesh - Accused No.15 whose full name is Dinesh Phulchand Rajbhar. Then she pointed out to Accused No.13 and said that he was Yasin, whose full name is Yasin Alibhai Khokhar. She then pointed out to Accused No.3 and gave his name as Hareh, whose full name is Hareh Virendragir Gosai. She has stated that she was not able to identify Painter since, according to her, at that time, he had no beard and appearance of some of the accused had changed. She stated that it was possible that Painter was among the accused but she was unable to identify him. She then stated that Jayanti Chaiwala, Mafat, Munna and Rinku were not found among the accused persons, who are present in Court. She stated that police met her when she was in the hospital and they made inquiries with her on 04/03/2002. She has then stated that she was staying in Chhota Udaipur alongwith her parents and that she was not called as witness in the Court at Vadodara. She has then stated that she went back to Vadodara and that she was residing in the Best Bakery premises. She has then stated that rioters were having swords like the swords which were shown to her and also similar pipes. She then stated that she came to Mumbai

about 15 days back and summons had been issued to her to appear as witness and she was staying with her maternal uncle in Mumbai.

159. The defence in cross-examination has brought on record several omissions and contradictions of this witness (P.W.29). It has been brought on record that the witness did not state the names of all the accused in her statement and that she had also not stated that Dinesh and Shana were among the persons who had asked them to get down or Dinesh was having sword with him. She had also not stated in her police statement that Shana was tying hands and legs of men who got down in the morning. The threats given by Jagdish and Jitu about rape also do not figure in her police statement and same is the case with the allegation that Mafat, Munna, Jitu and Jagdish were discussing among themselves as to who would rape the women first. Similarly, her statement regarding snatching of her chain by Ravi is also not mentioned in her police statement. It is also not mentioned in her police statement that Rinku - Jayantibhai's son, Harish and Pankaj were setting fire to the wood in the Bakery and Shailesh and Raju were involved in the act of catching hands. The statement that her daughter had sustained injury being hit by a stone has not been mentioned by her in her police statement. Similarly, she did not state that social worker Thakkar from their zopadpatti area was

present in the mob in the night. Then there is omission in her police statement regarding servants sitting below on a cot by the side of the Bakery and this improvement has been brought on record. The statement regarding rioters carrying swords, rods and mashals also does not figure in the said police statement. Her statement that she saw rioters assaulting Kausarali and Lulla by sword is also not found in her police statement and it is also not stated in her police statement that Kausarali and Lulla returned upstairs after talking to rioters. Similarly, following statements also have been proved to be either contradictions or omissions.

Yasmin(P.W.29)		
Subject	Om/Contr	Exhibit No.
Nasru and Firoz were on terrace	Om	
Lulla - one of the persons on first floor	Om	370
Rioters robbed maida, ghee, sugar etc	Om	
Did not state - after meals - went to first floor at about 9 p.m. - put off the lights and closed the door	Contr	371
Saw Kausar & Lulla being dragged by rioters from 1 st floor and taking them down	Om	
Sanjay Thakkar, Jayanti Chaiwala and Painter - Idhar Aag Lagao, Udhar Aag Lagao	Om	
Thakkar is Sanjay Thakkar	Om	
Rioters brought bamboo ladders - we f got down from the ladder	Om	

224
 APEAL 583/2006, 584/2006 & 585/2006
 WITH APPA 571/2011, 572/2011 & 573/2011
 WITH APPA 198/2012, 199/2012 & 200/2012

When mob tied down limbs of my husband and others - mob was telling - they would allow us to go after beating us a little - Not correct	Contr	372
Injured burnt by putting burning wood over their bodies	Om	
These names (accused) given to Jt. C.P.	Om	
Whether on refusal to follow instructions of mother-in-law and sister-in-law Zahira to give false names of <i>Falia</i> , got beaten by her husband - reason - not this.	Contr	Exh.507
When St.X-32 was recorded Shaheerunnisa and Sahira - staying with Shabana Azmi and Javed Akhtar in Mumbai	Contr	Exh.508
Do not know whether T.N.N had taken my interview. Did not state - T.N.N had taken my interview on 19/09/03 in which facts given by me about the Best Bakery incident are true and correct.	Contr	Exh.509
Not correct - I told Jt. C.P. - my statement was read over to me in Gujarati and Hindi, explained to me, was correct and that I put my signature	Contr	Exh.510
Did not happen - on very next day I went to Chota Udaypur	Contr	Exh.499
That I was beaten by my husband is true but not on this issue that means for opposing Sheheerunnisa and Zahira to give false names of the <i>Falia</i> as accused in this case	Contr	Exh.500
Did not state before T.V. Channel that I wanted to disclose whole truth therefore Zahira and my mother-in-law did not get my name recorded in FIR	Contr	Exh.514/1

Did not happen that I told the interviewer - Assault by taking name of Kailas - though he was muslim, he touched her and kept her as his wife.	Contr	Exh.514/2
Did not state - Kailas gave birth - male child - unrest in Mohalla - by saying this - persons - beating gents.	Contr	Exh.514/2
Do not know - whether asked by interviewer - whether those who were apprehended were the attackers (<i>Hamla Karnewale</i>)	Contr	Exh.514/3
Whether stated that those who were apprehended were not the attackers - they were falsely named - Attackers were all from outside	Contr	Exh.514/3
Did not state - Chandrakant Bhattu - saved our lives	Contr	Exh.514/5
Did state that I was ready to go to Supreme Court and state the facts. I did not state that the accused in this case were innocent and that they were not involved in this case and that the culprits were from outside. (<i>contr. Is in respect of willingness to state the above fact in Surpeme Court</i>)	Contr	Exh.514/4

160. The witness (P.W. 29) has been cross-examined at length and it has been suggested by defence that Yasmin was never present during night or in the morning when the incident of assault had taken place but had arrived later on. It has been submitted that her presence has not been mentioned by Zahirabibi in her statement which was marked

as Exhibit with Charge-sheet which was filed, copy of which was supplied to the defence. It has been further submitted that P.W. 29 in her cross-examination had further come out with a new theory about motivation for the assault. It has been submitted that in cross-examination, she had stated that reason for rioters assaulting and setting the bakery on fire was that Nafitulla (P.W.31) her husband got married a Hindu woman Kailas and since he converted her as Muslim and since a male child was born to her, the mob had attacked the house. It has been submitted that omissions and contradictions of these witnesses were material and, therefore, her testimony could not be relied upon. It has been further submitted that Yasmin had given interview to all TV Channels soon after the acquittal of all the accused by the Trial Court in Gujarat and in the said interview, she had categorically stated to all the Channels that the accused were not responsible for the attack but outsiders were responsible and she was not called to give evidence in trial because she had stated that she did not want to take names of the persons of their Falia who were neighbours in the Mohalla and, for that she was beaten up through her husband by her mother-in-law and sister-in-law - Zaheera who had stated that it was necessary to mention the names of Falia people residing in the locality since if those names were not taken, Government would not pay compensation. It has been submitted that D.W.4 - Khyati Pandya and D.W. 5 -

Ajay Patel who had taken video had shown the said video on all the TV Channels' news. It has been submitted that evidence of defence witnesses D.W. 4 and D.W. 5, therefore, clearly established that the testimony which was given by her in the Trial Court was totally false testimony and, therefore, no reliance could be placed on it. It has also been submitted that no injury was caused to this witness (P.W. 29) and it has been further urged that from the CD/tape which was shown by the prosecution after the incident had taken place, it could be seen that clothes of this witness Yasmin were fresh and it did appear that she had arrived there in the morning after the incident had taken place and that, therefore, further gives credence to the defence version that she was not present. It has also been submitted that the same witness has now filed applications on oath alongwith an affidavit stating therein that she was made to give evidence under coercion and was compelled to give names of the accused.

161. In our view, even without taking into consideration the affidavit which has now been filed, it is difficult to rely on the testimony of this witness (P.W. 29). It is surprising that this witness has not received injury in the entire incident and she has made improvement that her daughter was also injured as a result of stones which were thrown and the said omission has been brought on record. This witness has not

been examined by the prosecution in the Trial Court at Gujarat. No explanation has been given as to why she was not examined in the Trial Court at Gujarat and why for the first time she was examined in the Trial Court at Mumbai. Further, the prosecution had an ample opportunity to record her statement after the matter was remanded by the Supreme Court with the express direction, directing the Police to re-investigate, if necessary and to carry out investigation without seeking permission from the Court under section 173(8) of the Cr.P.C. In spite of this specific opportunity which was given, the prosecution chose to examine this witness, though there was lacuna of witness not stating the names of the accused before the police. It is surprising that even the Trial Court did not ask the prosecution as to what was their stand in respect of specific direction which was given by the Supreme Court directing the Police, Gujarat State to re-investigate the matter, if necessary and to take further steps in that direction. Ordinarily, Trial Court ought to have noticed the said directions which was specifically given by the Supreme Court and should have asked the prosecution regarding their stand on the direction which was given by the Supreme Court and it was the duty of the Trial Court to have recorded the stand of the prosecution before commencement of the trial. However, it appears from the record that no such question seems to have been asked and even if it is asked, it has not

been brought to our notice from the roznama during hearing of these appeals. Normally, whenever the mater is remanded by the Apex Court with specific directions, it is the duty of the Trial Court to ensure that those directions are complied with and also to record the submissions of the prosecution in respect of the said directions which were given by the Apex Court. In this case, however, no such stand has been taken by the prosecution. In the cross examination of Baria (P.W.72) and Kanani (P.W.74), they have tried to take a stand that they were not aware about further proceedings and directions which were given by the Apex Court. However, this stand has been demolished by the defence in the cross-examination of both these witnesses by pointing out various orders which were issued by the Government and Police from time to time. Be that as it may, the fact remains that though there was sufficient opportunity to the prosecution to have recorded the statement of Yasmin, no such steps have been taken and, therefore, it is difficult to rely on the testimony of this witness. Moreover, another distinction which can be drawn between the prosecution witnesses viz P.W.26, P.W. 27, P.W. 28 and P.W. 32 and P.W.29 - Yasmin is that those four witnesses were assaulted and were grievously injured and they were in the hospital under that condition for a very long time. Some of the witnesses were unconscious for almost 10-15 days and, thereafter, they went to their native place. That cannot be

said about Yasmin who was very much there and was residing with her parents in Chhota Udaypur. Apart from the fact that she was not injured, there was no reason why her additional statement could not have been recorded by the police immediately after her first statement was recorded. So far as the other four injured eye witnesses are concerned, an explanation is sought to be given by the prosecution that they went to their native place in U.P. and it was difficult to locate these witnesses. However, that excuse is not available to the prosecution so far as Yasmin is concerned since her whereabouts were known and police could have very well called her to give her further statement. Viewed from any angle, therefore, testimony of this witness becomes very doubtful and will have to be discarded in toto.

162. Reliance also was placed by the prosecution on the testimony of two other injured eye witnesses who have turned hostile and the learned Special Public Prosecutor has given list of admissions which have been given by P.W. 30 - Nasibulla and P.W.31 - Nafitulla. It has been submitted that though these witnesses have turned hostile, on the basis of these statements it was possible to rely on their testimony. Reliance was also sought to be placed on the interview which was taken by P.W. 73 - Pankaj Shanker Sharma of these witnesses in support of their submission that the said version given by them in the interview was an independent

corroboration and that should be relied upon.

163. So far as the interview which was taken by P.W. 73 - Pankaj Sharma is concerned, we have already observed that the evidence of this witness is not acceptable and similarly authenticity of the CD which was recorded by this witness not being tested by the expert witness and seriously disputed by the defence, it will not be possible to rely on the said statements of these two witnesses (P.W. 30 and P.W.31) when they have given interview. Apart from that, even assuming for the sake of arguments that the said CD is not doctored even then the said statements do not have a sanctity of statement which is given under section 161 of the Criminal Procedure Code. The scheme of Cr.P.C. clearly reflects the intention of the legislature that statements which are recorded under the said provision though not admissible in evidence would act as safeguards so that in the event any new statement is made by the witness in the court, defence gets an opportunity to confront the witness with the said statement since the witness is expected to state truth before the police. The same cannot be said in respect of the interviews which are given to press or given to third parties. Possibility of doctoring these CDs also cannot be ruled out and, therefore, unless authenticity of the document viz. CD is proved through expert, it is very risky to rely on the testimony of such persons who suddenly pops up their head

in the midst of the trial. It will, therefore, be not possible to rely on the interviews given by P.W. 30 - Nasibulla and P.W. 31 - Nafitulla to P.W. 73 - Pankaj Sharma as recorded in the said CD. Apart from that, the so-called admissions, the list of which has been given by the learned Special Public Prosecutor also, in our view, cannot be treated as admissions and the said statement do not assist the prosecution case in establishing independently the identity of the assailants. Apart from that, both these witnesses have turned hostile and have been extensively cross-examined by the prosecution to discredit their testimony. Their evidence, therefore, does not assist the prosecution case.

164. We would, briefly, like to make a reference to the finding of the Trial Court where Trial Court has observed that statement of Zahira which has been made to the police will have to be treated as an FIR and and it has been exhibited as an FIR at Exhibit-136. It has been strenuously urged by the learned Senior Counsel Shri Adhik Shirodkar appearing on behalf of the defence that the Trial Court had erred in treating the statement of Zahira as an FIR. It has been submitted that her statement was recorded at 1.00 P.M. in the hospital. It has been further submitted that the first information which was received by the police in the Panigate Police Station was at about 10.00 A.M. and pursuant to the information which was received, Baria (P.W.72), Kanani

(P.W.74) Piyush Patel (P.W.67) and Rathod (P.W.63) rushed to the scene of offence. It has been submitted that even assuming that the said information which was received was a telephonic information and even if the said information is not treated as an FIR, the first information which was received and recorded by the police was the statement of Raees Khan (P.W.27), after he was admitted in the hospital. It has been submitted that both, Dr. Meena (P.W.46) and Dr. Choksi (P.W.62) in their statements have categorically emphasized that this witness was the only witness who was fully conscious. It has also been submitted that he (P.W.27) in his evidence has stated that he regained consciousness in the hospital and inquiry was made by the police after he regained consciousness. It has been submitted that, he has given details about the said incident and, as such, his statement being earlier in point of time ought to have been treated as an FIR. It has been submitted that even the vardi which was given by P.W. 16 and 17 and which has been brought on record, clearly states that the statement of Zahira was recorded at 1.00 P.M. Under these circumstances, therefore, in our view, Trial Court clearly erred in treating Zahira's statement as an FIR.

165. It appears that the prosecution was interested in treating the said statement as an FIR since in the said statement, names of the accused had been mentioned. Trial

Court further erred after treating the said statement in the FIR by relying on the said FIR as a corroboration to the testimony of witnesses by stating that it would fall under section 6 of the Evidence Act by treating it as *res gestae*. In our view, Trial Court committed serious error in treating the statement made by the witness as *res gestae* and relying on the said statement in the FIR as a corroboration to the testimony of the eye witnesses. Even assuming that the said statement was correctly treated as an FIR even then the approach of the Trial Court is erroneous.

166. The next question which falls for our consideration is regarding evidence of P.W. 69 - Gautam Chauhan. This witness was a Videographer and he was asked by Gujarat Police to videograph various incidents which had taken place and he had stated that he had taken video tape of the incident at Best Bakery after the incident was over and he had videographed entire scene of the bodies being brought down from the first floor and the witnesses being taken in Ambulance to the hospital. We have, with learned Special Public Prosecutor appearing on behalf of the prosecution and the learned Senior Counsel appearing on behalf of the defence, seen this CD in the judges' Conference Hall with the assistance of our technicians and technicians of the prosecution. It is an admitted position that so far as this CD is concerned, the said CD has been taken after the main

incident was over and, therefore, at the highest, it can be used for the purpose of understanding the topography of the Best Bakery and the residential premises and also the manner in which Fire Brigade people brought down the bodies. The defence, however, has strenuously urged that the said CD was doctored. It has been submitted that this was evident from the time which was shown on the said CD and since there were gaps between the various incidents, it was evident that certain clips had been whittled and it has been urged that these clips were omitted possibly because they were in favour of the defence. He then submitted that the CD was made available to the prosecution much before the application was filed on 29/03/2005. It has been submitted that in the CD it has been indicated that the original CD was modified on 19/09/2004. It has been submitted that the explanation given by the prosecution that because the battery of the computer was very slow there was a time gap, is not technically possible and, therefore, an inference which could be drawn was that though copies of the CD were taken on court computer and supplied to the defence, appear to have been copies of the CD which were taken out earlier by the prosecution. It has been further submitted that cross-examination of Zahira ended on 31/1/2005 that is about two months prior to the application being made for direction of CD itself was an indication that sequence of events in the CD were asked to

Zahira, the hostile witness.

167. In our view, the submission of defence cannot be accepted that copies of the CD were deliberately taken out earlier because the prosecution had an advantage of being helped by Baria and Kanani and it is possible that Baria and Kanani might have instructed the prosecution and, therefore, the said submission is not acceptable. Even otherwise, nothing turns on this aspect, since it was a piece of evidence which was with the prosecution and the fact that they had seen it earlier would be inconsequential.

168. However, the fact remains that from CD it does appear that there were certain gaps in time which has been displayed on the said CD and it does appear that certain clips have been removed; whether it was done deliberately or otherwise is difficult to ascertain but, factually, it will have to be noted that certain clips appear to have been removed. In any case, the said CD/video tape recorded by Gautam Chauhan (P.W.69) does not assist the prosecution in any manner since it pertains to the time after the said incident had taken place.

169. The Trial Court also has relied on provisions of section 6 of the Evidence Act while relying on the testimony of Piyush Patel (P.W.67) and has observed that since he was

present at the scene of offence his evidence which has been recorded can be taken into consideration in view of provisions of section 6. We are unable to agree with the said observation made by the learned Trial Court. In the first place, so far as Piyush Patel (P.W.67) is concerned he has stated in his evidence that he was DCP of the entire Zone in which the Panigate Police Station is situated and was an immediate superior Officer who had arrived at the scene immediately after Baria (P.W.72), Kanani (P.W.74) and Rathod (P.W.63) had reached the scene of offence. In his evidence, he has stated that three women came and met him and narrated the entire incident. He has stated that those three women had given names of the accused and he has narrated names of these accused in his substantive evidence before the Court. The witness has been cross-examined at length and he was unable to give any explanation as to why his statement was not immediately recorded either by Baria or by Kanani who had taken over the investigation on 10/3/2002. It is a matter of record that statement of this witness has been recorded on 24/3/2002, almost after a lapse of about 22 days. Normally, a high ranking Officer who was a DCP of the Zone and if he had come to know about the names of the accused, he would have promptly given a direction to the Investigating Officer to first record his statement. Surprisingly, he has not given such direction. He was unable to give any explanation as to

why his statement was not recorded earlier and that he did not give any direction to arrest the accused whose names were narrated to him by three women. This witness also does not mention the names of three women who have given this information to him. Even Rathod (P.W.63) who has also stated that three women came and met him does not state that these women had given names of accused. It is also curious that though videographer was present at the scene of offence alongwith Baria and thereafter Piyush Patel arrived at the scene, surprisingly the said scene where three women met Piyush Patel (P.W.67) has not been recorded by Gautam (P.W. 69) and this, therefore, creates doubt about the names of the accused being given immediately by these women to this Police Officer because had these names been given, ordinarily, the immediate reaction of this Officer would have been to take steps to arrest the accused. There is no material on record to indicate that any such steps were taken. This being the position, Trial Court clearly erred in relying on section 6 of the Evidence Act for the purpose of relying on the testimony of this witness and more particularly regarding names of the accused which were given by this witness. The said findings, therefore, deserve to be set aside.

170. One other aspect which needs to be dealt with is regarding grievance made by Mr. Adhik Shirodkar, learned

Senior Counsel appearing on behalf of the defence. It has been submitted that the Trial court passed personal strictures against him and also against the defence team and certain aspersions were cast on the defence. He has submitted that, with utmost respect, the said observations were uncalled for and particularly the use of the words such as “absurd” and “ridiculous” and defence being in collusion with hostile witnesses. He has invited our attention to the observations made by the learned Trial Court while upholding the objections of the Special Public Prosecutor and regarding questions which were asked by the defence and also the observations made by the learned Trial Court in the judgments. He invited our attention to the following observations made by the Trial Court against him and the team of defence:-

“OBSERVATION 1: (Volume 37 - page 9005- para 475) - 'This has been done apparently to cover the points which though initially not thought of, but the significance of which was realized as the arguments progressed. It appears that the significance of certain points or the necessity to address to them was thought of by the Learned advocates for the accused in view of the queries of the Court and the discussions that took place pursuant to the queries, during the lengthy arguments advanced

by Shri Shirodkar'

OBSERVATION 2 : (Volume 36 -page 8806, para 201. -last line)

... 'This approach, in my opinion, is indicative of the failure (= of the defence) to comprehend the concept of 'omissions' and 'contradictions' and the significance of bringing them on record. (page 8809 - 7th line from bottom) ' exhibits an aimless attempt to show difference in the record, wherever they appear without understanding their significance and without being desirous of challenging a particular version. '

OBSERVATION 3:- (Volume 38 - page 9287- para 811 -last line)

'No test identification parade was demanded by the accused during the investigation' .

Court Observation 4:- **THIS IS ABSURD.**

It is for the defence to take such steps. | It is NOT insisted by the Court that ... P.P. should state in 'Yes' or 'No' whether she would produce the record or not. (4955)

OBSERVATION 5 :- The defence had

challenged the evidence of p.W.67 D.C.P. Piyush Patel on various grounds. (Vol. 19- page 4827). The Trial Court observed :The motive suggested is, 'RIDICULOUS': (Vol.37, page 8985 at 8988 - para 456);

OBSRVATION 6 :- The Trial Court has observed that, ' The claim of all witnesses having conspired to falsely implicate, "Social Worker Thakkar, is '**RIDICULOUS**'.

OBSERVATION - 7 :- (vol. 38 - page 9206 - para 721) :- Any way it was on the basis of the admission of P.J.Kanani, obtained in this manner in the previous trial, P.I. Kanani 'was made to admit', this fact (ABOUT THE DATE OF SENDING fir BEING 05-03-2004) in the present trial also .

OBSERVATION - 8 -:- (Volume 36 -page 8882 - para321) It is only on being assured of their support on this issue, the challenge to Yasmin's presenc~ appears to have been taken However that this assurance was felt before the hostile witnesses were examined in Court. None of the hostile witnesses were examined

before Yasmin was examined**This is rather strange.**

OBSERVATION - 9 :- (vol. 36 -page 8893- para 333)

'The challenge to Yasmin' s presence does not appear to be sincere at all and such a case was attempted to be built up FALSELY with the assistance and connivance of the hostile witnesses.

OBSERVATION - 10:- (vol 37 - page 9045 - para 524) - The collusion between the defence and Nasibulla is obvious .. (page 9046- 2ndline) Ironically, Shri Adhik Shirodkar who was very vehement In suggesting witnesses to be audacious 'DOES not mind such a drastically opposite statement.

OBSERVATION - 11 :- (vol. 37 - page 9157 - para 659 - page 9158- - 10th line from top) - - The criticism of P.I.Kanani's evidence is absolutely unjustified, unwarranted and uncalled for. On the contrary , the lengthy cross-examination of (450 pages) does not seem to be fair.

OBSERVATION - 12 :- (volume 36 page from page 8918 to 8932 - paras 375 to 390) **(a)** Kumar Swami proved to be an unreliable, **(b)** tried to avoid answering questions, on realising that it was not at all necessary to record Yasmin's statement. **(c)**

Page 8924 - This clearly shows that Kumar Swami was not interested in actually finding out the truth, but only in giving an official sanction to the statements made by Yasmin during the interview given to T.N.N. Channel."

171. It has been also submitted that the Trial Court had exceeded in its authority in asking the questions under section 165 of the Evidence Act, more particularly to the defence witness D.W. 1 - Kumar Swami who had been called only to bring on record the contradictions in respect of testimony of Yasmin (P.W.29). It has been submitted that the Trial Court had asked questions to this witness which were running into 23 pages when it was totally irrelevant and not necessary to ask these questions since the witness was called only to prove the contradictions.

172. So far as Court questions are concerned, Section 165 of the Evidence Act gives complete right to the Court to ask questions during trial. Section 165 of the Evidence Act reads 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 judgment 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 hereinbefore expected.”

173. The Apex Court has consistently held that it is the duty of the Court to have over all control over the proceedings and, if necessary, questions can be asked by the Trial Court.

174. However, it is also well settled that the Court, while

doing so, should not enter into arena and try to put on a robe of Public Prosecutor. Trial Court, possibly, in its endeavour to ensure that proper recording of evidence is done, had undertaken this task and in that enthusiasm had asked these questions from time to time. Possibly the Trial Court was also mindful of the observations made by the Apex Court in the judgment in *Zahira Habibulla H. Sheikh and another vs. State of Gujarat and others*¹ wherein the Supreme Court had observed that Trial Court ought to have made use of section 165 of the Evidence Act. It appears that keeping those observations in mind, the Trial Court felt that it was its duty to make use of the said provision. We have no manner of doubt that Trial Court with best intention had tried to do this by asking these questions. However, it has to be noted that from time to time this Court and Supreme Court have observed that Trial court, as far as possible, should ensure that trial is conducted in a fair and impartial manner and justice has not only to be done but it must be seen to have been done.

175. Much emphasis has been laid by the learned Senior Counsel appearing on behalf of the defence that though a lot of latitude was given to the prosecution, the objections raised by the defence were overruled. Mrs. Manjula Rao, the learned Special Public Prosecutor, at this

¹ AIR 2004 SC 3114

stage, while dictation of this judgment was going on, submitted that it was her duty to point out that she had raised objections regarding the objections which were taken from time to time by the defence and these objections were noted by the Trial Court and, therefore, those objections taken by the defence were overruled and thereafter the defence stopped taking objections to the cross-examination by the prosecution. Mr. Adhik, Shirodkar, the learned Senior Counsel for the defence submitted that certain crucial questions in the cross-examination were disallowed, though it is a settled position that some latitude has to be given to the defence to ask questions in the cross-examination which are relevant, yet, the defence was not given such latitude and number of questions were disallowed though they were relevant and cross-examination was germane to the issue involved in question. It has also been submitted that, on the other hand, Trial Court had permitted the prosecution to cross-examine the hostile witnesses and the said cross-examination ran into 540 pages so far as Zahira is concerned and similar is the case in respect of other hostile witnesses and total cross-examination of the hostile witnesses ran into 995 pages. Mrs. Manjula Rao, the learned Special Public Prosecutor, however, urged that the cross-examination was necessary in order to bring on record the conduct of the witnesses and to ensure that all the contradictions in the testimony of the hostile witnesses are

brought on record.

176. In our view, we have no manner of doubt that the Trial Court did not intend to deliberately insult the defence Counsel. It does appear that even at the time of final hearing of the trial, the learned Senior Counsel had pointed out certain words which were used by the Trial Court while recording of evidence was going on and the Trial Court has also in its judgment has made reference to it in para 554 which reads as under:-

“554. what is remarkable is that in the cross-examination, minute details - not based on any information disclosed from the record or not supposed to be known to the accused - have been put to Nafitulla. There is a clear indication of collusion between the accused or somebody interested in affecting the prosecution case on one hand and Nafitulla and the other hostile witnesses on the other hand.”

At the same time, we feel that Trial Court should have been more circumspect while making any observations regarding cross-examination and submissions made by the learned Senior Counsel for the defence and, in our view, the observations which are made and which are introduced

hereinabove are clearly uncalled for. It has to be remembered that it is the duty of the Counsel appearing for the accused to plead the case of the accused and that is the right which has been given to the Counsel under the Advocate's Act and other provisions and under Article 21 of the Constitution of India accused has a right to be defended. At the same time, it is the duty of the Public Prosecutors to present the case on behalf of the prosecution and they act as Officers of the Court. Similarly, witnesses who appear before the Trial Court also perform their part in the process of dispensation of justice. The Apex Court time and again has observed that the Courts should not use harsh words not only against the witnesses or Officers who appear before the Court but also against the Counsel who appear for defence since they are doing their duty and impression should not be allowed to be created that the Court is partial towards one party.

177. We have no manner of doubt that the Trial court has tried to discharge its duty in the best possible manner and there was no intention on its part to favour any party. It cannot be forgotten that the Trial Court has acquitted eight accused and has convicted other 9 accused. Possibly in a case like this which is contested tooth and nail, some time Court may in its anxiety may use certain expressions without fully understanding meaning and context of the said

expression. The said observations which are made by the Trial Court against Mr. Adhik Shirodkar, the learned Senior Counsel appearing on behalf of the appellants/accused in the trial court and his team of defence, particularly where it is observed in the judgment in para 524 (pages 9045-9046) that they are in collusion with the hostile witnesses, therefore, are uncalled for and all these observations, therefore, are expunged.

FINDINGS:

178. We record our findings on the questions framed in para 27 as under:-

POINTS	FINDINGS
1. Whether the death of 14 people in the incident which took place at Best Bakery was homicidal?	In the affirmative
2. Whether in the night of 1/3/2002 and in the morning of 2/3/2002, the incident of riot, arson, looting of the Best Bakery had taken place as alleged by the prosecution?	In the affirmative.

3. Whether a mob of 1000 to 1200 people had come to the Best Bakery from all directions and had set the Bakery on fire and had caused death of women and children viz Jainabibi Hasanbhai, Shabnambibi @ Rukhsana Aslam, Sabira Habibulla, Cipli @ Saili Aslam Shaikh, Babli Aslam Shaikh, Mantasha, aged 3 years, daughter of Firoz Aslam Shaikh and Subhan, aged 4 years, son of Firoz Aslam Shaikh, who were inside the room on the first floor and had looted the Bakery and had taken away Ghee Flour (Maida) and other articles which were in the Bakery and, thereafter, set it on fire?

In the affirmative.

<p>4. Whether a mob of 1000 to 1200 people thrown stones, soda water bottles and bottles filled with kerosene which were set on fire and were thrown as missiles on the terrace of the said Bakery?</p>	<p>In the affirmative.</p>
<p>5. Whether the victims viz P.W.26 - Taufel, P.W. 27 - Raees, P.W. 28 - Shehzad, P.W. 29 - Yasmin and P.W.32 - Sailum and the grandmother of Nafitulla were made to get down from the terrace with the help of a ladder ?</p>	<p>In the affirmative.</p>

<p>6. Whether, after the victims viz. P.W.26 - Taufel, P.W.27 - Raees, P.W. 28 - Shehzad, P.W.29 - Yasmin and P.W. 32 - Sailum and the grandmother of Nafitulla were brought down from the terrace, women folk were taken behind bushes with intention to commit rape on them by the accused?</p>	<p>Intention to commit rape is not established.</p>
<p>7. Whether the hands and feet of P.W. 26 - Taufel, P.W.27 - Raees, P.W. 28 - Shehzad and P.W.32 - Sailum and Ramesh, Baliram and Prakash were tied by the accused and kerosene was poured on them and they were set on fire and they were also assaulted with swords, sticks and iron rods?</p>	<p>Assault is established but setting them on fire is not established.</p>

<p>8. Whether the appellants/accused were members of unlawful assembly and were responsible for the death of 14 people viz. (1) Jainabibi Hasanbhai, (2) Shabnambibi @ Rukhsana Aslam, (3) Sabira Habibulla, (4) Cipli @ Saili Aslam Shaikh, (5) Babli Aslam Shaikh, (6) Mantasha Firoz Aslam Shaikh, (7) Subhan Firoz Aslam Shaikh, (8) Baliram Shamlal Verma, (9) Prakash Ugroo Dhobi, (10) Raju @ Ramesh Baijnath, (11) Kausarali Shaikh, (12) Arshad @ Lulla Hasanbahi Shaikh, (13) Firoz Pathan and (14) Narsoo Hasan Khan Pathan, and were also responsible for causing grievous injuries to P.W.26 - Taufel, P.W. 27 - Raees, P.W. 28 - Shehzad,</p>	<p>Not proved. However, A-11, A-15, A-12 and A-16 were responsible for causing grievous injuries to P.W.26 - Taufel, P.W. 27 - Raees, P.W.28 - Shehzad and P.W. 32 - Sailum, P.W.30 - Nasibulla and P.W.31 - Nafitulla.</p>
---	--

<p>P.W.32 - Sailum, P.W. 30 - Nasibulla and P.W. 31 - Nafitulla?</p>	
<p>9. Whether the appellants /accused had committed the said offences which had taken place at night of setting the Best bakery on fire?</p>	<p>In the negative.</p>
<p>10. Whether it is proved that the appellants/accused were members of the unlawful assembly and had caused injuries to P.W. 26 - Taufel, P.W. 27 - Raees, P.W. 28 - Shehzad, P.W. 32 - Sailum, P.W. 30 - Nasibulla and P.W.31 - Nafitulla and had assaulted Baliram Shamlal Verma, Prakash Ugroo Dhobi and Raju @ Ramesh Baijnath?</p>	<p>In the affirmative so far as A-11, A-15, A-12 and A-16 are concerned and in the negative so far as other accused are concerned.</p>

179. For the reasons stated hereinabove, A-1 - Rajubhai Baria, A-18 - Shailesh Anupbhai Tadv, A-4 - Pankaj Virendragir Gosai, A-14 - Jagdish Chunilal Rajput and A-20 - Suresh @ Lalo Devjibhai Vasava are acquitted of the offence with which they were charged and their appeals are allowed.

180. However, conviction against A-11 - Sanjay Thakkar, A-15 - Dinesh Rajbhar, A-12 - Bahadursinh Chauhan and A-16 - Shanabhai Baria is confirmed and their appeals are dismissed. It is clarified that the sentences imposed upon them by the Trial Court so far as other offences are concerned shall run concurrently alongwith the sentence of life imprisonment which is imposed upon them and the judgment and order of the Trial Court is modified to that extent. We also direct that all these accused whose conviction has been confirmed by this Court shall be kept in prison in State of Gujarat and not in State of Maharashtra.

COMPENSATION:

181. In the incident involved in this case, 14 people died and there has been a chequered history regarding this case. It was first tried in the Gujarat Trial Court and thereafter against its judgment appeal was made to Gujarat High Court. It was then carried upto Supreme Court which then remanded it to the Bombay High Court requesting Hon'ble Chief Justice to fix up a Court of competent jurisdiction and again from Trial Court, Mumbai, this case has come to this Court by way of these appeals. The fact remains that victims in this case have suffered the most and injury mental as well as physical suffered by them cannot be compensated in

terms of money. However, we cannot ignore the fact that the legislature has taken into consideration this aspect and has amended the Code of Criminal Procedure by introducing the provisions of section 357-A by Amendment Act No.5 of 2009 which was inserted with effect from 31/12/2009 which states that every State Government in co-ordination with the Central Government shall prepare a scheme for providing funds for the purpose of compensation to the victim or his dependents who have suffered loss or injury as a result of crime and who require rehabilitation. It is also mentioned in the said added section that whenever a recommendation is made by the Court for compensation, the District and Legal Service Authority or the State Legal Service Authority, as the case may be, shall decide the quantum of compensation to be awarded under the scheme referred to in sub-section (1). A discretion, however, is vested in the Trial Court to make recommendation for compensation if it feels that compensation under section 357 is not adequate for such rehabilitation. Sub-section (6) of section 357A also mentions that the State or the District Legal Services Authority, as the case may be, to alleviate the suffering of the victim, may order for immediate first-aid facility or medical benefits to be made available free of cost on the certificate of the police officer not below the rank of the officer in charge of the police station or a Magistrate of the area concerned, or any other interim relief as the appropriate authority may deems

fit. The High Court also can direct the compensation should be paid apart from making recommendation under sub-section (3) of the said section. Section 357 also empowers the Court to award compensation to the victims. Apart from that, High Court has inherent power to award compensation to the victims.

182. In the present case, we are informed that State of Gujarat has awarded compensation of Rs 2000/- to these victims who survived viz P.W.26, P.W. 27, P.W.28 and P.W. 32 and compensation of Rs 1,50,000/- has also been paid to relatives of deceased viz. Raju @ Ramesh and Prakash, Similarly, compensation to the tune of Rs 1,50,000/- is also paid to the relatives of Shabnam Aslam Shaikh and Sabira Daughter of Habibulla. Legal heirs of Baliram were not found and therefore no compensation was paid to his legal heirs.

183. In our view, the compensation paid to these four injured eye witnesses viz. P.W. 26 - Taufel Ahmed Habibulla Siddiqui, P.W. 27 - Raees Khan Nankau Khan, P.W. 28 - Shehzad Khan Hasan Khan Pathan and P.W.32 - Sailum Hasan Khan Pathan Habibulla Shaikh is inadequate, taking into consideration the injuries which have been suffered by them and the ordeal which they have undergone. We are also of the view that P.W. 29 - Yasmin Nafitulla Habibulla Shaikh also is entitled to get the compensation.

184. In our view two persons viz Kausarali Shaikh and Arshad @ Lulla Hasanbhai Shaikh who were killed in the said incident but their bodies were not found till today, and, therefore, wife and children of these two deceased persons also will be entitled to get the compensation.

185. We direct the State of Gujarat to pay compensation of Rs 3,00,000/- (Rupees Three lacs only) to each of the following victims viz (1) Nasibulla Habibulla Shaikh, (2) Sailum Hasan Khan Pathan, (3) Taufel Habibulla Shaikh, (4) Raees Khan Nankau Khan, (5) Shehzad Khan Hasan Khan Pathan, (6) Yasmin Nafitulla Habibulla Shaikh so also to the wife and children of two deceased persons viz Kausarali Shaikh and Arshad @ Lulla Hasanbhai Shaikh whose bodies were not found till today.

186. We must also observe that time has come that States should evolve a machinery for the purpose of giving protection to the witnesses who come and appear in such sensitive matters. It is desirable that this work should be undertaken by the State Governments and not by any NGO or private party since there is always a possibility of allegation being made by either party about interference by such third parties. Time has therefore come for the State Governments to have a witness protection programme so

that witnesses get protection and are not left to the mercy of either side i.e. the accused or complainant.

187. In this case, victims of the said incident particularly members of Habibulla family, not only lost their house but some of their relatives also died in the incident. We would not like to make any observation as to who is responsible for the said witnesses turning hostile but the fact remains that the State could not give adequate protection to these members of Habibulla family. The surviving members of the Habibulla family have been convicted by the Trial Court. The appeals/revisions which have been filed against the said order have not been placed before us. We are informed that the said appeals/revisions have been dismissed for want of prosecution and Zahirabibi has already undergone the sentence for perjury and other victims/members of Habibulla family, though convicted, are absconding and, as such, in our view, members of Habibulla family have suffered from both ends. A situation like this can only be avoided in future if proper police protection is given to such witnesses and or there should be witness protection programme where witnesses can be given assurance of being rehabilitated with new identity and new occupation so that they are not left at the mercy of any particular party.

188. We have also dismissed the applications filed by

Yasmin (P.W.29) since we have observed that even if these applications are not taken into consideration, her evidence is not trustworthy and we have felt that it is not necessary to further make inquiries and it would protract the proceedings. We have also dismissed the applications filed by Mrs. Teesta Setalvad for intervention. We have not made any observation against her in this case and we have observed that third parties have no right to intervene in appeal or even during trial and with these observations her applications are disposed of.

189 Before parting with this judgment, we must state that we will be failing in our duty if we do not express our gratitude towards the assistance given by Mr. Adhik Shirodkar, the learned Senior Counsel and Advocates Mr. D.S. Jambaulikar, Mr. V.D. Bichu, and Mr. Mangesh Pawar appearing on behalf of the defence and also towards Mrs. Manjula Rao, the learned Senior Counsel and Special Public Prosecutor appearing on behalf of the State of Gujarat and Advocates Mr. J.P. Yagnik and Mr Anoop Pandey. We must mention here that without the assistance of both these Senior Counsel, it would not have been possible for us to decide these appeals expeditiously.

OPERATIVE PART OF THE JUDGMENT:

190. In the result the following order is passed:-

ORDER

Appeals filed by Accused No.1 - Rajubhai Baria, Accused No. 18 - Shailesh Anupbhai Tadvi, Accused No.4 - Pankaj Virendragir Gosai, Accused No.14 - Jagdish Chunilal Rajput and Accused No.20 - Suresh @ Lalo Devjibhai Vasava are allowed. They are acquitted of the offence punishable under sections 143, 147, 324 r/w 149, 326 r/w 149, 302 r/w 149 and 188 I.P.C. Further, Accused No.4 - Pankaj Virendragir Gosai is also acquitted of the offence punishable under sections 435 r/w 149, 436 r/w 149, 395, 448 r/w 149, 449 r/w 149, 450 r/w 149 and 451 r/w 149 I.P.C. Further, Accused No. 20 Suresh Lalo Devjibhai Vasava is also acquitted of the offence punishable under sections 144 and 148 I.P.C. The Judgment and Order of the Trial Court is set aside only to the extent of convicting A-1, A-18, A-4, A-14 and A-20 for the aforesaid offences. A-1, A-18, A-4, A-14 and A-20 shall be released forthwith, unless they are otherwise required in any other case. The fine amount paid by these accused, if any, be refunded to them. A-14 - Jagdish Chunilal

Rajput has already been released on bail on medical ground. His bail bond stands cancelled.

Appeals filed by accused No.11 - Sanjay Thakkar, Accused No.15 - Dinesh Rajbhar, Accused No.12 - Bahadursinh Chauhan and Accused No. 16 - Shanabhai Baria are dismissed. Their conviction under sections 143, 147, 324 r/w 149, 326 r/w 149, 302 r/w 149 and 188 I.P.C. is confirmed. Further, the conviction of Accused No.11, Accused No.12 and Accused No.15 under following sections viz sections 435 r/w 149, 436 r/w 149, 395, 448 r/w 149, 449 r/w 149, 450 r/w 149, 451 r/w 149, 144 and 148 of I.P.C is also confirmed. However, it is clarified that the sentences imposed upon them by the Trial Court so far as other offences are concerned shall run concurrently alongwith the sentence of life imprisonment which is imposed upon them and the judgment and order of the Trial Court is modified to that extent. We also direct that all these accused whose conviction has been confirmed by this Court shall be kept in prison in State of Gujarat and not in State of Maharashtra.

All the three Criminal Applications viz Criminal Application Nos. 571 of 2011 in Criminal Appeal No.583 of 2006, 572 of 2011 in Criminal Appeal No.584 of

2006 and 573 of 2011 in Criminal Appeal No. 585 of 2006 taken out by the applicant Yasmeen Sheikh are dismissed.

Similarly, all three Criminal Applications viz Criminal Application Nos. 198 of 2012 in Criminal Appeal No.583 of 2006, 199 of 2012 in Criminal Appeal No.584 of 2006 and 200 of 2012 in Criminal Appeal No.585 of 2006 taken out by Mrs Teesta Setalvad are also dismissed.

Criminal Application No. 408 of 2012 taken out by Accused No.4 in Criminal Appeal No.583 of 2006 is dismissed as the same does not survive in view of disposal of the above appeals.

We also direct the State of Gujarat to pay compensation of Rs 3,00,000/- (Rupees Three lacs only) to each of the following victims viz (1) Nasibulla Habibulla Shaikh, (2) Sailum Hasan Khan Pathan, (3) Taufel Habibulla Shaikh, (4) Raees Khan Nankau Khan (5) Shehzad Khan Hasan Khan Pathan, (6) Yasmin Nafitulla Habibulla Shaikh so also to the wife and children of two deceased persons viz Kausarali Shaikh and Arshad @ Lulla Hasanbhai Shaikh whose bodies were not found till today. The amount of compensation

which is directed to be paid to these victims be deposited by the State of Gujarat in this Court within 8 weeks from today and these victims are allowed to withdraw the said amount, after producing a proof of their identity.

All the observations which are made by the Trial Court against the learned Senior Counsel Mr. Adhik Shirodkar and his team are expunged.

All these Criminal Appeals and Criminal Applications taken out therein are accordingly disposed of.

(P.D. KODE, J.)

(V.M. KANADE, J.)

B.D.Pandit