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(2004) 4 Supreme Court Cases 158

(BEFORE DORAISWAMY RAJU AND ARIJIT PASAYAT, JJ.)

ZAHIRA HABIBULLA H. SHEIKH AND ANOTHER . . Appellants;

Versus

STATE OF GUJARAT AND OTHERS . . Respondents.

Criminal Appeals Nos. 446-49 of 2004[†] with Nos. 450-52 of 2004[‡], decided on April 12, 2004

A. **Constitution of India — Arts. 21 and 19 — Communal riots — "Best Bakery Case" — Macabre killings arising out of communal frenzy — Failure of State machinery to protect citizens' life, liberties and property, and investigation conducted in a manner helpful to accused persons — Duty of courts arising therefrom to maintain confidence of the public in the judicial system — Courts to ensure that accused persons are punished and the might and authority of the State are not used to shield itself or its men — Deficiencies in investigation or prosecution to be dealt with an iron hand, appropriately within framework of law — Judicial criminal administration to be kept clean and beyond the reach of whimsical political wills or agendas and properly insulated from discriminatory standards of the type prohibited by the Constitution — Role of State Government in not getting the offenders to book deprecated in the strongest terms — Described as "modern-day 'Neros' " who looked elsewhere whilst innocent children and helpless women were burning — As "wanton boys" who's "flies" law and justice had become, which they killed for their sport — And as "fences that swallowed their crops" — Judiciary — Administration of justice — Nature of — Criminal Procedure Code, 1973 — S. 378**

B. **Jurisprudence — "Justice blindfolded" — Implication of — Held, courts blind only to identity of parties — Not blind to truth of the cause in disregard of their duty to prevent miscarriage of justice — Natural justice — Bias**

Facts :

The case commonly came to be known as the "Best Bakery Case". Between 8.30 p.m. of 1-3-2002 and 11.00 a.m. of 2-3-2002, a business concern known as "Best Bakery" at Vadodara was burnt down by an unruly mob of a large number of people. In the ghastly incident 14 persons died. The attacks were stated to be a part of retaliatory action to avenge the killing of 56 persons burnt to death in the Sabarmati Express near Godhra in Gujarat. Z, the appellant, was the main eyewitness who lost her family members, including helpless women and innocent children in the gruesome incident. Many persons other than Z were also eyewitnesses. The accused persons were the alleged perpetrators of the crime. After investigation a charge-sheet was filed in June 2002. During trial the purported eyewitnesses resiled from the statements made during investigation. Faulty and biased investigation as well as perfunctory trial were said to have marred the sanctity of the entire exercise undertaken to bring the culprits to book. By judgment dated 27-6-2003, the trial court directed acquittal of the accused persons. Z appeared before the National Human Rights Commission stating that

she was threatened by powerful politicians not to depose against the accused persons.

On 7-8-2003 an appeal was filed by the State against the judgment of acquittal before the Gujarat High Court. The Gujarat High Court upheld the acquittal of the respondents-accused. Along with the said appeal, two other petitions were disposed of. The prayers made by the State in those petitions for adducing additional evidence under Section 391 CrPC and/or for directing retrial were rejected. Consequentially, prayer for examination of witnesses under Section 311 CrPC was also rejected. Thereafter, NHRC moved the Supreme Court and its special leave petition was treated as a petition under Article 32 of the Constitution. Z and another organisation, Citizens for Justice and Peace, filed an SLP challenging the judgment of acquittal affirmed by the High Court.

These appeals raised important issues regarding witness protection, the quality and credibility of the evidence before court, the improper conduct of trial by the Public Prosecutor and the role of the

investigating agency itself, which was alleged to be perfunctory and not impartial.

Allowing the appeals to the extent and in the terms below, the Supreme Court

Held :

If the State's machinery fails to protect citizen's life, liberties and property and the investigation is conducted in a manner to help the accused persons, it is but appropriate that the Supreme Court should step in to prevent undue miscarriage of justice that is perpetrated upon the victims and their family members.

(Para 22)

Though justice is depicted to be blindfolded, as popularly said, it is only a veil not to see who the party before it is while pronouncing judgment on the cause brought before it by enforcing law and administering justice, and not to ignore or turn the mind/attention of the court away from the truth of the cause or lis before it, in disregard of its duty to prevent miscarriage of justice. Courts have always been considered to have an overriding 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. When an ordinary citizen makes a grievance against the mighty administration, any indifference, inaction or lethargy shown in protecting his right guaranteed in law will tend to paralyse by such inaction or lethargic action of courts, and erode in stages the faith inbuilt in the judicial system, ultimately destroying the very justice-delivery system of the country itself. Doing justice is the paramount consideration and that duty cannot be abdicated or diluted and diverted by manipulative red herrings.

(Paras 54 and 35)

Courts have to ensure that accused persons are punished and that the might or authority of the State are not used to shield itself or its men. It should be ensured that they do not wield such powers, which under the Constitution have to be held only in trust for the public and society at large. If deficiency in investigation or prosecution is visible or can be perceived by lifting the veil trying to hide the realities or covering the obvious deficiencies, courts have to deal with the same with an iron hand, appropriately within the framework of law. It is as much the duty of the prosecutor as of the court to ensure that full and

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material facts are brought on record so that there might not be miscarriage of justice.

(Para 56)

Shakila Abdul Gafar Khan v. Vasant Raghunath Dhoble, (2003) 7 SCC 749 : 2003 SCC (Cri) 1918; Gurcharan Dass Chadha v. State of Rajasthan, AIR 1966 SC 1418 : (1966) 2 SCR 678 : 1966 Cri LJ 1071; K. Anbazhagan v. Supdt. of Police, (2004) 3 SCC 767, relied on

If one even cursorily glances through the records of the present case, one gets a feeling that the justice-delivery system was being taken for a ride and literally allowed to be abused, misused and mutilated by subterfuge. The investigation appears to be perfunctory and anything but impartial without any definite object of finding out the truth and bringing to book those who were responsible for the crime. The Public Prosecutor appears to have acted more as a defence counsel than one whose duty was to present the truth before the Court. The Court in turn appeared to be a silent spectator, mute to the manipulations and preferred to be indifferent to sacrilege being committed to justice.

(Para 68)

The role of the State Government also leaves much to be desired. One gets a feeling that there was really no seriousness in the State's approach in assailing the trial court's judgment. This is clearly indicated by the fact that the first memorandum of appeal filed was an apology for the grounds. A second amendment was done, that too after the Supreme Court had expressed its unhappiness over the perfunctory manner in which the appeal was presented and the challenge made. That also was not the end of the matter. There was a subsequent petition for amendment. All this sadly reflects on the quality of determination exhibited by the State and the nature of seriousness shown to pursue the appeal. Those who are responsible for protecting life and property and ensuring that investigation is fair and proper seem to have shown no real anxiety. Large number of people had lost their lives. Whether the accused persons were really assailants or not could have been established by a fair and impartial investigation. The modern-day "Neros" were looking elsewhere when Best Bakery and innocent children and helpless

women were burning, and were probably deliberating how the perpetrators of the crime could be saved or protected. Law and justice had become flies in the hands of these "wanton boys". When fences start to swallow the crops, no scope will be left for survival of law and order or truth and justice. Public order as well as public interest become martyrs and monuments.

(Paras 68 and 69)

Julia A.F. Cabney: "Little Things" referred to

Criminal trials should not be reduced to be mock trials or shadow-boxing or fixed trials. Judicial criminal administration system must be kept clean and beyond the reach of whimsical political wills or agendas and properly insulated from discriminatory standards or yardsticks of the type prohibited by the mandate of the Constitution.

(Para 68)

It is no doubt true that the accused persons have been acquitted by the trial court and the acquittal has been upheld, but if the acquittal is unmerited and based on tainted evidence, tailored investigation, unprincipled prosecution and perfunctory trial and evidence of threatened/terrorised witnesses, it is no acquittal in the eye of the law and no sanctity or credibility can be attached and given to the so-called findings. It seems to be nothing but a travesty of truth, fraud on the legal process and the resultant decisions of courts — coram non judis and non est. There is, therefore, every justification to call for interference in these appeals.

(Para 64)

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C. **Constitution of India — Art. 139-A(2) — Transfer of case — When warranted — If the Supreme Court "deems it expedient so to do for the ends of justice" — Ends of justice — Principle that justice should not only be done but should be seen to be done — When attracted — On facts, on basis of the ample evidence on record, glaringly demonstrating a subversion of the justice-delivery system with no congenial atmosphere still prevailing in the State of Gujarat, retrial directed in adjoining State of Maharashtra — Criminal Procedure Code, 1973 — S. 406 — Maxims**

D. **Constitution of India — Art. 139-A(2) — Retrial ordered on transfer of case — Directions issued for conduct of retrial — Affected parties/complainants given liberty to have a say in appointment of the Public Prosecutor — Public Prosecutor permitted assistance of one lawyer — Fees and expenses of Public Prosecutor and trial initially to be borne by State to which case transferred subject to reimbursement by State from which case transferred — That State to provide all necessary assistance for conduct of retrial — Witnesses to be given protection not only by that State, but in case any witness asks for protection transfer State also to provide such protection as deemed necessary — Criminal Procedure Code, 1973 — Ss. 406 and 386(1), 24 and 225 — Retrial of case on transfer — Public Prosecutor — Appointment of — Say of affected parties/complainants in**

It is one of the salutary principles of the administration of justice that justice should not only be done but it should be seen to be done. However, a mere allegation that there is apprehension that justice will not be done in a given case or that there are general allegations of a surcharged atmosphere against a particular community alone does not suffice. The court has to see whether the apprehension is reasonable or not. The state of mind of the person who entertains the apprehension no doubt is a relevant factor but not the only determinative or concluding factor. But the court must be fully satisfied about the existence of such conditions which would render inevitably impossible the holding of a fair and impartial trial, uninfluenced by extraneous considerations that may ultimately undermine the confidence of a reasonable and right-thinking citizen, in the justice-delivery system. The apprehension must appear to the court to be a reasonable one.

(Para 74)

Maneka Sanjay Gandhi v. Rani Jethmalani, (1979) 4 SCC 167 : 1979 SCC (Cri) 934; G.X. Francis v. Banke Bihari Singh, AIR 1958 SC 309 : 1958 Cri LJ 569, relied on

Keeping in view the peculiar circumstances of the case, and the ample evidence on record, glaringly demonstrating a subversion of the justice-delivery system with no congenial and conducive atmosphere

still prevailing in the State of Gujarat, it is directed that the retrial shall be done by a court under the jurisdiction of the Bombay High Court. The Chief Justice of the said High Court is requested to fix up a court of competent jurisdiction.

(Para 75)

The State Government is directed to appoint another Public Prosecutor and it shall be open to the affected persons to suggest any name which may also be taken into account in the decision to so appoint. Though the witnesses or the victims do not have any choice in the normal course to have a say in the matter of appointment of a Public Prosecutor, in view of the unusual factors noticed in this case, to accord such liberties to the complainant parties, would be appropriate.

(Para 76)

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The fees and all other expenses of the Public Prosecutor who shall be entitled to assistance of one lawyer of his choice shall initially be paid by the State of Maharashtra, which will thereafter be entitled to get the same reimbursed from the State of Gujarat. The State of Gujarat shall ensure that all the documents and records are forthwith transferred to the court nominated by the Chief Justice of the Bombay High Court. The State of Gujarat shall also ensure that the witnesses are produced before the court concerned whenever they are required to attend that court. Necessary protection shall be afforded to them so that they can depose freely without any apprehension of threat or coercion from any person. In case, if any witness asks for protection, the State of Maharashtra shall also provide such protection as deemed necessary, in addition to the protection to be provided for by the State of Gujarat. All expenses necessary for the trial shall be initially borne by the State of Maharashtra, to be reimbursed by the State of Gujarat.

(Para 77)

E. **Criminal Procedure Code, 1973 — S. 173(8) — Reinvestigation — Scope for — On facts, since there was unanimity on part of both parties that investigation was tainted, biased and not fair, though for different reasons, investigating agency directed to act in terms of S. 173(8) — Director General of Police directed to monitor such reinvestigation**

Section 173(8) CrPC permits further investigation, and even dehors any direction from the court as such it is open to the police to conduct proper investigation even after the court has taken cognizance of any offence on the strength of a police report submitted earlier.

(Para 79)

The role of the investigating agency is perceived differently by the parties, but there is unanimity in their stand that it was tainted, biased and not fair. While the accused persons accuse it for alleged false implication, the victims' relatives like the appellant, allege its efforts to be merely to protect the accused. It would be desirable for the investigating agency or those supervising the investigation, to act in terms of Section 173(8) CrPC, as the circumstances seem to or may so warrant. The Director General of Police, Gujarat is directed to monitor the reinvestigation, if any, to be taken up with the urgency and utmost sincerity, as the circumstances warrant.

(Paras 2, 78 and 60)

F. **Jurisprudence — Fair Trial — Genesis of principle of fair trial — Its pervasiveness and centrality in laws and administration of justice — Its nature — A constant, ongoing development process continually adapted to new and changing circumstances, and exigencies of the situation — Constitution of India — Arts. 21 and 14 — Fair Trial**

By the traditional common law method of induction there has emerged in our jurisprudence the principle of a fair trial. The principle of fair trial now informs and energises many areas of the law. The operating principles for a fair trial permeate the common law in both civil and criminal contexts. It is reflected in numerous rules and practices. It is a constant, ongoing development process continually adapted to new and changing circumstances, and exigencies of the situation — peculiar at times and related to the nature of crime, persons involved — directly or operating behind social impact and societal needs and even so many powerful balancing factors, which may come in the way of administration of criminal justice system. The principle of a fair trial manifests itself in virtually every aspect of our practice and procedure, including the laws of evidence.

(Paras 32 to 34)

G. **Constitution of India — Arts. 21 and 14 — Fair and open trial — Fair trial — Fair hearing — Cardinality of, in protection of human rights — Inherence of fair hearing in "due process" and the rule of law — Natural justice — Audi alteram partem**

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. Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. Since a fair hearing requires an opportunity to preserve the process, it may be vitiated and violated by an overhasty, stage-managed, tailored and partisan trial.

(Paras 36 and 39)

H. **Constitution of India — Arts. 21 and 14 — Fair Trial — What is — Held, fair trial for a criminal offence consists not only in technical observance of 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 — Words and phrases — "Fair trial" — Meaning of — Jurisprudence**

(Paras 36 and 40)

I. **Constitution of India — Arts. 21 and 14 — Fair trial — Balancing of competing interests of the accused, the victim and society entailed — A trial which is primarily aimed at ascertaining the truth has to be fair to all concerned — Interests of society not to be treated with complete disdain — In fact, public interest in proper administration of justice to be given as much importance, if not more, as interests of the individual accused — In this courts have a vital role to play — Repeated emphasis by Supreme Court in this regard pointed out — Criminal Trial — Prosecution — Role of — Held, it is the community that acts through the State and prosecuting agencies — Jurisprudence**

J. **Criminology — Crimes — Nature of — Held, crimes are public wrongs, in breach and violation of public rights and duties, which affect the whole community as a community and are harmful to society in general**

The concept of fair trial entails the familiar triangulation of interests of the accused, the victim and society, and it is the community that acts through the State and prosecuting agencies. Interests of society are not to be treated completely with disdain and as persona non grata. It has to be unmistakably understood that a trial which is primarily aimed at ascertaining the truth has to be fair to all concerned. It will not be correct to say that it is only the accused who must be fairly dealt with. That would be turning a Nelson's eye to the needs of 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. Public interest in the proper administration of justice must be given as much importance, if not more, as the interests of the individual accused. In this courts have a vital role to play. The cause of the community deserves equal treatment at the hands of the court in the discharge of its judicial functions. The Supreme 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 are harmful to society in general.

(Paras 30, 35, 36, 42 and 49)

K. **Criminal Trial — Presiding Judge — Purpose of and role of — Held, is the discovery, vindication and establishment of truth — Hence, the trial**

should be a search for the truth and not a bout over technicalities — Presiding Judge must cease to be a spectator and a mere recording machine — He must become a participant in the trial evincing intelligence, active interest and eliciting 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 — Restraints on processes for determining the truth — Criminal Procedure Code, 1973 — Ss. 391, 311, 386, 231, 242, 244, 233, 243 and 247 — Purpose of and role of court in criminal trial — Judicial process — Raison d'être for existence of courts of justice

Right from the inception of the judicial system it has been accepted that discovery, vindication and

establishment of truth are the main purposes underlying the existence of courts of justice. However, restraints on the processes for determining the truth are multifaceted. They have emerged in numerous different ways, at different times and affect different areas of the conduct of legal proceedings.

(Paras 30 and 32)

Pearse v. Pearse, (1846), 1 De G. & Sm. 12; 63 ER 950, referred to

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 to 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. 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 eliciting 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 the 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.

(Paras 35, 38, 43, 46 and 55)

Jennison v. Baker, (1972) 1 All ER 997 : (1972) 2 QB 52 : (1972) 2 WLR 429 (CA), relied on

L. **Criminal Procedure Code, 1973 — S. 311 — Nature, scope and object of S. 311 r/w S. 165, Evidence Act, 1872 — Complementary nature of powers under — Two parts to S. 311: (i) giving a discretion to the court to examine the witness at any stage, and (ii) the mandatory portion which compels the court to examine a witness if his evidence appears to be "essential to the just decision of the court" — When power under to be exercised, discussed in detail — Court to separate "grain from chaff" — Explained that "essential" is to be construed as it would be by an active and alert mind and not one which is bent to abandon and abdicate — Held, S. 311 does not confer on any party any right to examine, cross-examine and re-examine any witness — Evidence Act, 1872 — S. 165**

M. **Criminal Procedure Code, 1973 — Ss. 311 and 225 — Prosecuting agency not acting in requisite manner — Special necessity for exercise of**

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powers under S. 311 r/w S. 165 Evidence Act, 1872 and courts not playing into hands of such prosecuting agency in case of, stressed

The power of the court under Section 165 of the Evidence Act is in a way complementary to its power under Section 311 CrPC. These sections confer vast and wide powers on presiding officers of courts to elicit all necessary materials by playing an active role in the evidence-collecting process. The object of the section is to enable the court to arrive at the truth, irrespective of the fact that the prosecution or the defence has failed to produce some evidence which is necessary for a just and proper disposal of the case and to uphold the truth.

(Paras 43 and 44)

Section 311 CrPC consists of two parts i.e.: (*i*) giving a discretion to the court to examine the witness at any stage, and (*ii*) the mandatory portion which compels the court to examine a witness if his evidence appears to be essential to the just decision of the court. Though the discretion given to the court is very wide, the very width requires a corresponding caution: that the discretionary powers should be invoked as the exigencies of justice require, and exercised judicially with circumspection and consistently with the provisions of the Code of Criminal Procedure, 1973. Section 311 does not confer on any party any right to examine, cross-examine and re-examine any witness. This is a power given to the court not to be merely exercised at the bidding of any one party/person but the powers conferred and discretion vested are to prevent any irretrievable or immeasurable damage to the cause of society, public interest and miscarriage of justice. It is not that the power is to be exercised in a routine manner, but being an exception to the ordinary rule of disposal of appeal on the basis of records received, in exceptional cases or extraordinary situations the court can neither feel powerless nor abdicate its duty to

arrive at the truth and satisfy the ends of justice. The court can certainly be guided by the metaphor — separate the grain from the chaff — and in a case which has telltale imprints of reasonableness and genuineness in the prayer, the same has to be accepted, at least to consider the worth, credibility and the acceptability of the same on merits of the material sought to be brought in. The second part of the section does not allow any discretion but obligates and binds the court to take necessary steps if the fresh evidence to be obtained is essential to the just decision of the case — "essential" to an active and alert mind and not to one which is bent to abandon or abdicate.

(Paras 44, 45 and 46)

Mohanlal Shamji Soni v. Union of India, 1991 Supp (1) SCC 271 : 1991 SCC (Cri) 595, relied on

The power under Section 311 CrPC is exercised and the evidence is examined neither to help the prosecution nor the defence. However, if the prosecutor is remiss in some ways, the court can control the proceedings effectively so that the ultimate objective i.e. truth is arrived at. This becomes more necessary where the court has reasons to believe that the prosecuting agency or the prosecutor is not acting in the requisite manner. The court cannot afford to be wishful or pretend to be blissfully ignorant or oblivious to such serious pitfalls or dereliction of duty on the part of the prosecuting agency. The prosecutor who does not act fairly and acts more like a counsel for the defence is a liability to the fair judicial system, and courts should not also play into the hands of such prosecuting agency showing indifference or adopting an attitude of total aloofness.

(Paras 43, 46 and 55)

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N. **Criminal Procedure Code, 1973 — Ss. 391 and 231, 242, 244, 233, 243 & 247 — Admissibility of evidence initially or as additional evidence distinguished from its efficacy, reliability and acceptability — Evidence Act, 1872 — Ss. 5 and 3**

The question of admission of evidence, initially or as additional evidence under Section 391 CrPC, is distinct from the efficacy, reliability and its acceptability for consideration of claims in the appeal on merits.

(Paras 59 and 24)

The High Court has observed that the question of accepting the application for additional evidence would be dealt with separately, but has in fact dealt with it in a cryptic manner, practically in one paragraph, and did not think it necessary to accept the additional evidence — but at the same time made threadbare analysis of the affidavits as if it had accepted them as additional evidence and was testing their acceptability. The High Court should not have thrown out the application, as well as the materials sought to be brought on record, even at the threshold and yet gone on to surmise on reasons, at the same time, professing to decide on its correctness.

(Paras 59, 24 and 71)

O. **Criminal Procedure Code, 1973 — S. 391 — Grounds for not admitting additional evidence — Veracity of affidavits sought to be adduced as additional evidence doubted by High Court on grounds that witnesses who had filed them were of unsound mind, untruthful, capable of being manipulated, and were in hands of persons using them with "oblique motives", without any material or reasonable and concrete basis to support such conclusions — Such finding made by High Court after holding that the affidavits were not being taken on record — Held, course adopted by High Court improper and logic applied by High Court to reject the affidavits unsustainable**

(Paras 20, 11 and 12)

P. **Criminal Procedure Code, 1973 — Ss. 391 and 386 — Relative operation of Ss. 391 and 386 — Held, S. 386 does not and cannot be said to exhaustively enumerate the modes by which alone the court can deal with an appeal — Ss. 391 and 386 are to be harmoniously considered to enable the appeal to be considered and disposed of in the light of additional evidence as well — S. 391 is in the nature of an exception to the general rule**

Q. **Criminal Procedure Code, 1973 — S. 391 — Nature, scope and object of — Legislative intent behind, indicated — Power under, when and for whom to be exercised, discussed in detail — Wide discretion of appellate court — Requirement of recording of reasons safety valve on — Importance of pragmatic considerations — Impermissibility of filling of any lacunae — Question**

of sufficiency of evidence already on record vis-à-vis the admissibility of additional evidence sought to be adduced — Held, it cannot be laid down as a rule of universal application that the court has to first find out whether evidence already on record is sufficient — Both exercises, that is, whether evidence already on record is sufficient and admissibility of additional evidence sought to be adduced, have to be taken up together — Further held, when circumstances clearly indicate prima facie substance in application for adduction of additional evidence, appropriate course for courts would be to admit additional evidence for final adjudication, so that acceptability or otherwise of evidence tendered by way of additional evidence can be tested properly, and legally tested in the context of the

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probative value of the two versions — There cannot be a straitjacket formula or rule of universal application when alone it can be done and when not — Whether appellate court maintains or upsets verdict of trial court depends upon relevance and acceptability of the additional evidence and its qualitative worth in deciding the guilt or innocence of the accused — This is not a factor in determining the admissibility of additional evidence sought to be adduced

R. **Criminal Procedure Code, 1973 — S. 391 — Grounds for not admitting additional evidence — Held, that the affidavits sought to be adduced as additional evidence were also filed in the Supreme Court, in another proceeding, is no reason in the eye of the law to refuse to take on record additional evidence**

(Para 24)

S. **Criminal Procedure Code, 1973 — Ss. 386 and 391 — Retrial — Additional evidence taken on record — Held, retrial not a necessary corollary when additional evidence taken on record**

Section 391 CrPC, 1973 is another salutary provision which clothes the courts with the power to effectively decide an appeal. Though Section 386 envisages the normal and ordinary manner and method of disposal of an appeal, yet it does not and cannot be said to exhaustively enumerate the modes by which alone the court can deal with an appeal. Section 391 is one such exception to the ordinary rule and if the appellate court considers additional evidence to be necessary, the provisions in Section 386 and Section 391 have to be harmoniously considered, to enable the appeal to be considered and disposed of in the light of the additional evidence as well. For this purpose it is open to the appellate court to call for further evidence before the appeal is disposed of. The appellate court can direct the taking up of further evidence in support of the prosecution; a fortiori it is open to the court to direct that the accused persons may also be given a chance of adducing further evidence, who may file an application in this regard, in an appropriate case. Section 391 is in the nature of an exception to the general rule and the powers under it must also be exercised with great care, especially on behalf of the prosecution lest the admission of additional evidence for the prosecution operates in a manner prejudicial to the defence of the accused. The legislative intent in enacting Section 391 appears to be the empowerment of the appellate court to see that justice is done between the prosecutor and the persons prosecuted by arriving at the truth, that is, the prevention of the guilty man's escape through some careless or ignorant proceedings before a court or vindication of an innocent person wrongfully accused: and if the appellate court finds that certain evidence is necessary in order to enable it to give a correct and proper finding, it would be justified in taking action under Section 391. However, there is no question of filling of any lacuna in the case on hand.

(Paras 47, 48, 58, 21 and 50)

Rambhau v. State of Maharashtra, (2001) 4 SCC 759 : 2001 SCC (Cri) 812; Rajendra Prasad v. Narcotic Cell, (1999) 6 SCC 110 : 1999 SCC (Cri) 1062; Ram Chander v. State of Haryana, (1981) 3 SCC 191 : 1981 SCC (Cri) 683; Jamatraj Kewalji Govani v. State of Maharashtra, AIR 1968 SC 178 : (1967) 3 SCR 415 : 1968 Cri LJ 231; Mohanlal Shamji Soni v. Union of India, 1991 Supp (1) SCC 271 : 1991 SCC (Cri) 595, relied on

There is no restriction in the wording of Section 391 either as to the nature of the evidence, or that the provisions of the section are only to be invoked when formal proof for the prosecution is necessary. The matter is one of discretion of the appellate court and any approach without pragmatic consideration defeats the

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very purpose for which Section 391 CrPC, 1973 has been enacted. However, the same has to be exercised judicially and the legislature has put a safety valve by requiring the recording of reasons. The necessity for additional evidence arises when the court feels that some evidence which ought to have been before it is not there or that some evidence has been left out or erroneously brought in. It is true that merely because an affidavit has been filed stating that the witnesses were threatened, as a matter of routine, additional evidence should not be permitted. But when the circumstances, as in this case, clearly indicate that there is some truth or prima facie substance in the grievance made, having regard to background of events that happened, the appropriate course for the courts would be to admit additional evidence for final adjudication, so that the acceptability or otherwise of evidence tendered by way of additional evidence can be tested properly, and legally tested in the context of the probative value of the two versions. There cannot be a straitjacket formula or rule of universal application when alone it can be done and when, not.

(Paras 49, 59, 58, and 73)

In all cases, it cannot be laid down as a rule of universal application, that the court has to first find out whether the evidence already on record is sufficient. The nature and quality of the evidence on record is also relevant. If the evidence already on record is shown or found to be tainted, tailored to suit or help a particular party or side and the real truth has not and could not have been spoken or brought forth during trial, it would constitute merely an exercise in futility, if it is considered first whether the evidence already on record is sufficient to dispose of the appeals. Disposal of appeal does not mean disposal for statistical purposes but effective and real disposal to achieve the object of any trial. The exercise has to be taken up together. It is not that the Court has to be satisfied that the additional evidence would be necessary for rendering a verdict different from what was rendered by the trial court. Merely because the High Court permits additional evidence to be adduced, it does not necessarily lead to the conclusion that the judgment of the trial court was wrong. In a given case even after assessing the additional evidence, the High Court can maintain the verdict of the trial court and similarly the High Court on consideration of the additional evidence can upset the trial court's verdict. It all depends upon the relevance and acceptability of the additional evidence and its qualitative worth in deciding the guilt or innocence of the accused. Moreover, whenever additional evidence is accepted, retrial is not a necessary corollary.

(Paras 58, 59, 73 and 21)

Nowhere has the High Court effectively dealt with the application under Section 391 as a part of the exercise to deal with and dispose of the appeal. In fact the High Court dealt with it practically in one paragraph, accepting the stand of counsel for the accused that the consideration of the appeal has to be limited to the records sent up under Section 385(2) CrPC for disposal of the appeal under Section 386. This perception of the powers of the appellate court and misgivings as to the manner of disposal of an appeal per se vitiates the decision rendered by the High Court. If the stand of counsel for the accused as was accepted by the High Court is maintained, it would mean that Section 391 CrPC would be a dead letter in the statute-book.

(Para 58)

T. **Criminal Procedure Code, 1973 — Ss. 386 and 391 — Retrial when to be ordered — Held, whether retrial under S. 386 or taking up of additional evidence under S. 391 proper procedure will depend on facts and circumstances of each case — No straitjacket formula of universal and invariable application can be formulated — Ultimately courts must keep in**

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view their very raison d'être, that is, to find out the truth and dispense justice impartially, in this regard — On facts, case found to be one writ large with serious infirmities, telltale even to the naked eye of an ordinary man, arbitrariness, where truth had become a casualty, without parallel, and which stood on its own as an exemplary one, special of its kind, necessary to prevent its recurrence and therefore fit and proper for retrial — Further held, a retrial in the case on hand was essentially called for, in order to save and preserve the justice-delivery system, unsullied and unscathed by vested interests — Retrial directed to be taken up on a day-to-day basis, to be concluded by December 2004

Whether a retrial under Section 386 or taking up of additional evidence under Section 391 is the proper procedure will depend on the facts and circumstances of each case for which no straitjacket formula of universal and invariable application can be formulated. In the ultimate analysis whether it is a case covered by Section 386 or Section 391 CrPC, 1973, the underlying object which the court must

keep in view is the very reason for which the courts exist i.e. to find out the truth and dispense justice impartially and ensure also that the very process of courts is not employed or utilized in a manner which gives room to unfairness or lend themselves to be used as instruments of oppression and injustice.

(Paras 52, 53 and 73)

It is not necessary to highlight all the infirmities in the judgment of the High Court or the approach of the trial court lest nothing credible or worth mentioning remains in the process. There are several infirmities which are telltale even to the naked eye of an ordinary common man. The entire approach of the High Court suffers from serious infirmities, its conclusions lopsided and lacks proper or judicious application of mind. Arbitrariness is found writ large on the approach as well as the conclusions arrived at in the judgment under challenge, in unreasonably keeping out relevant evidence from being brought on record. This appears to be a case where the truth has become a casualty in the trial. It is a 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, where a retrial is a must and essentially called for in order to save and preserve the justice-delivery system unsullied and unscathed by vested interests. 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.

(Paras 73, 70, 59 and 21)

If the accused persons were not on bail at the time of conclusion of the trial, they shall go back to custody, if on the other hand they were on bail that order shall continue unless modified by the court concerned. It would be appropriate if the retrial is taken up on day-to-day basis keeping in view the mandate of Section 309 CrPC and completed by the end of December 2004.

(Para 85)

U. **Criminal Procedure Code, 1973 — S. 391 — Contradictions/inconsistency between evidence adduced earlier and additional evidence sought to be adduced — Admissibility of additional evidence in light of — Creditworthiness and acceptability of depositions made in earlier evidence or additional evidence due to contradictions/inconsistencies therebetween, to be considered only after admission — Additional evidence not to be rejected at threshold merely because of contradictions, especially in sensitive cases like the present one — Witness claiming that he did not speak truthfully**

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before trial court but was willing to speak the truth before appellate court — Power under S. 391 to be exercised and such testimony to be accepted only if appellate court is satisfied for reasons on record that such a course should be adopted — In this regard, the court can consider whether the party concerned had a fair opportunity to speak the truth earlier

It is only after admission, that the court should consider in each case whether on account of a contradiction between the evidence adduced earlier before the court and the testimony allowed to be given as additional evidence, which of them or any one part or parts of the depositions are creditworthy and acceptable, after a comparative analysis and consideration of the probabilities and probative value of the materials for adjudging the truth. To reject additional evidence merely because of contradictions, and that too in a sensitive case like this one, with a horror and terror oriented history of its own, would amount to a conspicuous omission and deliberate dereliction of discharging functions judiciously and with a justice-oriented mission. In a given case when the court is satisfied that for reasons on record the witness had not stated truthfully before the trial court and was willing to speak the truth before it, the power under Section 391 CrPC, 1973 is to be exercised. However, it is not that in every case where the witness, who had given evidence before court, wants to change his mind and is prepared to speak differently, that the court concerned should readily accede to such a request by lending its assistance. If the witness who deposed one way earlier comes before the appellate court with a prayer that he is prepared to give evidence which is materially different from what he has given earlier at the trial with the reasons for the earlier lapse, the court can consider the genuineness of the prayer in the context as to whether the party concerned had a fair opportunity to speak the truth earlier and in an appropriate case, accept it.

(Paras 59, 24, 71 and 45)

Whether the witness had told the truth before the trial court or as stated in the affidavit, were matters for assessment of evidence when admitted and tendered, and when the affidavit itself was not tendered

as evidence, the question of analysing it to find fault was not the proper course to be adopted by the High Court. The affidavits were filed to emphasise the need for permitting additional evidence to be taken and for being considered as the evidence themselves. Even the conclusions arrived at with reference to those affidavits do not appear to be correct and seem to suffer from apparent judicial obstinacy and an avowed determination to reject them. For example, to brand a person as not truthful because a different statement was given before the trial court, unmindful of the earliest statement given during investigation and the reasons urged for turning hostile before the trial court negates the legislative intent and purpose of incorporating Section 391 in CrPC, 1973.

(Paras 59, 24 and 71)

Even if the appellant Z had taken different stands as concluded by the High Court, it was obligatory for the Court to find out as to what was the correct stand and the real truth, which could have been decided and examined by accepting the prayer for additional evidence. The disclosed purpose in the State Government's prayer with reference to the affidavits was to bring to the High Court's notice the situation which prevailed during trial and the reasons as to why the witnesses gave the version as noted by the trial court.

(Paras 24 and 71)

V. **Criminal Procedure Code, 1973 — Ss. 157, 161, 164, 311 and 391 — Defective investigation — Effect of and examination of prosecution evidence in case of — Course to be adopted by court detailed — Court exhorted to**

adopt active and analytical role and to have recourse to Ss. 391 and 311 CrPC, 1973 and S. 165 Evidence Act, 1872 if necessary, and to evaluate entire evidence — Accused not to be acquitted solely on account of the defect in investigation — To do so would tantamount to playing into hands of investigating officer if investigation is designedly defective and perpetuating the designed mischief — Evidence Act, 1872 — S. 165 — Criminal Trial — Investigation — Defective investigation

W. **Criminal Procedure Code, 1973 — Ss. 386 and 157 — Retrial — Dishonest and faulty investigation — High Court coming to definite conclusion as to — Held, per se sufficient justification to have directed retrial of the case**

X. **Criminal Procedure Code, 1973 — Ss. 157, 161 and 164 — Designedly dishonest and faulty investigation — Possible purposes therefor — Held, the only purpose of such an investigation cannot be false implication, but equally it is possible that the investigating agency was trying to shield the accused — On facts held, High Court's conclusion in this regard not proper**

If the lapse or omission is committed by the investigating agency or because of negligence, the prosecution evidence is required to be examined dehors such omissions, to find out whether the said evidence is reliable or not. The court has to adopt an active and analytical role. The contaminated conduct of officials should not stand in the way of courts getting at the truth by having recourse to Sections 311, 391 CrPC, 1973 and Section 165 of the Evidence Act, 1872 at the appropriate and relevant stages and evaluating the entire evidence. 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 and the designed mischief would be perpetuated with a premium to the offenders and justice would not only be denied to the complainant party but also made an ultimate casualty.

(Paras 61 and 62)

Karnel Singh v. State of M.P., (1995) 5 SCC 518 : 1995 SCC (Cri) 977; Paras Yadav v. State of Bihar, (1999) 2 SCC 126 : 1999 SCC (Cri) 104; Ram Bihari Yadav v. State of Bihar, (1998) 4 SCC 517 : 1998 SCC (Cri) 1085; Amar Singh v. Balwinder Singh, (2003) 2 SCC 518 : 2003 SCC (Cri) 641, relied on

Right from the beginning, the stand of the appellant Z was that the investigating agency was trying to help the accused persons and so was the Public Prosecutor. If the investigation was faulty, it was not the fault of the victims or the witnesses. If the same was done in a manner with the object of helping the accused persons as it appears to be apparent from what has transpired so far, it was an additional ground just and reasonable as well for accepting the additional evidence.

(Paras 60 and 24)

The High Court has come to a definite conclusion that the investigation carried out by the police was dishonest and faulty. That was and should have been per se sufficient justification to direct a retrial of the case. There was no reason for the High Court to come to the further conclusion of its own about false implication without a concrete basis, and that too merely on conjectures. On the other hand, the possibility of the investigating agency trying to shield the accused persons keeping in view the methodology adopted and turn of events,

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can equally not be ruled out. When the investigation is dishonest and faulty, it cannot be only with the purpose of false implication.

(Paras 70, 71 and 20)

Y. **Criminal Trial — Witnesses — Generally — Primacy of witnesses in administration of criminal justice — Trial vitiated if witnesses incapacitated — Reasons for incapacitation — Witness protection — Need for — Broader public and societal interests therein — Role of State in witness protection pointed out — Pressing and urgent need for legislative measures to protect witnesses highlighted — Imperativeness of initiation of "witness protection programmes" along the lines of those adopted in other nations stressed**

(Paras 41, 42 and 57)

Vineet Narain v. Union of India, (1998) 1 SCC 226 : 1998 SCC (Cri) 307, relied on

Z. **Criminal Procedure Code, 1973 — Ss. 231 and 242 — Non-examination of witnesses — Permissible grounds for — Particular order of examination of witnesses set — Departure from — When permissible — Evidence Act, 1872 — Ss. 134 and 135 — Criminal Trial**

It is true that the prosecution is not bound to examine each and every person who has been named as a witness. A person named as a witness may be given up when there is material to show that he has been gained over or that there is no likelihood of the witness speaking the truth in court.

(Para 71)

The reasons indicated by the High Court to justify non-examination of the eyewitnesses are not sustainable. In respect of one it has been said that whereabouts of the witness may not be known. There is nothing on record to show that efforts were made by the prosecution with any meticulous care or seriousness to produce the witness for tendering evidence, and yet the net result was "untraceable". Another aspect which has been lightly brushed aside by the High Court is that one person who was to be examined on a particular date was examined earlier than the date fixed. This unusual conduct by the prosecutor should have been seriously taken note of by the trial court and also by the High Court.

(Para 71)

So far as non-examination of some injured relatives is concerned, the High Court has held that in the absence of any medical report, it appears that they were not present during the incident and, therefore, held that the prosecutor might have decided not to examine them because there was no injury. This is nothing but a wishful conclusion based on presumption.

(Para 73)

AA. **Criminal Procedure Code, 1973 — Ss. 231 and 242 — Non-examination of witnesses on ground that witnesses not present during incident — Conclusion based on the fact that statements of such witnesses purportedly recorded in language not known to them — Held, not a ground by itself sufficient to conclude that such witnesses were not present, for it was not a requirement of law that the language of statement recorded under S. 161 CrPC be known to the witness — Moreover, merely because witnesses could only speak the said language, and were not literate in it was not enough to conclude that they did not know the language**

AB. **Criminal Procedure Code, 1973 — Ss. 161 and 162 — Language of statement recorded under — Held, does not have to be language known to person making statement — Moreover, such person does not have to sign the statement either**

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It is not a requirement in law that the statement under Section 161 CrPC has to be recorded in the language known to the person giving the statement. As a matter of fact, the person giving the statement is not required to sign the statement as is mandated in Section 162 CrPC.

(Para 71)

The High Court noted that the statements of certain witnesses under Section 161 CrPC were recorded in Gujarati language though the witnesses did not know Gujarati, and therefore concluded that they were not present during the incident and, therefore, question of their statement being recorded by the police did not arise. There was no material before the High Court for coming to a finding that the persons did not know Gujarati since there may be a person who could converse fluently in a language though not literate to read and write. The reasoning is erroneous for more reasons than one and the conclusion of the High Court holding that the persons were not present during the incident is untenable.

(Para 71)

AC. **Criminal Trial — Witnesses — Related witnesses — Reliance on evidence of relatives of accused, though there is no legal bar thereagainst, on facts of case, deprecated**

(Paras 72 and 59)

AD. **Criminal Procedure Code, 1973 — Ss. 24 and 225 — Public Prosecutor — Role and duties of — Duty of court in case of dereliction of duty by prosecuting agency**

Though a Public Prosecutor is not supposed to be a persecutor, yet the minimum that was required to be done, to fairly present the case of the prosecution, was not done. It is as much the duty of the prosecutor as of the court to ensure that full and material facts are brought on record so that there might not be miscarriage of justice. The prosecutor who does not act fairly and acts more like a counsel for the defence is a liability to the fair judicial system, and courts should not also play into the hands of such prosecuting agency showing indifference or adopting an attitude of total aloofness.

(Paras 71, 56 and 43)

In the present case, the Public Prosecutor appears to have acted more as a defence counsel than one whose duty was to present the truth before the court.

(Para 68)

AE. **Criminal Procedure Code, 1973 — Ss. 231 & 242 and 173 & 157 — Investigating officer — Presence of during trial**

Time and again, the Supreme Court has stressed upon the need of the investigating officer being present during trial unless compelling reasons exist for a departure. In the instant case, this does not appear to have been done, and there is no explanation whatsoever why it was not done. Even the Public Prosecutor does not appear to have taken note of this desirability.

(Para 71)

Shailendra Kumar v. State of Bihar, (2002) 1 SCC 655 : 2002 SCC (Cri) 230 : (2001) 8 Supreme 13, relied on

AF. **Criminal Trial — Proof of charge**

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.

(Para 38)

AG. **Criminal Procedure Code, 1973 — S. 354(b) — Contents of judgment — Reasons not rendered by High Court while giving order, indicating that they would be subsequently given — Highlighted that such a practice on part of High Courts had been deprecated by the Supreme Court in several cases, and was impermissible — Explained why such a practice**

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was permissible in the case of the Supreme Court and not the High Courts — Civil Procedure Code, 1908 — Or. 20 R. 5

(Paras 80 and 82)

State of Punjab v. Jagdev Singe Talwandi, (1984) 1 SCC 596 : 1984 SCC (Cri) 135 : AIR 1984 SC 444, relied on

AH. **Constitution of India — Art. 136 — Expunction of unwarranted remarks — Course adopted by High Court deprecated — Need for decency, decorum and judicial discipline stressed**

— Held, proceedings of court normally reflect true state of affairs — Therefore, it was not warranted of the High Court to refer to certain objectionable submissions in its judgment and then state that no serious note was being taken of them

(Para 83)

AI. **Criminal Trial — Fair Trial — Question, whether on facts, accused could be accorded a fair trial given the media attention that had been given to them, left open for an appropriate case where the media is duly and effectively represented**

(Para 84)

D-M/29920/CR

Chronological list of cases cited ***on page(s)***

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2. (2003) 7 SCC 749 : 2003 SCC (Cri) 1918, *Shakila Abdul Gafar Khan* v. *Vasant Raghunath Dhoble*	193*a*
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18. AIR 1958 SC 309 : 1958 Cri LJ 569, *G.X. Francis* v. *Banke Bihari Singh*	186*b-c*
19. (1846) 63 ER 950, *Pearse* v. *Pearse*	182*g*

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The Judgment of the Court was delivered by

ARIJIT PASAYAT, J.— Leave granted.

2. The present appeals have several unusual features and some of them pose very serious questions of far-reaching consequences. The case is commonly to be known as

"Best Bakery Case". One of the appeals is by Zahira who claims to be an eyewitness to macabre killings allegedly as a result of communal frenzy. She made statements and filed affidavits after completion of trial and judgment by the trial court, alleging that during trial she was forced to depose falsely and turn hostile on account of threats and coercion. That raises an important issue regarding witness protection besides the quality and credibility of the evidence before court. The other rather unusual question interestingly raised by the State of Gujarat itself relates to improper conduct of trial by the Public Prosecutor. Last, but not the least, that the role of the investigating agency itself was perfunctory and not impartial. Though its role is perceived differently by the parties, there is unanimity in their stand that it was tainted, biased and not fair. While the accused persons accuse it for alleged false implication, the victims' relatives like Zahira allege its efforts to be merely to protect the accused.

3. The appeals are against judgment of the Gujarat High Court in Criminal Appeal No. 956 of 2003 upholding acquittal of the respondents-accused by the trial court. Along with the said appeal, two other petitions, namely, Criminal Miscellaneous Application No. 10315 of 2003 and Criminal Revision No. 583 of 2003 were disposed of. The prayers made by the State for adducing additional evidence under Section 391 of the Code of Criminal Procedure, 1973 (in short "the Code"), and/or for directing retrial were rejected. Consequentially, prayer for examination of witnesses under Section 311 of the Code was also rejected.

4. In a nutshell, the prosecution version which led to trial of the accused persons is as follows:

Between 8.30 p.m. of 1-3-2002 and 11.00 a.m. of 2-3-2002, a business concern known as "Best Bakery" at Vadodara was burnt down by an unruly mob of a large number of people. In the ghastly incident 14 persons died. The attacks were stated to be a part of retaliatory action to avenge the killing of 56 persons burnt to death in *Sabarmati Express*. Zahira was the main eyewitness who lost family members including helpless women and innocent children in the gruesome incident. Many persons other than Zahira were also eyewitnesses. The accused persons were the perpetrators of the crime. After investigation charge-sheet was filed in June 2002.

5. During trial the purported eyewitnesses resiled from the statements made during investigation. Faulty and biased investigation as well as perfunctory trial were said to have marred the sanctity of the entire exercise undertaken to bring the culprits to book. By judgment dated 27-6-2003, the trial court directed acquittal of the accused persons.

6. Zahira appeared before the National Human Rights Commission (in short "the NHRC") stating that she was threatened by powerful politicians

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not to depose against the accused persons. On 7-8-2003 an appeal not up to the mark and neither in conformity with the required care, appears to have been filed by the State against the judgment of acquittal before the Gujarat High Court. NHRC moved this Court and its special leave petition has been treated as a petition under Article 32 of the Constitution of India. Zahira and another organisation — Citizens for Justice and Peace filed SLP (Crl.) No. 3770 of 2003 challenging the judgment of acquittal passed by the trial court. One Sahera Banu (sister of appellant Zahira) filed the aforenoted Criminal Revision No. 583 of 2003 before the High Court questioning the legality of the judgment returning a verdict of acquittal. The appellant State filed an application (Criminal Misc. Application No. 7677 of 2003) in terms of Sections 391 and 311 of the Code for permission to adduce additional evidence and for examination of certain persons as witness. Criminal Miscellaneous Application No. 9825 of 2003 was filed by the State to bring on record a document and to treat it as corroborative piece of evidence. By the impugned judgment

the appeal, revision and the applications were dismissed and rejected.

7. The State and Zahira had requested for a fresh trial primarily on the following grounds:

When a large number of witnesses have turned hostile, it should have raised a reasonable suspicion that the witnesses were being threatened or coerced. The Public Prosecutor did not take any step to protect the star witness who was to be examined on 17-5-2003 specially when four out of seven injured witnesses had on 9-5-2003 resiled from the statements made during investigation. Zahira Sheikh, the star witness had specifically stated on affidavit about the threat given to her and the reason for her not coming out with the truth during her examination before court on 17-5-2003.

8. The Public Prosecutor was not acting in a manner befitting the position held by him. He even did not request the trial court for holding the trial in camera when a large number of witnesses were resiling from the statements made during investigation.

9. The trial court should have exercised power under Section 311 of the Code and recalled and re-examined witnesses as their evidence was essential to arrive at the truth and a just decision in the case. The power under Section 165 of the Indian Evidence Act, 1872 (in short "the Evidence Act") was not resorted to at all and that also had led to miscarriage of justice.

10. The Public Prosecutor did not examine the injured witnesses. Exhibit 36/68 was produced by the Public Prosecutor which is a statement of one Rahish Khan on the commencement of the prosecution case, though the prosecution was neither relying on it nor was it called upon by the accused, to be produced before the court. The said statement was wrongly allowed to be exhibited and treated as FIR by the Public Prosecutor.

11. Statement of one eyewitness was recorded on 4-3-2002 by PI Baria at S.S.G. Hospital, Vadodara disclosing names of five accused persons and when he was sought to be examined before the Court, summons were issued to this person on 27-4-2003 for examination on 9-5-2003. It could not be

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served on the ground that he had left for his native place in Uttar Pradesh. Therefore, fresh summons were issued on 9-6-2003 for recording his evidence on the next day i.e. on 10-6-2003, giving only one day's time. When it could not be served, then summons were issued on 13-6-2003 for remaining present before the court on 16-6-2003. It could not be also served for the same reasons. Ultimately, the Public Prosecutor gave *purshis* for dropping him as witness and surprisingly the same was granted by the trial court. This goes to show that both the Public Prosecutor as well as the court were not only oblivious but also failed to discharge their duties. An important witness was not examined by the prosecutor on the ground that he, Sahejadkhan Hasankhan (PW 48) was of unsound mind. Though the witness was present, the Public Prosecutor dropped him on the ground that he was not mentally fit to depose. When such an application was made by the prosecution for dropping on the ground of mental deficiency, it was the duty of the learned trial Judge to at least make some minimum efforts to find out as to whether he was actually of unsound mind or not, by getting him examined by the Civil Surgeon or a doctor from the Psychiatric Department. This witness (PW 48) has received serious injuries and the doctor Meena (PW 9) examined him. She has not stated in her evidence that he was mentally deficient. The police has also not reported that this witness was of unsound mind. During investigation also it was never stated that he was of unsound mind. His statement was recorded on 6-3-2002.

12. Sahejadkhan Hasankhan, the witness was unconscious between 2-3-2002 — 6-3-2002. When he regained consciousness, his statement was recorded on 6-3-2002. He

gave names of four accused persons i.e. A-5, A-6, A-8 and A-11. This witness has also filed an affidavit before this Court in a pending matter narrating the whole incident. This clearly shows that the person was not of unsound mind as was manipulated by the prosecution to drop him.

13. In the case of one Shailun Hasankhan Pathan summons were issued on 9-6-2003 requiring his presence on 10-6-2003 which could not be served on him. He disclosed the names of three accused persons i.e. A-6, A-8 and A-11. This witness was also surprisingly treated to be of deficient mind without any material and even without taking any efforts to ascertain the truth or otherwise of such serious claims.

14. Similarly, one injured eyewitness Tufel Habibulla Sheikh was not examined, though he had disclosed the names of four accused i.e. A-5, A-6, A-8 and A-11. No summons was issued to this witness and he was not at all examined.

15. Another eyewitness Yasminbanu who had disclosed the names of A-5, A-6 and A-11 was also not examined. No reason whatsoever was disclosed for non-examination of this witness.

16. The affidavit filed by different witnesses before this Court highlighted as to how and why they have been kept unfairly out of trial. Lalmohamad Khudabax Shaikh (PW 15) was hurriedly examined on 27-5-2003 though summons was issued to him for remaining present on 6-6-2003.

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No reason has been indicated as to why he was examined before the date stipulated.

17. Strangely, the relatives of the accused were examined as witnesses for the prosecution obviously with a view that their evidence could be used to help the accused persons.

18. According to the appellant Zahira there was no fair trial and the entire effort during trial and at all relevant times before also was to see that the accused persons got acquitted. When the investigating agency helps the accused, the witnesses are threatened to depose falsely and the prosecutor acts in a manner as if he was defending the accused, and the court was acting merely as an onlooker and when there is no fair trial at all, justice becomes the victim.

19. According to Mr Sibal, learned counsel appearing for the appellant Zahira, the High Court has not considered the stand taken by the appellant and the State of Gujarat in the proper perspective. Essentially, two contentions were raised by the State before the High Court, in addition to the application filed by the appellant Zahira highlighting certain serious infirmities in the entire exercise undertaken. The State had made prayers for acceptance of certain evidence under Section 391 of the Code read with Section 311 of the Code. So far as the acceptance of additional evidence is concerned, the same related to affidavits filed by some injured witnesses who on account of circumstances indicated in the affidavits were forced not to tell the truth before the trial court, making justice a casualty. The affidavits in essence also highlighted the atmosphere that prevailed in the trial court. The affidavits in fact were not intended to be used as evidence. A prayer was made that the witnesses who had filed affidavits before this Court should be examined, so that the truth can be brought on record. The High Court surprisingly accepted the extreme stand of learned counsel for the accused persons that under Section 386 of the Code the court can 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. It was the stand of learned counsel for the accused before the High Court that by an indirect method certain materials were sought to be brought on record which should not be

permitted. The High Court while belittling and glossing over the serious infirmities and pitfalls in the investigation as well as trial, readily accepted the said stand and held that an attempt was being made to bring on record the affidavits by an indirect method, though they were not part of the record of the trial court. It further held that no one including the State can be allowed to take advantage of its own wrong and thereby make capricious exercise of powers in favour of the prosecution to fill in the lacuna, overlooking completely the obligation cast on the courts also to ensure that the truth should not become a casualty and substantial justice is not denied to the victims as well. With reference to these conclusions it was submitted that the High Court did not keep in view the true scope and ambit of Section 391 as also the need or desirability to resort to Section 311 of the

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Code and virtually rendered the provisions otiose by nullifying the very object behind those provisions. The conclusion that the appeal can be decided only on the basis of records brought before the High Court in terms of Section 385(2) would render Section 391 of the Code and other allied powers conferred upon courts to render justice completely nugatory.

20. Further, after having held that the affidavits were not to be taken on record, the High Court has recorded findings regarding contents of those affidavits, and has held that the affidavits are not truthful and are false. Unfortunately, the High Court has gone to the extent of saying that the appellant Zahira has been used by some persons with oblique motives. The witnesses who filed affidavits have been termed to be of unsound mind, untruthful and capable of being manipulated, without any material or reasonable and concrete basis to support such conclusions. In any event, the logic applied by the High Court to discard the affidavits of Zahira and others that they have fallen subsequently into the hands of some who remained behind the curtain, can be equally applied to accept the plea that the accused or persons acting at their behest only had created fear on the earlier occasion before deposing in court by threats, in the minds of Zahira and others. After having clearly concluded that the investigation was faulty and there were serious doubts about the genuineness of the investigation, it would have been proper for the High Court to accept the prayer made for additional evidence and/or retrial. Abrupt conclusions drawn about false implication not only cannot stand the test of scrutiny but also lack judicious approach and objective consideration, as is expected of a court.

21. Section 391 of the Code is intended to subserve the ends of justice by arriving at the truth and there is no question of filling of any lacuna in the case on hand. The provision though a discretionary one is hedged with the condition about the requirement to record reasons. All these aspects have been lost sight of and the judgment, therefore, is indefensible. It was submitted that this is a fit case where the prayer for retrial as a sequel to acceptance of additional evidence should be directed. Though, retrial is not the only result flowing from acceptance of additional evidence, in view of the peculiar circumstances of the case, the proper course would be to direct acceptance of additional evidence and in the fitness of things also order for a retrial on the basis of the additional evidence.

22. It was submitted by the appellants that in view of the atmosphere in which the case was tried originally, there should be a direction for a trial outside the State in case this Court thinks it so appropriate to direct, and evidence could be recorded by video-conferencing so that a hostile atmosphere can be avoided. It is further submitted that a fresh investigation should be directed as investigation already conducted was not done in a fair manner and the prosecutor did not act fairly. If the State's machinery fails to protect citizen's life, liberties and property and the investigation is conducted in a manner to help

the accused persons, it is but appropriate that this Court should step in to prevent undue miscarriage of justice that is perpetrated upon the victims and their family members.

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23. Mr Rohatgi, learned Additional Solicitor General appearing for the State of Gujarat in the appeal filed by it submitted that the application under consideration of the High Court was in terms of Section 311 and Section 391 of the Code. Though the nomenclature is really not material, the prayer was to permit the affidavits to be brought on record, admit and take additional evidence of the persons filing the affidavits by calling/recalling them in addition to certain directions for retrial if the High Court felt it to be so necessary after considering the additional evidence. Though there was no challenge to Zahira's locus standi to file an appeal, it is submitted that prayer for rehearing by another High Court and/or for trial outside the State cannot be countenanced and it is nobody's case that the courts in Gujarat cannot do complete justice and such moves do not serve anybody's purpose.

24. There is no proper reason indicated by the High Court to refuse to take on record the affidavits and the only inferable reason as it appears i.e. that the affidavits were also filed in this Court in another proceeding is no reason in the eye of the law. Admissibility of material is one thing and what is its worth is another thing and relates to acceptability of the evidence. Since they were relevant, being filed by alleged eyewitnesses, there was no basis for the High Court to discard them. Even if the appellant Zahira has taken different stands as concluded by the High Court, it was obligatory for the Court to find out as to what is the correct stand and real truth which could have been decided and examined by accepting the prayer for additional evidence. The High Court has, without any material or sufficient basis, come to hold that the FIR was manipulated, and the fax message referred to by the State could also have been manipulated. There is no basis for coming to such a conclusion. There was no material before the trial court to conclude that the FIR was lodged by one Rahish Khan, though the statement of appellant Zahira was anterior in point of time. The stand of the State was that it was relying on Zahira's version to be the FIR. The State had filed the application for acceptance of additional evidence as it was of the view that the FIR registered on the basis of Zahira's statement was an authentic one and no evidence aliunde was necessary. In the absence of even any material the abrupt conclusion about manipulation and the other conclusions of the High Court are perverse and also contradictory in the sense that after having said that affidavits were not to be brought on record, it went on to label it as not truthful. The High Court should not have thrown out the application as well as the materials sought to be brought on record even at the threshold and yet gone on to surmise on reasons, at the same time, professing to decide on its correctness.

25. The stands taken before the High Court to justify acceptance of additional evidence and directions for retrial were reiterated.

26. Mr Sushil Kumar, learned Senior Counsel for the accused submitted that it is not correct to say that application under Section 391 of the Code was not admitted. It was in fact admitted and rejected on merits. It is also not correct to say that the investigation was perfunctory. The affidavits sought to be brought on record were considered on their own merits. While Zahira's prayer was for fresh investigation, the State's appeal in essence was for fresh

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trial. The four persons whose affidavits were pressed into service were PWs 1, 6, 47 and

48. They were examined as PWs and there was no new evidence. There can be no re-examination on the pretext used by the State for retrial. The original appeal filed by the State was Appeal No. 956 of 2003. There was first an amendment in September 2003, and finally in December 2003. The stand got changed from time to time. What essentially was urged or sought for, related to fresh trial on the ground that investigation was not fair. The stand taken by the State in its appeal is also contrary to evidence on record. Though one of the grounds seeking fresh trial was the alleged deficiencies of the Public Prosecutor in conducting the trial and for not bringing on record the contradictions with reference to the statements recorded during investigation, in fact it has been done. There was nothing wrong in treating the statement of Rahish Khan as the FIR. The High Court has rightly concluded that Zahira's statement was manipulated as if she had given information at the first point of time which is belied by the fact that it reached the court concerned after three days. The High Court after analysing the evidence has correctly come to the conclusion that the police manipulated in getting false witnesses to rope in wrong people as the accused. Irrelevant and out-of-context submissions are said to have been made, and grounds taken and reliefs sought for by Zahira in her appeal.

27. Mr K.T.S. Tulsi, learned Senior Counsel also appearing for the accused persons in the appeal filed by the State submitted that in Section 311 the key words are "if his evidence appears to it to be essential to the just decision of the case". Therefore, the court must be satisfied that the additional evidence is necessary and it is not possible to arrive at a just conclusion on the basis of the records. For that purpose it has to apply its mind to the evidence already on record and thereafter decide whether it feels any additional evidence to be necessary. For that purpose, the court has to come to a prima facie conclusion that an appeal cannot be decided on the basis of materials existing on record. Therefore, before dealing with an application under Section 391 the court has to analyse the evidence already existing. Since the High Court in the instant case has analysed the evidence threadbare and come to the conclusion that the trial was fair and satisfactory and a positive conclusion has been arrived at after analysing the evidence, the question of pressing into service Section 391 of the Code does not arise.

28. In essence three points were urged by Mr Tulsi. They are as follows:

For the purpose of exercise of power under Section 391 of the Code, the court has to come to a conclusion about the necessity for additional evidence which could only be done after examining evidence on record. In other words, the court must arrive at a conclusion that the existing material is insufficient for the purpose of arriving at a just decision.

29. The High Court has undertaken an elaborate exercise for the purpose of arriving at the conclusion as to whether additional evidence was necessary after examining every relevant aspect. It has come to a definite conclusion that the trial of the case was fair, satisfactory and neither were any illegalities committed nor was any evidence wrongly accepted or rejected. The

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extraneous factors have been kept out of consideration as these may have influenced the witnesses in changing their evidence and giving a go-by to substantive evidence tendered in court. A need for giving finality to trial in criminal proceedings is paramount as otherwise prejudice is caused to the accused persons and in fact it would be a negation of the fundamental rule of law to make the accused to undergo trial once over which has the effect of derailing the system of justice. Elaborating the points it is submitted that if the court feels that additional evidence is not necessary after analysing the existing evidence and the nature of materials sought to be brought in, it cannot be said that the court has acted in a manner contrary to law. In fact, the High Court has felt that extraneous materials are now sought to be introduced and it is not known as to whether the present

statement of the witnesses is correct or what was stated before the trial court originally was the truth. The Court analysed the evidence of the material witnesses and noticed several relevant factors to arrive at this conclusion. The necessity and need for additional evidence has to be determined in the context of the need for a just decision and it cannot be used for filling up a lacuna. Reference is made to the decisions of this Court in *Jamatraj Kewalji Govani* v. *State of Maharashtra*[1] and *Mohanlal Shamji Soni* v. *Union of India*[2]. The High Court has also come to a definite conclusion that the submissions of the State and Sahera cannot be accepted because non-examination of certain persons was on account of the circumstances indicated by the trial court and that conclusion has been arrived at after analysing the factual background. There is no guarantee, as rightly observed by the High Court, that the subsequent affidavits are true. On the contrary, in the absence of any contemporary grievance having been made before the Court about any pressure or threat, the affidavits and the claims now sought to be made have been rightly discarded.

30. Right from the inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying existence of courts of justice. The operating principles for a fair trial permeate the common law in both civil and criminal contexts. Application of these principles involves a delicate judicial balancing of competing interests in a criminal trial, the interests of the accused and the public and to a great extent that of the victim have to be weighed not losing sight of the public interest involved in the prosecution of persons who commit offences.

31. In 1846, in a judgment which Lord Chancellor Selborne would later describe as "one of the ablest judgments of one of the ablest judges who ever sat in this court", Vice-Chancellor Knight Bruce said[2a]:

"The discovery and vindication and establishment of truth are main purposes certainly of the existence of courts of justice; still, for the obtaining of these objects, which, however valuable and important, cannot be usefully pursued without moderation, cannot be either usefully or creditably pursued unfairly or gained by unfair means, not every channel is or ought to be open to them. The practical inefficacy of torture is not, I suppose, the most weighty objection to that mode of examination… Truth, like all other good things, may be loved unwisely — may be pursued too keenly — may cost too much."

The Vice-Chancellor went on to refer to paying "too great a price … for truth". This is a formulation which has subsequently been frequently invoked, including by Sir Gerard Brennan. On another occasion, in a joint judgment of the High Court, a more expansive formulation of the proposition was advanced in the following terms: "The evidence has been obtained at a price which is unacceptable having regard to the prevailing community standards."

32. Restraints on the processes for determining the truth are multifaceted. They have emerged in numerous different ways, at different times and affect different areas of the conduct of legal proceedings. By the traditional common law method of induction there has emerged in our jurisprudence the principle of a fair trial. Oliver Wendell Holmes described the process:

"It is the merit of the common law that it decides the case first and determines the principle afterwards…. It is only after a series of determination on the same subject-matter, that it becomes necessary to 'reconcile the cases', as it is called, that is, by a true induction to state the principle which has until then been obscurely felt. And this statement is often modified more than once by new decisions before the abstracted

general rule takes its final shape. A well-settled legal doctrine embodies the work of many minds, and has been tested in form as well as substance by trained critics whose practical interest is to resist it at every step."

33. The principle of fair trial now informs and energises many areas of the law. It is reflected in numerous rules and practices. It is a constant, ongoing development process continually adapted to new and changing circumstances, and exigencies of the situation — peculiar at times and related to the nature of crime, persons involved — directly or operating behind, social impact and societal needs and even so many powerful balancing factors which may come in the way of administration of criminal justice system.

34. As will presently appear, the principle of a fair trial manifests itself in virtually every aspect of our practice and procedure, including the laws of evidence. There is, however, an overriding and, perhaps, unifying principle. As Deane, J. put it:

"It is desirable that the requirement of fairness be separately identified since it transcends the content of more particularized legal rules and principles and provides the ultimate rationale and touchstone of

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the rules and practices which the common law requires to be observed in the administration of the substantive criminal law."

35. 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 are 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 are not to be treated completely with disdain and as persona non grata. Courts have always been considered to have an overriding 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.

36. 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 the 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 a Nelson's eye 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.

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37. While dealing with the claims for the transfer of a case under Section 406 of the Code from one State to another, this Court in *Maneka Sanjay Gandhi* v. *Rani Jethmalani*[3] emphasised the necessity to ensure fair trial, observing as hereunder: (SCC pp. 169 & 170-71, paras 2 & 5-7)

> "*2*. Assurance of a fair trial is the first imperative of the dispensation of justice and the central criterion for the court to consider when a motion for transfer is made is not the hypersensitivity or relative convenience of a party or easy availability of legal services or like mini-grievances. Something more substantial, more compelling, more imperilling, from the point of view of public justice and its attendant environment, is necessitous if the court is to exercise its power of transfer. This is the cardinal principle although the circumstances may be myriad and vary from case to case. We have to test the petitioner's grounds on this touchstone bearing in mind the rule that normally the complainant has the right to choose any court having jurisdiction and the accused cannot dictate where the case against him should be tried. Even so, the process of justice should not harass the parties and from that angle the court may weigh the circumstances.
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> *5*. A more serious ground which disturbs us in more ways than one is the alleged absence of congenial atmosphere for a fair and impartial trial. It is becoming a frequent phenomenon in our country that court proceedings are being disturbed by rude hoodlums and unruly crowds, jostling, jeering or cheering and disrupting the judicial hearing with menaces, noises and worse. This tendency of toughs and street roughs to violate the serenity of court is obstructive of the course of justice and must surely be stamped out. Likewise, the safety of the person of an accused or complainant is an essential condition for participation in a trial and where that is put in peril by commotion, tumult or threat on account of pathological conditions prevalent in a particular venue, the request for a transfer may not be dismissed summarily. It causes disquiet and concern to a court of justice if a person seeking justice is unable to appear, present one's case, bring one's witnesses or adduce evidence. Indeed, it is the duty of the court to assure propitious conditions which conduce to comparative tranquillity at the trial. Turbulent conditions putting the accused's life in danger or creating chaos inside the court hall may jettison public justice. If this vice is peculiar to a particular place and is persistent the transfer of the case from that place may become necessary. Likewise, if there is general consternation or atmosphere of tension or raging masses of people in the entire region taking sides and polluting the climate, vitiating the necessary neutrality to hold a detached judicial trial, the situation may be said to have deteriorated to such an extent as to warrant transfer. In a decision cited by the counsel for the petitioner, Bose, J., observed:
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'... But we do feel that good grounds for transfer from Jashpurnagar are made out because of the bitterness of local communal feeling and the tenseness of the atmosphere there. Public confidence in the fairness of a trial held in such an atmosphere would be seriously undermined, particularly among reasonable Christians all over India not because the Judge was unfair or biased but because the machinery of justice is not geared to work in the midst of such conditions. The calm detached atmosphere of a fair and impartial judicial trial would be wanting, and even if justice were done it would not be "seen to be done".' (*G.X. Francis* v. *Banke Bihari Singh*[4])

6. Accepting this perspective we must approach the facts of the present case without excitement, exaggeration or eclipse of a sense of proportion. It may be true that the petitioner attracts a crowd in Bombay. Indeed, it is true of many controversial figures in public life that their presence in a public place gathers partisans for and against, leading to cries and catcalls or 'jais' or 'zindabads'. Nor is it unnatural that some persons may have acquired, for a time a certain quality of reputation, sometimes notoriety, sometimes glory, which may make them the cynosure of popular attention when they appear in cities even in a court. And when unkempt crowds press into a court hall it is possible that some pushing, some nudging, some brash ogling or angry staring may occur in the rough and tumble resulting in ruffled feelings for the victim. This is a far cry from saying that the peace inside the court has broken down, that calm inside the court is beyond restoration, that a tranquil atmosphere for holding the trial is beyond accomplishment or that operational freedom for judge, parties, advocates and witnesses has ceased to exist. None of the allegations made by the petitioner, read in the pragmatic light of the counter-averments of the respondent and understood realistically, makes the contention of the counsel credible that a fair trial is impossible. Perhaps, there was some rough weather but it subsided, and it was a storm in the tea cup or transient tension to exaggerate which is unwarranted. The petitioner's case of great insecurity or molestation to the point of threat to life is, so far as the record bears out, difficult to accept. The mere word of an interested party is insufficient to convince us that she is in jeopardy or the court may not be able to conduct the case under conditions of detachment, neutrality or uninterrupted progress. We are disinclined to stampede ourselves into conceding a transfer of the case on this score, as things stand now.

7. Nevertheless, we cannot view with unconcern the potentiality of a flare-up and the challenge to a fair trial, in the sense of a satisfactory participation by the accused in the proceedings against her. Mob action may throw out of gear the wheels of the judicial process. Engineered fury may paralyse a party's ability to present his case or participate in the

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trial. If the justice system grinds to a halt through physical manoeuvres or sound and fury of the senseless populace the rule of law runs aground. Even the most hated human anathema has a right to be heard without the rage of ruffians or huff of toughs being turned against him to unnerve him as party or witness or advocate. Physical violence to a party, actual or imminent, is reprehensible when he seeks justice before a tribunal. Manageable solutions must not sweep this Court off its feet into granting an easy transfer but uncontrollable or perilous deterioration will surely persuade us to shift the venue. It depends. The frequency of mobbing manoeuvres in court precincts is a bad omen for social justice in its wider connotation. We, therefore, think it necessary to make a few cautionary observations which will be sufficient, as we see at present, to protect the petitioner and ensure for her a fair trial."

38. 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 to 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.

39. Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. It is inherent in the concept of due process of law, that condemnation should be rendered only after the trial in which the hearing is a real one, not sham or a mere farce and pretence. Since the fair hearing requires an opportunity to preserve the process, it may be vitiated and violated by an overhasty, stage-managed, tailored and partisan trial.

40. 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.

41. "Witnesses", as Bentham said: are the eyes and ears of justice. Hence, the importance and primacy of the quality of trial process. If the witness himself is incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralysed, and it no longer can constitute a fair trial. The incapacitation may be due to several factors like the witness being not in a position for reasons beyond control to speak the truth in the court or due to negligence or ignorance or some corrupt collusion. Time has become ripe to act on account of numerous experiences faced by courts on account of frequent turning of witnesses as hostile, either due to threats, coercion, lures and monetary considerations at the instance of those in power, their henchmen and hirelings, political clout and patronage and innumerable other

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corrupt practices ingeniously adopted to smother and stifle truth and realities coming out to surface rendering truth and justice to become ultimate casualties. Broader public and societal interests require that the victims of the crime who are not ordinarily parties to prosecution and the interests of State represented by their prosecuting agencies do not suffer even in slow process but irreversibly and irretrievably, which if allowed would undermine and destroy public confidence in the administration of justice, which may ultimately pave way for anarchy, oppression and injustice resulting in complete breakdown and collapse of the edifice of rule of law, enshrined and jealously guarded and protected by the Constitution. There comes the need for protecting the witness. Time has come when serious and undiluted thoughts are to be bestowed for protecting witnesses so that ultimate truth is presented before the court and justice triumphs and that the trial is not reduced to a mockery. The State has a definite role to play in protecting the witnesses, to start with at least in sensitive cases involving those in power, who have political patronage and could wield muscle and money power, to avert the trial getting tainted and derailed and truth becoming a casualty. As a protector of its citizens it has to ensure that during a trial in court the witness could safely depose the truth without any fear of being haunted by those against whom he has deposed. Some legislative enactments like the Terrorist and Disruptive Activities (Prevention) Act, 1987 (in short "the TADA Act") have taken note of the reluctance shown by witnesses to depose against dangerous criminals/terrorists. In a milder form also the reluctance and the hesitation of

witnesses to depose against people with muscle power, money power or political power has become the order of the day. If ultimately truth is to be arrived at, the eyes and ears of justice have to be protected so that the interests of justice do not get incapacitated in the sense of making the proceedings before courts mere mock trials as are usually seen in movies.

42. Legislative measures to emphasise prohibition against tampering with witness, victim or informant have become the imminent and inevitable need of the day. Conducts which illegitimately affect the presentation of evidence in proceedings before the courts have to be seriously and sternly dealt with. There should not be any undue anxiety to only protect the interest of the accused. That would be unfair as noted above to the needs of the society. On the contrary, the efforts should be to ensure fair trial where the accused and the prosecution both get a fair deal. Public interest in the proper administration of justice must be given as much importance, if not more, as the interests of the individual accused. In this courts have a vital role to play.

43. The courts have to take a participatory role in a trial. They are not expected to be tape recorders to record whatever is being stated by the witnesses. Section 311 of the Code and Section 165 of the Evidence Act confer vast and wide powers on presiding officers of court to elicit all necessary materials by playing an active role in the evidence-collecting process. They have to monitor the proceedings in aid of justice in a manner that something, which is not relevant, is not unnecessarily brought into record. Even if the prosecutor is remiss in some ways, it can control the proceedings effectively so that the ultimate objective i.e. truth is arrived at.

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This becomes more necessary where the court has reasons to believe that the prosecuting agency or the prosecutor is not acting in the requisite manner. The court cannot afford to be wishfully or pretend to be blissfully ignorant or oblivious to such serious pitfalls or dereliction of duty on the part of the prosecuting agency. The prosecutor who does not act fairly and acts more like a counsel for the defence is a liability to the fair judicial system, and courts could not also play into the hands of such prosecuting agency showing indifference or adopting an attitude of total aloofness.

44. The power of the court under Section 165 of the Evidence Act is in a way complementary to its power under Section 311 of the Code. The section consists of two parts i.e.: (*i*) giving a discretion to the court to examine the witness at any stage, and (*ii*) the mandatory portion which compels the court to examine a witness if his evidence appears to be essential to the just decision of the court. Though the discretion given to the court is very wide, the very width requires a corresponding caution. In *Mohanlal* v. *Union of India*[2] this Court has observed, while considering the scope and ambit of Section 311, that the very usage of the words such as, "any court", "at any stage", or "any enquiry or trial or other proceedings", "any person" and "any such person" clearly spells out that the section has expressed in the widest-possible terms and do not limit the discretion of the court in any way. However, as noted above, the very width requires a corresponding caution that the discretionary powers should be invoked as the exigencies of justice require and exercised judicially with circumspection and consistently with the provisions of the Code. The second part of the section does not allow any discretion but obligates and binds the court to take necessary steps if the fresh evidence to be obtained is essential to the just decision of the case, "essential" to an active and alert mind and not to one which is bent to abandon or abdicate. Object of the section is to enable the court to arrive at the truth irrespective of the fact that the prosecution or the defence has failed to produce some evidence which is necessary for a just and proper disposal of the case. The power is exercised and the evidence is examined neither to help the prosecution nor the

defence, if the court feels that there is necessity to act in terms of Section 311 but only to subserve the cause of justice and public interest. It is done with an object of getting the evidence in aid of a just decision and to uphold the truth.

45. It is not that in every case where the witness who had given evidence before court wants to change his mind and is prepared to speak differently, that the court concerned should readily accede to such request by lending its assistance. If the witness who deposed one way earlier comes before the appellate court with a prayer that he is prepared to give evidence which is materially different from what he has given earlier at the trial with the reasons for the earlier lapse, the court can consider the genuineness of the prayer in the context as to whether the party concerned had a fair opportunity to speak the truth earlier and in an appropriate case, accept it. It is not that the power is to be exercised in a routine manner, but being an exception to the ordinary rule of disposal of appeal on the basis of records received in exceptional cases or extraordinary situation the court can neither feel

powerless nor abdicate its duty to arrive at the truth and satisfy the ends of justice. The court can certainly be guided by the metaphor, separate the grain from the chaff, and in a case which has telltale imprint of reasonableness and genuineness in the prayer, the same has to be accepted, at least to consider the worth, credibility and the acceptability of the same on merits of the material sought to be brought in.

46. Ultimately, as noted above, ad nauseam the duty of the court is to arrive at the truth and subserve the ends of justice. Section 311 of the Code does not confer on any party any right to examine, cross-examine and re-examine any witness. This is a power given to the court not to be merely exercised at the bidding of any one party/person but the powers conferred and discretion vested are to prevent any irretrievable or immeasurable damage to the cause of society, public interest and miscarriage of justice. Recourse may be had by courts to power under this section only for the purpose of discovering relevant facts or obtaining proper proof of such facts as are necessary to arrive at a just decision in the case.

47. Section 391 of the Code is another salutary provision which clothes the courts with the power to effectively decide an appeal. Though Section 386 envisages the normal and ordinary manner and method of disposal of an appeal, yet it does not and cannot be said to exhaustively enumerate the modes by which alone the court can deal with an appeal. Section 391 is one such exception to the ordinary rule and if the appellate court considers additional evidence to be necessary, the provisions in Section 386 and Section 391 have to be harmoniously considered to enable the appeal to be considered and disposed of also in the light of the additional evidence as well. For this purpose it is open to the appellate court to call for further evidence before the appeal is disposed of. The appellate court can direct the taking up of further evidence in support of the prosecution; a fortiori it is open to the court to direct that the accused persons may also be given a chance of adducing further evidence. Section 391 is in the nature of an exception to the general rule and the powers under it must also be exercised with great care, especially on behalf of the prosecution lest the admission of additional evidence for the prosecution operates in a manner prejudicial to the defence of the accused. The primary object of Section 391 is the prevention of a guilty man's escape through some careless or ignorant proceedings before a court or vindication of an innocent person wrongfully accused. Where the court through some carelessness or ignorance has omitted to record the circumstances essential to elucidation of truth, the exercise of powers under Section 391 is desirable.

48. The legislative intent in enacting Section 391 appears to be the empowerment of the appellate court to see that justice is done between the prosecutor and the persons

prosecuted and if the appellate court finds that certain evidence is necessary in order to enable it to give a correct and proper finding, it would be justified in taking action under Section 391.

49. There is no restriction in the wording of Section 391 either as to the nature of the evidence or that it is to be taken for the prosecution only or that

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the provisions of the section are only to be invoked when formal proof for the prosecution is necessary. If the appellate court thinks that it is necessary in the interest of justice to take additional evidence, it shall do so. There is nothing in the provision limiting it to cases where there has been merely some formal defect. The matter is one of discretion of the appellate court. As reiterated supra, the ends of justice are not satisfied only when the accused in a criminal case is acquitted. The community acting through the State and the Public Prosecutor is also entitled to justice. The cause of the community deserves equal treatment at the hands of the court in the discharge of its judicial functions.

50. In *Rambhau* v. *State of Maharashtra*[5] it was held that the object of Section 391 is not to fill in lacuna, but to subserve the ends of justice. The court has to keep these salutary principles in view. Though wide discretion is conferred on the court, the same has to be exercised judicially and the legislature had put the safety valve by requiring recording of reasons.

51. Need for circumspection was dealt with by this Court in *Mohanlal Shamji Soni case*[2] and *Ram Chander* v. *State of Haryana*[6] which dealt with the corresponding Section 540 of the Code of Criminal Procedure, 1898 (in short "the old Code") and also in *Jamatraj case*[1]. While dealing with Section 311 this Court in *Rajendra Prasad* v. *Narcotic Cell*[7] held as follows: (SCC p. 113, paras 7-8)

> "*7*. It is a common experience in criminal courts that defence counsel would raise objections whenever courts exercise powers under Section 311 of the Code or under Section 165 of the Evidence Act, 1872 by saying that the court could not 'fill the lacuna in the prosecution case'. A lacuna in the prosecution is not to be equated with the fallout of an oversight committed by a Public Prosecutor during trial, either in producing relevant materials or in eliciting relevant answers from witnesses. The adage 'to err is human' is the recognition of the possibility of making mistakes to which humans are prone. A corollary of any such laches or mistakes during the conducting of a case cannot be understood as a lacuna which a court cannot fill up.
>
> *8*. Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be foreclosed from correcting errors. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified. After all, function of the criminal court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better."

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52. Whether a retrial under Section 386 or taking up of additional evidence under Section 391 is the proper procedure will depend on the facts and circumstances of each case for

which no straitjacket formula of universal and invariable application can be formulated.

53. In the ultimate analysis whether it is a case covered by Section 386 or Section 391 of the Code, the underlying object which the court must keep in view is the very reason for which the courts exist i.e. to find out the truth and dispense justice impartially and ensure also that the very process of courts are not employed or utilized in a manner which give room to unfairness or lend themselves to be used as instruments of oppression and injustice.

54. Though justice is depicted to be blindfolded, as popularly said, it is only a veil not to see who the party before it is while pronouncing judgment on the cause brought before it by enforcing law and administer justice and not to ignore or turn the mind/attention of the court away from the truth of the cause or lis before it, in disregard of its duty to prevent miscarriage of justice. When an ordinary citizen makes a grievance against the mighty administration, any indifference, inaction or lethargy shown in protecting his right guaranteed in law will tend to paralyse by such inaction or lethargic action of courts and erode in stages the faith inbuilt in the judicial system ultimately destroying the very justice-delivery system of the country itself. Doing justice is the paramount consideration and that duty cannot be abdicated or diluted and diverted by manipulative red herrings.

55. The courts, at the expense of repetition we may state, exist for doing justice to the persons who are affected. The trial/first appellate courts cannot get swayed by abstract technicalities and close their eyes to factors which need to be positively probed and noticed. The court is not merely to act as a tape recorder recording evidence, overlooking the object of trial i.e. to get at the truth. It cannot be oblivious to the active role to be played for which there is not only ample scope, but sufficient powers conferred under the Code. It has a greater duty and responsibility i.e. to render justice, in a case where the role of the prosecuting agency itself is put in issue and is said to be hand in glove with the accused, parading a mock fight and making a mockery of the criminal justice administration itself.

56. As pithily stated in *Jennison* v. *Baker*[8]: (All ER p. 1006*d*)

> "The law should not be seen to sit by limply, while those who defy it go free, and those who seek its protection lose hope."

Courts have to ensure that accused persons are punished and that the might or authority of the State are not used to shield themselves or their men. It should be ensured that they do not wield such powers which under the Constitution has to be held only in trust for the public and society at large. If deficiency in investigation or prosecution is visible or can be perceived by lifting the veil trying to hide the realities or covering the obvious deficiencies, courts have to deal with the same with an iron hand appropriately within the framework of

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law. It is as much the duty of the prosecutor as of the court to ensure that full and material facts are brought on record so that there might not be miscarriage of justice. (See *Shakila Abdul Gafar Khan* v. *Vasant Raghunath Dhoble*[9].)

57. This Court in *Vineet Narain* v. *Union of India*[10] has directed that steps should be taken immediately for the constitution of able and impartial agency comprising persons of unimpeachable integrity to perform functions akin to those of the Director of Prosecution in England. In the United Kingdom, the Director of Prosecution was created in 1879. His appointment is by the Attorney General from amongst the members of the Bar and he functions under the supervision of the Attorney General. The Director of Prosecution plays a vital role in the prosecution system. He even administers "Witness Protection Programmes". Several countries, for example Australia, Canada and USA have even

enacted legislation in this regard. The Witness Protection Programmes are imperative as well as imminent in the context of the alarming rate of somersaults by witnesses with ulterior motives and purely for personal gain or fear for security. It would be a welcome step if something along those lines is done in our country. That would be a step in the right direction for a fair trial. Expression of concern merely in words without really the mind to concretise it by positive action would be not only useless but also amounts to betrayal of public confidence and trust imposed.

58. Though it was emphasised with great vehemence by Mr Sushil Kumar and Mr K.T.S. Tulsi that the High Court dealt with the application under Section 391 of the Code in detail and not perfunctorily as contended by learned counsel for the appellants, we find that nowhere the High Court has effectively dealt with the application under Section 391 as a part of the exercise to deal with and dispose of the appeal. In fact the High Court dealt with it practically in one paragraph i.e. para 36 of the judgment accepting the stand of learned counsel for the accused that the consideration of the appeal has to be limited to the records set up under Section 385(2) of the Code for disposal of the appeal under Section 386. This perception of the powers of the appellate court and misgivings as to the manner of disposal of an appeal per se vitiates the decision rendered by the High Court. Section 386 of the Code deals with the manner and disposal of the appeal in the normal or ordinary course. Section 391 is in the nature of exception to Section 386. As was observed in *Rambhau case*[5] if the stand of learned counsel for the accused as was accepted by the High Court is maintained, it would mean that Section 391 of the Code would be a dead letter in the statute book. The necessity for additional evidence arises when the court feels that some evidence which ought to have been before it is not there or that some evidence has been left out or erroneously brought in. In all cases it cannot be laid down as a rule of universal application that the court has to first find out whether the evidence already on record is sufficient. The nature and quality of the evidence on record is also relevant. If the evidence already on record is

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shown or found to be tainted, tailored to suit or help a particular party or side and the real truth has not and could not have been spoken or brought forth during trial, it would constitute merely an exercise in futility, if it considered first whether the evidence already on record is sufficient to dispose of the appeals. Disposal of appeal does not mean disposal for statistical purposes but effective and real disposal to achieve the object of any trial. The exercise has to be taken up together. It is not that the Court has to be satisfied that the additional evidence would be necessary for rendering a verdict different from what was rendered by the trial court. In a given case even after assessing the additional evidence, the High Court can maintain the verdict of the trial court and similarly the High Court on consideration of the additional evidence can upset the trial court's verdict. It all depends upon the relevance and acceptability of the additional evidence and its qualitative worth in deciding the guilt or innocence of the accused.

59. Merely because the High Court permits additional evidence to be adduced, it does not necessarily lead to the conclusion that the judgment of the trial court was wrong. That decision has to be arrived at after assessing the evidence that was before the trial court and the additional evidence permitted to be adduced. The High Court has observed that question of accepting application for additional evidence will be dealt with separately, and in fact dealt with it in a cryptic manner, practically in one paragraph, and did not think it necessary to accept the additional evidence. But at the same time made threadbare analysis of the affidavits as if it had accepted it as additional evidence and was testing its acceptability. Even the conclusions arrived at with reference to those affidavits do not appear to be correct and seem to suffer from apparent judicial obstinacy and avowed

determination to reject it. For example, to brand a person as not truthful because a different statement was given before the trial court unmindful of the earliest statement given during investigation and the reasons urged for turning hostile before court negates the legislative intent and purpose of incorporating Section 391 in the Code. The question of admission of evidence initially or as additional evidence under Section 391 is distinct from the efficacy, reliability and its acceptability for consideration of claims in the appeal on merits. It is only after admission, the court should consider in each case whether on account of earlier contradiction before court and the testimony allowed to be given as additional evidence, which of them or any one part or parts of the depositions are creditworthy and acceptable, after a comparative analysis and consideration of the probabilities and probative value of the materials for adjudging the truth. To reject it merely because of contradiction and that too in a sensitised case like the one before the Court with a horror and terror oriented history of its own would amount to conspicuous omission and deliberate dereliction of discharging functions judiciously and with a justice-oriented mission. In a given case when the Court is satisfied that for reasons on record the witness had not stated truthfully before the trial court and was willing to speak the truth before it, the power under Section 391 of the Code is to be exercised. It is to be noted at this stage that it is not the prosecution

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which alone can file an application under Section 391 of the Code. It can also be done, in an appropriate case by the accused to prove his innocence. Therefore, any approach without pragmatic consideration defeats the very purpose for which Section 391 of the Code has been enacted. Certain observations of the High Court like, that if the accused persons were really guilty they would not have waited for long to commit offences or that they would have killed the victims in the night taking advantage of the darkness and/or that the accused persons had saved some persons belonging to the other community, were not only immaterial for the purpose of adjudication of application for additional evidence but such surmises could have been carefully avoided at least in order to observe and maintain the judicial calm and detachment required of the learned Judges in the High Court. The conclusions of the High Court that 65 to 70 persons belonging to the attacked community were saved by the accused or others appears to be based on the evidence of the relatives of the accused who were surprisingly examined by the prosecution. We shall deal with the propriety of examining such persons, infra. These aspects could have been, if at all permissible to be done, considered after accepting the prayer for additional evidence. It is not known as to what extent these irrelevant materials have influenced the ultimate judgment of the High Court, in coming with such a strong and special plea in favour of a prosecuting agency which has miserably failed to demonstrate any credibility by its course of action. The entire approach of the High Court suffers from serious infirmities, its conclusions lopsided and lacks proper or judicious application of mind. Arbitrariness is found writ large on the approach as well as the conclusions arrived at in the judgment under challenge, in unreasonably keeping out relevant evidence from being brought on record.

60. Right from the beginning, the stand of the appellant Zahira was that the investigating agency was trying to help the accused persons and so was the Public Prosecutor. If the investigation was faulty, it was not the fault of the victims or the witnesses. If the same was done in a manner with the object of helping the accused persons as it appears to be apparent from what has transpired so far, it was an additional ground just and reasonable as well for accepting the additional evidence.

61. 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.*[11])

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62. In *Paras Yadav* v. *State of Bihar*[12] it was held that if the lapse or omission is committed by the investigating agency designedly or because of negligence, the prosecution evidence is required to be examined dehors such omissions to find out whether the said evidence is reliable or not. The contaminated conduct of officials should not stand in the way of courts getting at the truth by having recourse to Sections 311, 391 of the Code and Section 165 of the Evidence Act at the appropriate and relevant stages and evaluating the entire evidence; otherwise the designed mischief would be perpetuated with a premium to the offenders and justice would not only be denied to the complainant party but also made an ultimate casualty.

63. As was observed in *Ram Bihari Yadav* v. *State of Bihar*[13] if primacy is given to such designed or negligent investigation, to the omission or lapses by perfunctory investigation or omissions, the faith and confidence of the people would be shaken not only in the law-enforcing agency but also in the administration of justice in the hands of courts. The view was again reiterated in *Amar Singh* v. *Balwinder Singh*[14].

64. It is no doubt true that the accused persons have been acquitted by the trial court and the acquittal has been upheld, but if the acquittal is unmerited and based on tainted evidence, tailored investigation, unprincipled prosecutor and perfunctory trial and evidence of threatened/terrorised witnesses, it is no acquittal in the eye of the law and no sanctity or credibility can be attached and given to the so-called findings. It seems to be nothing but a travesty of truth, fraud on the legal process and the resultant decisions of courts — coram non judis and non est. There is, therefore, every justification to call for interference in these appeals.

65. In a country like ours with heterogeneous religions and multiracial and multilingual society which necessitates protection against discrimination on the ground of caste or religion taking lives of persons belonging to one or the other religion is bound to have dangerous repercussions and reactive effect on the society at large and may tend to encourage fissiparous elements to undermine the unity and security of the nation on account of internal disturbances. It strikes at the very root of an orderly society, which the founding fathers of our Constitution dreamt of.

66. When the ghastly killings take place in the land of Mahatma Gandhi, it raises a very pertinent question as to whether some people have become so bankrupt in their ideology that they have deviated from everything which was so dear to him. When a large number of people including innocent and helpless children and women are killed in a diabolic manner it brings disgrace to the entire society. Criminals have no religion. No religion teaches violence and cruelty-based religion is no religion at all, but a mere cloak to usurp power by fanning ill feeling and playing on feelings aroused thereby. The golden thread passing through every religion is love and compassion.

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The fanatics who spread violence in the name of religion are worse than terrorists and more dangerous than an alien enemy.

67. The little drops of humanness which jointly make humanity a cherished desire of mankind had seemingly dried up when the perpetrators of the crime had burnt alive helpless women and innocent children. Was it their fault that they were born in the houses of persons belonging to a particular community? The still, staid music of humanity had become silent when it was forsaken by those who were responsible for the killings.

"Little drops of water,
Little grains of sand,
Make the mighty ocean
And the pleasant land,
Little deeds of kindness,
Little words of love,
Help to make earth happy
Like the heaven above"

said Julia A.F. Cabney in "*Little Things*".

68. If one even cursorily glances through the records of the case, one gets a feeling that the justice-delivery system was being taken for a ride and literally allowed to be abused, misused and mutilated by subterfuge. The investigation appears to be perfunctory and anything but impartial without any definite object of finding out the truth and bringing to book those who were responsible for the crime. The Public Prosecutor appears to have acted more as a defence counsel than one whose duty was to present the truth before the Court. The Court in turn appeared to be a silent spectator, mute to the manipulations and preferred to be indifferent to sacrilege being committed to justice. The role of the State Government also leaves much to be desired. One gets a feeling that there was really no seriousness in the State's approach in assailing the trial court's judgment. This is clearly indicated by the fact that the first memorandum of appeal filed was an apology for the grounds. A second amendment was done, that too after this Court expressed its unhappiness over the perfunctory manner in which the appeal was presented and the challenge made. That also was not the end of the matter. There was a subsequent petition for amendment. All this sadly reflects on the quality of determination exhibited by the State and the nature of seriousness shown to pursue the appeal. Criminal trials should not be reduced to be mock trials or shadow-boxing or fixed trials. Judicial criminal administration system must be kept clean and beyond the reach of whimsical political wills or agendas and properly insulated from discriminatory standards or yardsticks of the type prohibited by the mandate of the Constitution.

69. Those who are responsible for protecting life and properties and ensuring that investigation is fair and proper seem to have shown no real anxiety. Large number of people had lost their lives. Whether the accused

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persons were really assailants or not could have been established by a fair and impartial investigation. The modern-day "Neros" were looking elsewhere when Best Bakery and innocent children and helpless women were burning, and were probably deliberating how the perpetrators of the crime can be saved or protected. Law and justice become flies in the hands of these "wanton boys". When fences start to swallow the crops, no scope will be left for survival of law and order or truth and justice. Public order as well as public interest become martyrs and monuments.

70. In the background of principles underlying Section 311 and Section 391 of the Code and Section 165 of the Evidence Act, it has to be seen as to whether the High Court's approach is correct and whether it had acted justly, reasonably and fairly in placing premiums on the serious lapses of grave magnitude by the prosecuting agencies

and the trial court, as well. There are several infirmities which are telltale even to the naked eye of even an ordinary common man. The High Court has come to a definite conclusion that the investigation carried out by the police was dishonest and faulty. That was and should have been per se sufficient justification to direct a retrial of the case. There was no reason for the High Court to come to further conclusion of its own about false implication without concrete basis and that too merely on conjectures. On the other hand, the possibility of the investigating agency trying to shield the accused persons keeping in view the methodology adopted and out-turn of events can equally be not ruled out. When the investigation is dishonest and faulty, it cannot be only with the purpose of false implication. It may also be noted at this stage that the High Court has even gone to the extent of holding that the FIR was manipulated. There was no basis for such a presumptive remark or arbitrary conclusion.

71. The High Court has come to a conclusion that Zahira seems to have unfortunately for some reasons after the pronouncement of the judgment fallen into the hands of some who prefer to remain behind the curtain to come out with the affidavit alleging threat during trial. It has rejected the application for adducing additional evidence on the basis of the affidavit, but has found fault with the affidavit and hastened to conclude unjustifiably that they are far from truth by condemning those who were obviously victims. The question whether they were worthy of credence, and whether the subsequent stand of the witnesses was correct needed to be assessed, and adjudged judiciously on objective standards which are the hallmark of a judicial pronouncement. Such observations, if at all, could have been only made after accepting the prayer for additional evidence. The disclosed purpose in the State Government's prayer with reference to the affidavits was to bring to the High Court's notice the situation which prevailed during trial and the reasons as to why the witnesses gave the version as noted by the trial court. Whether the witnesses had told the truth before the trial court or as stated in the affidavit, were matters for assessment of evidence when admitted and tendered and when the affidavit itself was not tendered as evidence, the question of analysing it to find fault was not the proper course to be adopted. The affidavits were filed to emphasise the need for permitting

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additional evidence to be taken and for being considered as the evidence itself. The High Court has also found that some persons were not present and, therefore, question of their statement being recorded by the police did not arise. For coming to this conclusion, the High Court noted that the statements under Section 161 of the Code were recorded in Gujarati language though the witnesses did not know Gujarati. The reasoning is erroneous for more reasons than one. There was no material before the High Court for coming to a finding that the persons did not know Gujarati since there may be a person who could converse fluently in a language though not a literate to read and write. Additionally, it is not a requirement in law that the statement under Section 161 of the Code has to be recorded in the language known to the person giving the statement. As a matter of fact, the person giving the statement is not required to sign the statement as is mandated in Section 162 of the Code. Sub-section (1) of Section 161 of the Code provides that the competent police officer may examine orally any person supposed to be acquainted with the facts and circumstances of the case. Requirement is the examination by the police officer concerned. Sub-section (3) is relevant, and it requires the police officer to reduce to writing any statement made to him in the course of an examination under this section; and if he does so, he shall make a separate and true record of the statement of each such person whose statement he records. Statement made by a witness to the police officer during investigation may be reduced to writing. It is not obligatory on the part of the

police officer to record any statement made to him. He may do so if he feels it necessary. What is enjoined by the section is a truthful disclosure by the person who is examined. In the above circumstances the conclusion of the High Court holding that the persons were not present is untenable. The reasons indicated by the High Court to justify non-examination of the eyewitnesses is also not sustainable. In respect of one it has been said that whereabouts of the witness may not be known. There is nothing on record to show that the efforts were made by the prosecution to produce the witness for tendering evidence and yet the net result was "untraceable". In other words, the evidence which should have been brought before the Court was not done with any meticulous care or seriousness. It is true that the prosecution is not bound to examine each and every person who has been named as witness. A person named as a witness may be given up when there is material to show that he has been gained over or that there is no likelihood of the witness speaking the truth in the court. There was no such material brought to the notice of the courts below to justify non-examination. The materials on record are totally silent on this aspect. Another aspect which has been lightly brushed aside by the High Court is that one person who was to be examined on a particular date was examined earlier than the date fixed. This unusual conduct by the prosecutor should have been seriously taken note of by the trial court and also by the High Court. It is to be noted that the High Court has found fault with DCP Shri Piyush Patel and has gone to the extent of saying that he has miserably failed to discharge his duties; while finding at the same time that Police Inspector Baria had acted fairly. The criticism

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according to us is uncalled for. Role of the Public Prosecutor was also not in line with what is expected of him. Though a Public Prosecutor is not supposed to be a persecutor, yet the minimum that was required to be done to fairly present the case of the prosecution was not done. Time and again, this Court stressed upon the need of the investigating officer being present during trial unless compelling reasons exist for a departure. In the instant case, this does not appear to have been done, and there is no explanation whatsoever why it was not done. Even the Public Prosecutor does not appear to have taken note of this desirability. In *Shailendra Kumar* v. *State of Bihar*[15] it was observed as under: (SCC pp. 657-58, para 9)

> "*9*. In our view, in a murder trial it is sordid and repulsive matter that without informing the police station officer-in-charge, the matters are proceeded by the court and by the APP and tried to be disposed of as if the prosecution has not led any evidence. From the facts stated above, it appears that the accused wants to frustrate the prosecution by unjustified means and it appears that by one way or the other the Additional Sessions Judge as well as the APP have not taken any interest in discharge of their duties. It was the duty of the Sessions Judge to issue summons to the investigating officer if he failed to remain present at the time of trial of the case. The presence of investigating officer at the time of trial is must. It is his duty to keep the witnesses present. If there is failure on the part of any witness to remain present, it is the duty of the court to take appropriate action including issuance of bailable/non-bailable warrants as the case may be. It should be well understood that prosecution cannot be frustrated by such methods and victims of the crime cannot be left in a lurch."

72. A somewhat unusual mode in contrast to the lapse committed by non-examining victims and injured witnesses adopted by the investigating agency and the prosecutor was examination of six relatives of the accused persons. They have expectedly given a clean chit to the accused and labelled them as saviours. This unusual procedure was highlighted before the High Court. But the same was not considered relevant as there is

no legal bar. When we asked Mr Rohatgi, learned counsel for the State of Gujarat as to whether this does not reflect badly on the conduct of the investigating agency and the prosecutor, he submitted that this was done to show the manner in which the incident had happened. This is a strange answer. Witnesses are examined by the prosecution to show primarily who the accused is. In this case it was nobody's stand that the incident did not take place. That the conduct of the investigating agency and the prosecutor was not bona fide, is apparent and patent.

73. So far as non-examination of some injured relatives is concerned, the High Court has held that in the absence of any medical report, it appears that they were not present and, therefore, held that the prosecutor might have decided not to examine Yasminbanu because there was no injury. This is

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nothing but a wishful conclusion based on presumption. It is true that merely because the affidavit has been filed stating that the witnesses were threatened, as a matter of routine, additional evidence should not be permitted. But when the circumstances as in this case clearly indicate that there is some truth or prima facie substance in the grievance made, having regard to the background of events as happened, the appropriate course for the courts would be to admit additional evidence for final adjudication so that the acceptability or otherwise of evidence tendered by way of additional evidence can be tested properly and legally tested in the context of probative value of the two versions. There cannot be a straitjacket formula or rule of universal application when alone it can be done and when, not. As the provisions under Section 391 of the Code are by way of an exception, the court has to carefully consider the need for and desirability to accept additional evidence. We do not think it necessary to highlight all the infirmities in the judgment of the High Court or the approach of the trial court lest nothing credible or worth mentioning would remain in the process. This appears to be a case where the truth has become a casualty in the trial. We are satisfied that it is a 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 retrial 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, retrial 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 retrial becomes inevitable.

74. Prayer was made by learned counsel for the appellant that the trial should be conducted outside the State so that the unhealthy atmosphere which led to failure or miscarriage of justice is not repeated. This prayer has to be considered in the background and keeping in view the spirit of Section 406 of the Code. It is one of the salutary principles of the administration of justice that justice should not only be done but it should be seen to be done. However, a mere allegation that there is apprehension that justice will not be done in a given case or that general allegations of a surcharged atmosphere against a particular community alone does not suffice. The court has to see whether the apprehension is reasonable or not. The state of mind of the person who entertains apprehension, no doubt is a relevant factor but not the only determinative or concluding factor. But the court must be fully satisfied about the existence of such conditions which would render inevitably impossible the holding of a fair and impartial

trial, uninfluenced by extraneous considerations that may ultimately undermine the confidence of reasonable and right-thinking citizen, in the justice delivery system. The

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apprehension must appear to the court to be a reasonable one. This position has been highlighted in *Gurcharan Dass Chadha* v. *State of Rajasthan*[16] and *K. Anbazhagan* v. *Supdt. of Police*[17].

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

76. We direct the State Government to appoint another Public Prosecutor and it shall be open to the affected persons to suggest any name which may also be taken into account in the decision to so appoint. Though the witnesses or the victims do not have any choice in the normal course to have a say in the matter of appointment of a Public Prosecutor, in view of the unusual factors noticed in this case, to accord such liberties to the complainants' party, would be appropriate.

77. The fees and all other expenses of the Public Prosecutor who shall be entitled to assistance of one lawyer of his choice shall initially be paid by the State of Maharashtra, who will thereafter be entitled to get the same reimbursed from the State of Gujarat. The State of Gujarat shall ensure that all the documents and records are forthwith transferred to the court nominated by the Chief Justice of the Bombay High Court. The State of Gujarat shall also ensure that the witnesses are produced before the court concerned whenever they are required to attend that court. Necessary protection shall be afforded to them so that they can depose freely without any apprehension of threat or coercion from any person. In case, if any witness asks for protection, the State of Maharashtra shall also provide such protection as deemed necessary, in addition to the protection to be provided for by the State of Gujarat. All expenses necessary for the trial shall be initially borne by the State of Maharashtra, to be reimbursed by the State of Gujarat.

78. Since we have directed retrial, 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 seem to or may so warrant. The Director General of Police, Gujarat is directed to monitor reinvestigation, if any, to be taken up with the urgency and utmost sincerity, as the circumstances warrant.

79. Sub-section (8) of Section 173 of the Code permits further investigation, and even dehors 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.

80. Before we part with the case it would be appropriate to note some disturbing factors. The High Court after hearing the appeal directed its

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dismissal on 26-12-2003 indicating in the order that the reasons were to be subsequently given, because the Court was closing for winter holidays. This course was adopted "due to paucity of time". We see no perceivable reason for the hurry. The accused were not in custody. Even if they were in custody, the course adopted was not permissible. This Court has in several cases deprecated the practice adopted by the High Court in the present case.

81. About two decades back this Court in *State of Punjab* v. *Jagdev Singe Talwandi*[18] had inter alia observed as follows: (SCC p. 611, para 30)

> "*30*. We would like to take this opportunity to point out that serious difficulties arise on account of the practice increasingly adopted by the High Courts, of pronouncing the final order without a reasoned judgment. It is desirable that the final order which the High Court intends to pass should not be announced until a reasoned judgment is ready for pronouncement. Suppose, for example, that a final order without a reasoned judgment is announced by the High Court that a house shall be demolished, or that the custody of a child shall be handed over to one parent as against the other, or that a person accused of a serious charge is acquitted, or that a statute is unconstitutional or, as in the instant case, that a detenu be released from detention. If the object of passing such orders is to ensure speedy compliance with them, that object is more often defeated by the aggrieved party filing a special leave petition in this Court against the order passed by the High Court. That places this Court in a predicament because, without the benefit of the reasoning of the High Court, it is difficult for this Court to allow the bare order to be implemented. The result inevitably is that the operation of the order passed by the High Court has to be stayed pending delivery of the reasoned judgment."

82. It may be thought that such orders are passed by this Court and, therefore, there is no reason why the High Courts should not do the same. We would like to point out that the orders passed by this Court are final and no further appeal lies against them. The Supreme Court is the final court in the hierarchy of our courts. Orders passed by the High Court are subject to the appellate jurisdiction of this Court under Article 136 of the Constitution and other provisions of the statutes concerned. We thought it necessary to make these observations so that a practice which is not a very desirable one and which achieves no useful purpose may not grow out of and beyond its present infancy. What is still more baffling is that written arguments of the State were filed on 29-12-2003 and by the accused persons on 1-1-2004. A grievance is made that when the petitioner in Criminal Revision No. 583 of 2003 wanted to file notes of arguments that were not accepted making a departure from the cases of the State and the accused. If the written arguments were to be on record, it is not known as to why the High Court dismissed the appeal. If it had already arrived at a particular view, there was no question of filing written arguments.

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83. The High Court appears to have miserably failed to maintain the required judicial balance and sobriety in making unwarranted references to personalities and their legitimate moves before competent courts — the highest court of the nation, despite knowing fully well that it could not deal with such aspects or matters. Irresponsible allegations, suggestions and challenges may be made by parties, though not permissible or pursued defiantly during the course of arguments at times with the blessings or veiled support of the presiding officers of court. But such besmirching tacts (*sic*), meant as innuendos or serve as surrogacy ought not to be made or allowed to be made, to become part of solemn judgments, of at any rate by High Courts, which are created as court of record as well. Decency, decorum and judicial discipline should never be made casualties by adopting such intemperate attitudes of judicial obstinacy. The High Court also made some observations and remarks about persons/constitutional bodies like NHRC who were not before it. We had occasion to deal with this aspect to a certain extent in the appeal relating to SLPs (Crl.) Nos. 530-32 of 2004. The move adopted and manner of references made, in para 3 of the judgment except the last limb (sub-para) is not in good taste or

decorous. It may be noted that certain reference is made therein or grievances purportedly made before the High Court about the role of NHRC. When we asked Mr Sushil Kumar who purportedly made the submissions before the High Court, during the course of hearing, he stated that he had not made any such submission as reflected in the judgment. This is certainly intriguing. Proceedings of the court normally reflect the true state of affairs. Even if it is accepted that any such submission was made, it was not proper or necessary for the High Court to refer to them in the judgment, to finally state that no serious note was taken of the submissions. Avoidance of such manoeuvres would have augured well with the judicial discipline. We order the expunging and deletion of the contents of para 3 of the judgment except the last limb of the sub-para therein and it shall always be read to have not formed part of the judgment.

84. A plea which was emphasised by Mr Tulsi relates to the desirability of restraint in publication/exhibition of details relating to sensitive cases, more particularly description of the alleged accused persons in the print/electronic/broadcast medias. According to him, "media trial" causes indelible prejudice to the accused persons. This is a sensitive and complex issue, which we do not think it proper to deal in detail in these appeals. The same may be left open for an appropriate case where the media is also duly and effectively represented.

85. If the accused persons were not on bail at the time of conclusion of the trial, they shall go back to custody, if on the other hand they were on bail that order shall continue unless modified by the court concerned. Since we are directing a retrial, it would be appropriate if the same is taken up on day-to-day basis keeping in view the mandate of Section 309 of the Code and completed by the end of December 2004.

86. The appeals are allowed on the terms and to the extent indicated above.

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[†] Arising out of SLPs (Crl.) Nos. 538-41 of 2004

[‡] Arising out of SLPs (Crl.) Nos. 1039-41 of 2004

[1] AIR 1968 SC 178 : (1967) 3 SCR 415 : 1968 Cri LJ 231

[2] 1991 Supp (1) SCC 271 : 1991 SCC (Cri) 595

[2a] *Pearse* v. *Pearse* (1846), 1 De G&Sm. 12 : 16 L.J. Ch. 153 : 63 ER 950 : 18 Digest (Repl.) 91, 748

[3] (1979) 4 SCC 167 : 1979 SCC (Cri) 934

[4] AIR 1958 SC 309 : 1958 Cri LJ 569

[5] (2001) 4 SCC 759 : 2001 SCC (Cri) 812

[6] (1981) 3 SCC 191 : 1981 SCC (Cri) 683

[7] (1999) 6 SCC 110 : 1999 SCC (Cri) 1062

[8] (1972) 1 All ER 997 : (1972) 2 QB 52 : (1972) 2 WLR 429 (CA)

[9] (2003) 7 SCC 749 : 2003 SCC (Cri) 1918

[10] (1998) 1 SCC 226 : 1998 SCC (Cri) 307

[11] (1995) 5 SCC 518 : 1995 SCC (Cri) 977

[12] (1999) 2 SCC 126 : 1999 SCC (Cri) 104 (para 8)

[13] (1998) 4 SCC 517 : 1998 SCC (Cri) 1085

[14] (2003) 2 SCC 518 : 2003 SCC (Cri) 641

[15] (2002) 1 SCC 655 : 2002 SCC (Cri) 230 : (2001) 8 Supreme 13

[16] AIR 1966 SC 1418 : (1966) 2 SCR 678 : 1966 Cri LJ 1071

[17] (2004) 3 SCC 767 : JT (2003) 9 SC 31

[18] (1984) 1 SCC 596 : 1984 SCC (Cri) 135 : AIR 1984 SC 444

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