

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/CRIMINAL APPEAL NO. 749 of 2012****With****R/CRIMINAL APPEAL NO. 1240 of 2012****With****R/CRIMINAL APPEAL NO. 890 of 2012****With****R/CRIMINAL APPEAL NO. 961 of 2012****With****R/CRIMINAL APPEAL NO. 964 of 2012****With****R/CRIMINAL APPEAL NO. 965 of 2012****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR.JUSTICE AKIL KURESHI****and****HONOURABLE MR.JUSTICE B.N. KARIA**

=====

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

=====

VIJAYBHAI RAVJIBHAI PATEL**Versus****STATE OF GUJARAT**

=====

Appearance:

MR YOGESH LAKHANI, SR COUNSEL FOR MR PRAVIN GONDALIA AND MR JAY M THAKKAR, MR GAJENDRA P BAGHEL, MR SAILESH C SHARMA, MR YOGENDRA THAKORE, MR C.G. SHARMA. MR P.B. KHAMBHOLJA AND HL PATEL ADVOCATES FOR THE PETITIONERS

MS MANISHA LAVKUMAR(1010), SPECIAL PP AND MS SHRUTI PATHAK, APP for the RESPONDENT

=====

CORAM: HONOURABLE MR.JUSTICE AKIL KURESHI
and
HONOURABLE MR.JUSTICE B.N. KARIA

Date : 11/05/2018

CAV JUDGMENT

(PER : HONOURABLE MR.JUSTICE AKIL KURESHI)

1. These appeals arise out of a common judgment dated 12.4.2012 passed by the learned Additional Sessions Judge, Anand in Sessions Case Nos. 45/2008, 77/2009 and 78/2009.
2. In such judgment, learned Judge was pleased to convict 18 accused for offences punishable under sections 302 and 307 read with sections 120B and 149 of the Indian Penal Code, as also for offences punishable under sections 143, 144, 147, 148, 153A, 435, 436 427 and 440 of the IPC read with section 149 thereof. They have been sentenced to life imprisonment for offence punishable under section 302. For the remaining offences, lesser sentences have been awarded.
3. Learned Judge also convicted four more accused for offence under section 307 read with sections 120B and 149

of the IPC, besides the offences punishable under sections 143, 144, 147, 148, 153A, 435, 436, 427, 440 read with section 149 of the IPC. For offence punishable under section 307, they have been sentenced to rigorous imprisonment of seven years. Fines have also been imposed. For the remaining offences, lesser sentences have been awarded.

4. The Trial Court also convicted one more accused Atulbhai Dahyabhai Patel for offences punishable under sections 143, 144, 147, 148, 153A, 435, 436, 427, read with section 149 of the IPC. He has been sentenced to rigorous imprisonment of seven years for offence under section 436 of the IPC. Lesser sentences have been awarded for the remaining offences. Remaining accused have been acquitted.

Brief introduction :-

5. The convicted accused have filed Criminal Appeals No.749/2012, 890/2012, 964/2012 and 1240/2012. The State has preferred two Criminal Appeals. Criminal Appeal No.961/2012 is the acquittal appeal. This includes those accused who have been acquitted of all the charges as well as some of the accused who have been convicted for lesser offences but acquitted for offence punishable under section 302 of the IPC. Criminal Appeal No.965/2012 filed by the State pertains to enhancement of sentences. This has principally two elements. The State contends that the accused who are convicted or ought to have been convicted

for offence punishable under section 302 of the IPC should be awarded capital punishment. The State also argues that the sentence of seven years rigorous imprisonment for offences punishable under sections 307 and 436 awarded to the respective accused is too lenient. Such sentence should also be enhanced.

6. The trial pertains to one of the post Godhra train burning riot cases. The incidents happened in the village Oad which is situated in Anand District of the State. As is well-known on 27th February, 2002, the ugly incident of train burning took place in Muslim dominated area of Godhra during which large number of people mostly Karsevaks returning from Ayodhya died. This had serious repercussions in the State which witnessed large scale communal riots, spread of which was unprecedented. Many incidents of arson, looting, burning of properties, violence and heavy loss of human lives were reported from various parts of the State. The administration, particularly, the police department came under severe criticism in the process of handling such riots, riots cases and in investigation of such incidents. Complaints of inefficiency, apathy and at times outright bias reached the Supreme Court. Further trials in some of the riot cases were stayed pending consideration of such allegations. The Supreme Court by an order dated 26.3.2008 in case of **National Human Rights Commission v. State of Gujarat and others** reported in (2009) 6 Supreme Court Cases 342, directed constitution of Special Investigation Team ("SIT" for short) for which notifications

were issued by the State Government comprising of Shri P.K. Raghavan - retired Director of CBI, Shri C.B. Satpathy – retired Director General, Uttar Pradesh Police College, Moradabad and three IPS officers Ms. Geeta Johri, Shri Shivanand Jha and Shri Ashish Bhatia. Shri Raghavan would be the chairman of SIT. SIT would in its first meeting work out the modalities to be adopted for the purpose of enquiry/investigation. SIT would carry out further investigation including recording of statements of those who want to give their version of the alleged incidents. The Supreme Court had selected nine riot cases in the State where large scale casualties were reported in which SIT would carry out further investigation. Present is one such case.

7. For some time after constitution of SIT, Supreme Court continued to monitor the progress. On 1.5.2009, the Supreme Court passed further order in case of **National Human Rights Commission v. State of Gujarat and others** reported in (2009) 6 Supreme Court Cases 767 after perusing the reports of SIT in respect of each of the cases which were entrusted to the SIT for further investigation. The Court referred to the judgment of Supreme Court in case of **Zahira Habibullah Sheikh v. State of Gujarat** reported in (2006) 3 Supreme Court Cases 374 and highlighted the requirement of witness protection. The stay against further trial was lifted. The proceedings were disposed of with the following directions :

“40. We have considered the submissions made by Mr. Harish N. Salve, learned amicus curiae, Mr. Mukul Rohtagi, learned counsel for the State, Ms. Indira Jaisingh and other learned counsel. The following directions are given presently:

(i) Supplementary charge sheets shall be filed in each of these cases as the SIT has found further material and/or has identified other accused against whom charges are now to be brought.

(ii) the conduct of the trials has to be resumed on a day-to-day basis – keeping in view the fact that the incidents are of January, 2002 and the trials already stand delayed by seven years. The need for early completion of sensitive cases more particularly in cases involving communal disturbances cannot be overstated.

(iii) the SIT has suggested that the six "Fast Track Courts" be designated by the High Court to conduct trial, on day-to-day basis, in the five districts as follows:

- i) Ahmedabad (Naroda Patia, Naroda Gam)
- ii) Ahmedabad (Gulbarg).
- iii) Mehsana (for two cases).
- iv) Saabarkantha opened(British National case)
- v) Anand
- vi) Godhra Train Case (at Sabarmati Jail, Ahmedabad).

(iv) It is imperative, considering the nature and sensitivity of these nominated cases, and the history of the entire litigation, that senior judicial officers be appointed so that these trials can be concluded as soon as possible and in the most satisfactory manner. In order to ensure that all concerned have the highest degree of confidence in the system being put in place, it would be advisable if the Chief Justice of the High, Court of Gujarat selects the judicial officers to be so nominated. The State of Gujarat has, in its suggestions, stated that it has no objection to constitution of such "fast track courts", and has also suggested that this may be left to Hon'ble the Chief Justice of the High Court.

(v) Experienced lawyers familiar with the conduct of

criminal trials are to be appointed as Public Prosecutors. In the facts and circumstances of the present case, such public prosecutors shall be appointed in consultation with the Chairman of the SIT. The suggestions of the State Government indicate acceptance of this proposal. It shall be open to the Chairman of SIT to seek change of any Public prosecutor so appointed if any deficiency in performance is noticed. If it appears that a trial is not proceeding as it should, and the Chairman of the SIT is satisfied that the situation calls for a change of the public prosecutor or the appointment of an additional public prosecutor, to either assist or lead the existing Public Prosecutor, he may make a request to this effect to the Advocate General of the State, who shall take appropriate action in light of the recommendation by the SIT.

(vi) If necessary and so considered appropriate SIT may nominate officers of SIT to assist the public prosecutor in the course of the trial. Such officer shall act as the communication link between the SIT and the Public Prosecutor, to ensure that all the help and necessary assistance is made available to such Public Prosecutor.

(vii) The Chairman of the SIT shall keep track of the progress of the trials in order to ensure that they are proceeding smoothly and shall submit quarterly reports to this court in regard to the smooth and satisfactory progress of the trials.

(viii) The stay on the conduct of the trials are vacated in order to enable the trials to continue. In a number of cases bail had been granted by the High Court/Sessions Court principally on the ground that the trials had been stayed. Wherever considered necessary, the SIT can request the Public Prosecutor to seek cancellation of the bails already granted.

(ix-i) For ensuring of a sense of confidence in the mind of the victims and their relatives, and to ensure that witnesses depose freely and fearlessly before the court, in case of witnesses following steps shall be taken:

(a) Ensuring safe passage for the witnesses to and from the court precincts.

(b) Providing security to the witnesses in their place of residence wherever considered necessary, and

(c) Relocation of witnesses to another state wherever such a step is necessary.

(ix-ii) As far as the first and the second is concerned, the SIT shall be the nodal agency to decide as to which witnesses require protection and the kind of witness protection that is to be made available to such witness.

(ix-iii) In the case of the first and the second kind of witness protection, the Chairman, SIT could, in appropriate cases, decide which witnesses require security of the paramilitary forces and upon his request same shall be made available by providing necessary security facilities.

(ix-iv) In the third kind of a situation, where the Chairman, SIT is satisfied that the witness requires to be relocated outside the State of Gujarat, it would be for the Union of India to make appropriate arrangements for the relocation of such witness. The Chairman, SIT shall send an appropriate request for this purpose to the Home Secretary, Union of India, who would take such steps as are necessary to relocate the witnesses.

(ix-v) All the aforesaid directions are to be considered by SIT by looking into the threat perception if any.

(x) The SIT would continue to function and carry out any investigations that are yet to be completed, or any further investigation that may arise in the course of the trials. The SIT would also discharge such functions as have been cast upon them by the present order.

(xi) If there are any matters on which directions are considered necessary (including by way of change of public prosecutors or witness protection), the Chairman of the SIT may (either directly or through the Amicus Curiae) move this Court for appropriate directions.

(xii) It was apprehension of some learned counsel that unruly situations may be created in court to terrorise witnesses. It needs no indication that the Court shall have to deal with such situations sternly and pass necessary orders. The SIT shall also look into this area.

(xiii) Periodic three monthly reports shall be submitted by the SIT to this Court in sealed covers.”

Prosecution version:

8. At this stage, we may record in brief version of the prosecution. On 27th February, 2002, the infamous Godhra train burning incident happened. On 1st March, 2002, certain organizations had given a State wide Bandh call. Oad is a village situated in Anand District having a population of about 15000, majority of them belonging to Hindu community. Village also had a few pockets of Muslim settlements where people of the said community lived in small clusters. 1st March, 2002 happened to be a Friday. Anticipating trouble, extra police force was deployed at village Oad consisting of police and para-police officers such as home-guards. This police deployment was however, inadequate to control large riotous mob. By early afternoon of 1st March, agitated crowds had started gathering in the village. First such crowd gathering was reported at Shili road where in the fields, mob had collected. The police officers reached there and tried to disperse the mob and received partial success. The mob however, entered the residential areas of the village and reached Surivali Bhagol area which had pockets of Muslim houses and shops. The mob started pelting stones, causing damage to the properties and also set Muslim

establishments on fire. House of complainant Rafikmohammad Abdulbhai Khalifa, PW-104, exh.240 was locked from outside and then set on fire. The police personnel present tried to contain the mob. After failing to control the mob through Lathi charge and teargas shelling, the senior police officer Vabang Zameer ordered firing. During the police firing, one member of the mob Nishit Patel received fatal injuries. The mob thereafter went towards Sumrav Chora. There also Muslim establishments were damaged and set on fire. From there the mob went towards Piravali Bhagol where at an area called Purnima Chowk, where in about seven houses facing each other, several Muslim families lived. The mob surrounded this area and started throwing stones. They were armed with inflammable substances such as petrol and kerosene carried in jerry-cans. They started throwing burning rags and objects on the Muslim houses. These houses were set on fire. Many of the people from nearby houses tried to take shelter in a three-storeyed building with pukka construction called Jhamplivalu Makan, meaning the house with a gate. They soon realised that even there, they were not safe when this house was also set on fire. Many of them therefore, came out of the house and tried to take shelter elsewhere. The rest nearly 23 in number stayed back to meet a gruesome fate. According to the prosecution, all of them were burnt alive. The heat was such that they were burnt to ashes. In fact, the raging fire demolished the three-storeyed building and turned it into rubble. According to the prosecution, the mob comprised of

the people of the same village. The eyewitnesses also resided in the same village. The incident took place at about 4:30 and onwards in broad day light. Many of the witnesses therefore, had the opportunity to see the members of the mob. Many of them were residing in the same or nearby localities of the same village. These witnesses therefore, could identify the accused who were part of the mob.

9. According to the prosecution, the next day i.e 2nd March 2002, the cremation of Nishit Patel who died in the police firing of previous day took place. During such process also some more communal incidents took place in which one more person died. Initially this incident was clubbed with the main event of the village which took place on 1st March. However, once the SIT assumed the control of the further investigation, this later incident was separated out and treated as a separate case and tried separately. In these appeals we are not concerned with this trial.

Nature of evidence :-

10. The prosecution examined large number of witnesses including eyewitnesses, doctors, DNA experts, police witnesses and Investigating Officers. Prosecution also produced voluminous documentary evidence. Broad categorisation of such evidence can be made as under :

(1) Oral evidence –

This would comprise of depositions of witnesses. These witnesses can be bifurcated into the following sub-categories.

Group-A are the eyewitnesses who have named certain accused in their police statements and also in their depositions before the Court. This group consists of the following witnesses :

- 1) Bashirmiya Hasanmiya Malek, PW-42, exh.142.
- 2) Ayubkhan Kasamkhan Pathan, PW-93, exh.207.
- 3) Firozkhan Matbarkhan Pathan, PW-99, exh.216.
- 4) Kalumiya Jivamiya Malek, PW-101, exh.222.
- 5) Majidmiya Muradmiya Malek, PW-103, exh.238.
- 6) Rafikmohammad Abdulbhai Khalifa, PW-104, exh.240.
- 7) Shafimiya Mohammadmiya Malek, PW-105, exh.242.
- 8) Maherajbibi Rasulkhan Pathan, PW-109, exh.251.
- 9) Mahemudabibi Majidmiya Malek, PW-110, exh.252.
- 10) Aarifmiya @ Lala Jusabmiya Malek, PW-111, exh.254
- 11) Mohammadkhan @ Gafurkhan Akbarkhan Pathan, PW-113, exh.259.

Group-B witnesses would comprise of those eyewitnesses who had not named the accused in their police statements but named them in the depositions before the Court. This group consists of the following witnesses :

- 1) Mehboobmiya @ Kalumiya Rasulmiya Shaikh, PW-43, exh.143.
- 2) Sikandermiya Mohammadmiya Malek, PW-51, exh.153.
- 3) Yasinmiya Mustufamiya Malek, PW-53, exh.155.
- 4) Nabimiya Akbarmiya Malek, PW-65, exh.170.
- 5) Ahmedmiya Abbasmiya Malek, PW-70, exh.177.
- 6) Kalumiya Rasulmiya Pathan, PW-98,exh.213.
- 7) Mohammad Yunus Ismailbhai Vhora, PW-100, exh.219.
- 8) Kalumiya Mohammadmiya Malek, PW-102, exh.228.
- 9) Hasankhan Hasukhan Pathan, PW-112, exh.258.

Group-C witnesses would consist of the witnesses who turned hostile. They had named the accused in their police statements but did not support the prosecution in their depositions before the Court. This group consists of the following witnesses :

- 1) Sadrukhan Rasulkhan Pathan, PW-54, exh.156.
- 2) Firozkhan Kalukhan Pathan, PW-59, exh.161.
- 3) Jafarkhan Bhikhankhan Pathan, PW-60, exh.162
- 4) Sharifkhan Rasulkhan Pathan, PW-61, exh.163
- 5) Nabikhan Ashrafkhan Pathan, PW-73, exh.180
- 6) Mohammadbhai Rasulbhai Khalifa, PW-77, exh.184
- 7) Ahmedmiya Ashrafmiya Pathan, PW-83, exh.190
- 8) Ruksanabanu @ Miya Malek. PW-90, exh.200

In **Group-D** witnesses, we would categorise those witnesses, who are not eyewitnesses to the incident but provided important incidental information. This group consists of the following witnesses :

- 1) Akbarbhai Husenbhai Saiyed, PW-12, exh.97.
- 2) Pujakhan Husenkhan Pathan, PW-20, exh.111.
- 3) Haroonbhai Kadarbhai Meman (Vohra), PW-34, exh.132.
- 4) Kalumiya Bhikumiya Malek, PW-38, exh.136.
- 5) Shabbirmiya Rasulmiya Shaikh, PW-39, exh.137.
- 6) Gulamnabi Umravmiya Malek, PW-72, exh.179.
- 7) Matbarkhan Bhikhankhan Pathan, PW-123, exh.288.

Group-E witnesses would consist of police and para-police witnesses who were posted at Oad village on the fateful day. This group consists of the following witnesses :

- 1) Vinubhai Ramanbhai, PW-124, exh.293
- 2) Jagdishbhai Budhabhai, PW-125, exh.296
- 3) Ishwarbhai Valabhai, PW-126, exh.297
- 4) Bhanusinh Bhagwansinh Chauhan, PW-92, exh.206.
- 5) Pravinsinh Chandrasinh Chauhan, PW-96, exh.211.
- 6) Bhimsinh Prabhatsinh Raulji, PW-150, exh.443

Group-F witnesses would consist of medical officers and FSL witnesses and consists of the following witnesses :

- 1) Dr. Umiya Jadavbhai Pipliya, PW-139, exh.380.
- 2) Dr. Ashish Manibhai Patel, PW-141. Exh.393.
- 3) Dr. Ashokbhai Babulal Sharma, PW-142, exh.398.
- 4) Dr. Bhavin Somabhai Sharma, PW-145, exh.416.
- 5) Narayanbhai Ramjibhai Chaudhary, PW-149, exh.437.
- 6) Dr. Anilkumar Madhukant Mehta, PW-153, exh.455.
- 7) Dr. Sanjiv Narendranath Sighla, PW-147, exh.424.

- 8) Dr. Chaganbhai Jinvarsha Raibarkar, PW-144, exh.414.
- 9) Dr.Pankaj Haridas Barai, PW-148, exh.426.

Last **Group-G** witnesses would consist of the investigating officers who are as under :

- 1) Kadarkhan Peerkhan Pathan, PW-152, exh.453.
- 2) Ranchodbhai Gopalbhai Patel, PW-155, exh.490.
- 3) Keshubhai Rambhai Bhuva, PW-156, exh, 515.
- 4) Himanshubhai Chandravadanbhai Pathak, PW-157, exh.519.
- 5) Girishbhai Haribhai Patel, PW-158, exh.540.

(2) Documentary evidence which mainly comprises of panchnamas, postmortem reports and experts' opinion such as DNA report.

Judgement of the Trial Court :-

11. The Trial Court in the impugned judgment assessed such evidence, found the eyewitnesses' accounts otherwise reliable. To the extent, the witnesses were consistent in naming the accused in the police statement, in the deposition before the Court and also succeeded in identifying him before the Court, learned Judge believed such evidence and convicted the concerned accused. In rest of the cases, Trial Court acquitted the accused. These were the cases where the witnesses had named the accused for the first time before the Court or where they

had named the accused in the police statement, the witnesses had turned hostile. Before the Trial Court, the prosecution had disputed the factum of death of one Sikandermiya and his daughter Guddi and their identification. The defence had also questioned the death of remaining persons in the house suggesting instead, that they were missing and may not have died as was sought to be suggested by the prosecution. The Trial Court rejected both these versions. Learned Judge was of the opinion that Sikandermiya and his daughter Guddi died during the incident as was alleged by the prosecution. Their identification was also properly done. The defence had pointed out that the dead bodies of the none of the remaining persons were found. Their remains were also not found from Jhamplivalu Makan. The Trial Court was of the opinion that temperature due to raging fire would have been so high that the remains of the human body were unlikely to survive. Learned Judge referred to the evidence on record suggesting that temperature in excess of 1000° Centigrade could be reached during such time which would be sufficient even to melt metal utensils. The Court noted that due to the fire even a three-storeyed constructed house had collapsed.

12. The Court had bifurcated the involvement of the accused in three separate parts. The five accused who according to the Trial Court were involved in locking up the house of the complainant and setting up on fire were principally convicted for offence punishable under section

307 read with sections 120B and 149 of the IPC, since no death had occurred at that place. The Court convicted one Atulbhai Dahyabhai Patel, accused no.2, for the incident of setting on fire the bullock-cart of Kalumiya Jivamiya Malek, PW-101, exh.222 for offence under section 436 of the IPC. Remaining 18 accused were found involved in the incident of Jhamplivalu Makan. They were, besides lesser other offences, convicted for offence under section 302 read with section 120B and 149 of the IPC. The Court was however of the opinion that this was not the rarest of rate case where death penalty should be imposed. Accordingly, life sentence was awarded to the said accused.

Gist of evidence :

13. At this stage, we may record the gist of the evidence :

Group-A witnesses :-

14. Bashirmiya Hasanmiya Malek, PW-42, exh.142 was the resident of Purnima chowk. He was residing there along with his family. According to his deposition, on 1.3.2002, riot had started in the village. Between 3 and 4 in the afternoon, he was at home when the riotous mob had come there, had set his house on fire. These people were carrying petrol cans, dhariya and other deadly weapons. He could identify four of them. Pravinbhai Mangalbhai - accused no.45, Sanatbhai Ranchodbhai - accused no.26, Hemantbhai Satabhai - accused no.22 and Vinubhai Shanabhai -accused no.32. He knew them since

15 to 20 years. He also identified these accused before the Court. He alleged that these people were setting the house on fire. After this, the mob had gone towards Jhamplivalu Makan and set it also on fire where small children were inside the house. He and his other family members escaped from the place at about 7:30 to 8:00 in the evening and went to Bhalej on foot. His stay at Bhalej came for about three months.

Cross examination :-

In the cross examination, he stated that he had received compensation of Rs.3,08,000/- from the Government. He denied that he had wrongly implicated the said four accused.

Though he so denied it seems that in his police statement he had stated that after some peace prevailing, at about 8 O' clock at night, he and his other family members locked the house and quietly reached Bhalej at about 12 O' clock.

In the police statement, he had also not specifically stated that the four accused he had identified were setting the house on fire.

15. Ayubkhan Kasamkhan Pathan, PW-93, exh.207, was residing at Piravali Bhagol, Purnima chowk with his family which comprised of his mother, wife and two children. They lived in a three-storeyed house situated on the road.

He was residing on the ground floor of the house. Middle floor was occupied by his uncle Rasulkhan Umravkhan. Top floor was used for keeping agricultural equipments and dry grass for cattle. Right next to his house was the house of Akbarkhan Bhikhankhan. Next to Akbarkhan's house was that of Muradmiya Bhulamiya. Next to Muradmiya's house was the house of Mustufamiya Umravmiya. After the house of Mustufamiya, towards the north is the house of Ravjibhai. He also knew Usmanmiya Bhulamiya whose house was opposite his house separated by a road. House of Sikandermiya Usmanmiya was next to the house of Usmanmiya and thereafter, house of Shafimiya Mohammadmiya was situated from where against towards the north would start Ravjibhai's house. House of Akbarkhan was known as Jhamplivalu Makan.

On 1.3.2002, there was a Bandh call in protest against the Godhra incident of 27th February. Market in the village was closed. The atmosphere was tense. His wife and children had gone to his in-laws place. He was at his home with his mother. His uncle and his family members were also at home. According to him at about quarter to four in the afternoon, a mob of Hindu people comprising of 500 to 1000 people of the same village started stone pelting. Members of the mob had dhariya, sticks, kerosene pouches, cans etc. They had set his house on fire. He could identify six or seven people in this mob who were Vinubhai Bhikhabhai – accused no.1, Hemantbhai Gokalbhai – accused no.22, Vinubhai Shanabhai – accused

no.32, Dilipbhai Vinubhai -accused no.17, Sureshbhai Bhailalbai- accused no.16, Vijaybhai Ravjibhai – accused no.3 and Arvindbhai Ravjibhai – accused no.20. These people had started setting the house on fire. They were also throwing stones. They were throwing kerosene pouches and burning rags on his house. He identified all the said accused except Vinubhai Shanabhai – accused no.32. He had seen these people from the window of the upper floor of the house. After the house caught fire, he and his uncle and other family members had come down to ground floor room. The mob then went towards the milk parlour. They got the chance to escape from the house. They went inside Pathan Mohalla which was at a distance of about 50 steps from his house. They stayed there for a while during which time Mohammadkhan Akbarkhan, son of his uncle Akbarkhan Bhikhankhan, came there in a burnt condition. He came and reported that his house was burnt and his family members had been killed. Once it became slightly dark, they went towards Bhalej. They spent couple of months in the camp at Bhalej.

Cross examination :-

In the cross examination, he agreed that in the camp at Bhalej, there were other Muslim families from his village also. There were discussions with such people about the incident which took place in the village. It seems that he had gone back to the site along with the police. He was present when the ashes were collected from the gutted house of Akbarkhan Bhikhankhan and surrounding. He

agreed that when he was at the camp, police officers would often come there. He had also heard that search was on for tracing the missing members of his family.

The defence tried to suggest that it was not possible for this witness to have seen any of the members of the mob from his house since he would have closed all the doors and the windows before the trouble started. It was suggested that in his police statement, he had not stated that he had seen the accused from the first floor window of the house. Apparently, this witness also had not referred to the presence of Mohammadkhan Akbarkhan in a burnt condition when he was hiding in Pathan Mohalla in his police statement.

It was suggested to the witness that the open place near Purnima chowk where his house is situated was covered by cactus fence and in the past there was some friction about this area and it was because of this that he had falsely involved the accused in the said incident.

It seems that in his police statement he had not named Arvindhbai Ravjibhai – accused no.20. Though he had referred to the involvement of Vinubhai Bhikhabhai – accused no.1, he had named him as Dinubhai Bhikhabhai.

16. Firozkhan Matbarkhan Pathan, PW-99, exh.216, was the resident of Pathan Mohalla at Piravali Bhagol. This

place is situated about 50 steps away from Purnima chowk. He was residing there with his wife and children. His brothers and parents resided in the same house but separately. On the date of the incident, he was at home. In the afternoon, he could hear lots of noises from the market. He then saw smoke going up in the air. At about 4 O' clock, he saw a mob coming towards his house and then going to Purnima chowk. There were more than 2000 people in the mob. He was standing on the edge of his street. The people in the mob had weapons, petrol and kerosene cans and burning rags. They set the house of his uncle Akbarkhan on fire. He could recognise some 8 to 10 people in the mob. They were throwing petrol and kerosene and setting the properties on fire. They had set on fire, house of Akbarkhan and other houses behind his house. He had identified Harishbhai Valabhbhai Patel - accused no.10 (since deceased) Hirubhai Ravjibhai Patel (not the accused), Dinubhai Bhikhabhai Patel - accused no.1 [Vinubhai Bhikhabhai Patel), Pareshbhai Ranchodbhai Patel -accused no.19, Dilipbhai Ranchodbhai Patel – accused no.28, Vinubhai Shanabhai Patel - accused no.32, Pravinbhai Mangalbhai Patel – accused no.45, Hemantbhai Gokalbhai Patel – accused no.22 and Sureshbhai Bhailalbhai Patel – accused no.16. He identified all the above-named accused before the Court except Dilipbhai Ranchodbhai Patel – accused no.28 and stated that he was not present. He had however, referred to the accused Suryakant Bhailalbhai Patel as Sureshbhai Bhailalbhai Patel, a discrepancy which the defence would seek to

exploit. Likewise, he had referred to accused no.1 as Dinubhai Bhikhabhai Patel and when asked whether Dinubhai is same as Vinubhai, he could not confirm but stated that in the village he is known as Dinubhai.

House of his uncle Akbarkhan was completely burnt. At that time, his family members were inside the house. His son Mohammadkhan had come out running towards his house. He was badly burnt. He went to the house to see if he could save anyone who may be alive. His uncle Akbarkhan called him inside. He brought him out and took him to his house, Akbarkhan had got injury on his head. His left hand was fractured. He was burnt on the face. His body had got burnt. No other members of the family came out. The house had then collapsed. All the members of Akbarkhan's family had died.

He, Majidmiya and other brother Faridkhan Majidmiya then went to the house of Majidmiya. From this house, Majidmiya's wife, one daughter and one son came out. However, his father, mother and other family members did not come out. At that time, one dead body fell from upper floor carrying one small child also dead. That was Sikandermiya and his daughter. Both were charred. He had taken Akbarkhan and Mohammadkhan on a scooter towards the fields and at night they had gone to Bhalej in a tractor. Akbarkhan and Mohammadkhan were treated at Government hospital at Bhalej. From there they were taken to Karamsad hospital for further treatment.

Next day, he came to know that even his house was burnt. Akbarkhan's house which was burnt was known as Jhamplivalu Makan. In this house and the house next to it some 23 people had been burnt alive.

Cross examination :-

A detailed cross examination was conducted of this witness to suggest that from the front of the lane of his house, he could not have seen the incident of Jhamplivalu Makan. He however, denied the suggestion. He was also confronted with a criminal case filed against him for having beaten up Dilipbhai Ranchodbhai Patel – accused no.28 at about 4 O' clock on 1st March.

In the cross examination, the defence also brought out certain discrepancies in his police statement as compared to the deposition before the Court. Most of them did not go to the root of the matter. It may however be noted that in his police statement, he had not stated that in Jhamplivalu Makan and the next house, 23 people were killed. He was also questioned on identification of the dead body of Sikandermiya and his daughter Guddi. Suggestion of the defence seems to be that the dead bodies were so badly burnt that they were beyond recognition.

17. Kalumiya Jivamiya Malek, PW-101, exh.222, was residing in Sumrav Chora also known as Chandni chowk. He resided there with his family. On the date of the incident in the morning, he had gone to the field of

Hirubhai Dahyabhai for labour work. He returned home for lunch at about 1:30. He stayed at home because the atmosphere in the village was tense. Between 3 to 4 in the afternoon, mob of Hindu people came towards Sumravno Chora. They had deadly weapons, kerosene cans and burning rags. They first set the house of Sabirkhan Bakshukhan on fire and then the house of Kalumiya Mohammadmiya. He had bullock-cart which was lying in the chowk. The mob pushed the bullock-cart in fire. He identified Sanatbhai Ranchodbhai - accused no.26, Pareshbhai Ranchodbhai - accused no.19, Arvinbhai Ravjibhai - accused no.20, Atulbhai Dahyabhai - accused no.2 and Sureshbhai Bhailalbai - accused no.16 as part of the mob. He identified all except Sureshbhai Bhailalbai - accused no.16 before the Court. He clarified that Sureshbhai Bhailalbai present before the Court is not the one he is referring to because they lived in different areas of the village. After this incident, the mob went towards Purnima chowk at about 4 O' clock. He found himself unsafe and therefore, went to Pathan Mohalla with his wife and son. There he stood at the edge of the street. He had seen the house of Usmanmiya Bhulamiya being set on fire. Five people named by him were also present there in the mob. At the dusk time, he left village with his family and went towards the fields. They spent the night in the field of Nabimiya. There Firozkhan had come with injured Akbarmiya and Mohammadmiya in the scooter. Next day early morning they all went to Bhalej in a tractor.

Since his previous statement was not accurately recorded, he had complained to SIT which application was produced at exh.223.

Cross examination :

He was questioned on the geography of the village in order to suggest that he could not have possibly witnessed the incident from where he claimed to have seen the incident. He agreed that while he was at the relief camp, often discussions took place about the incidents which took place in the village with other people. He also agreed that leading members of the Muslim community often visited the camp. He however denied that before his statement was recorded he had discussed with these people about such statement.

18. Majidmiya Muradmiya Malek, PW-103, exh.238 was residing at Purnima chowk, Piravali Bhagol. He was residing there with his family which comprised of his wife, children and parents in a two-storeyed house. Next to his house was the house of Mustufamiya Umravmiya and on the other side was the house of Akbarmiya Umravkhan, son of Bhikhankhan. His house is opposite the house of Shafimiya Mohammadmiya and Sikandermiya Usmanmiya. On 1.3.2002, in the morning he had gone to his field and returned at around 1:30. He saw the flames and smoke in the village. He went towards his house at about 5:30. When he reached the Muslim Mohalla, people told him that his house was burnt and he would not be able to reach

there. Since his family was at home, he went to see what had happened to them. He went to the edge of Pathan Mohalla where his uncle Jusabmiya Bhulamiya's house was situated from where he saw that Hindu mob was throwing burning rags and pouches on his house and house of Ayubhai. He could recognize the following people in the mob – Dinubhai Bhikhabhai – accused no.1, Sanatkumar Ranchodbhai-accused no.26, Punambhai Laljibhai -accused no.29, Natubhai Mangalbai- accused no.40, Dilipbhai Ranchodbhai -accused no.28, Ghanshyambhai Kashibhai – accused no.35, Rameshbhai Ranchodbhai @ Medi - accused no.21 and Arvinbhai Ravjibhai – accused no.20. These people were carrying pouches in a sack. They also had cans. They were throwing burning rags. This witness identified all the accused before the Court except Punambhai Laljibhai -accused no.29 whose identification was wrong.

When still at Pathan Mohalla at about 7 O' clock, Gafurkhan Akbarkhan had come there. He had got burns all over the body. He had informed the witness that all his family members were burnt alive in the house. Sometime later he along with Faridkhan and Firozkhan went near the house of Akbarkhan Bhikhankhan and shouted for his family members. They could bring out Akbarkhan from the bathroom. He had got burnt on the face and feet. His hand was broken. Faridkhan took him to Pathan Mohalla. He then went to his own house. From the corner of the house, his wife Mahemuda, his two sons Salim and Imtiazhusen,

his daughter Sartajbanu and his cousin Shafimiya Mohammadmiya rushed out. There was no mob there at that time. When they were there something fell from above. He saw that the two dead bodies had fallen down. It was Sikandermiya and his daughter. He could identify him because of metal bracelet he was wearing on the wrist. From there, they went to Pathan Mohalla and later reached Bhalej camp at night. His statement was recorded by the police and later statements were recorded by SIT. He had also filed an application before the SIT complaining about the behaviour and investigation carried out by the police investigators i.e. Shri R.G. Patel and Shri Bhuva.

On 8.3.2002, he had gone to the site along with Shri Vabang Zameer. With the help of JCB machine, the police had taken out the ashes from the backside of the house of Akbarkhan Bhikhankhan. According to the witness, during such time, small pieces of bones were also found. He stated that in the incident his father, his mother, his sister and other family members, total six family members had died. Six family members of Sikandermiya Usmanmiya also had died. Seven members of the family of Akbarkhan Bhikhankhan had also died.

Cross examination :-

It appeared that in his statement before Shri Bhuva, he had stated that despite search, his relatives are not found and therefore, they may have died in the house. He had gone to Bhalej through fields and he had not identified

anybody. In the cross examination, the defence confronted him with his police statement suggesting that he had made number of improvements in his deposition. Significant being with respect to his approaching higher police officers and finding some of the family members alive and having witnessed the bodies of Sikandermiya and his daughter falling when he was present at the site. Apparently, this witness also had not named the accused in his police statement dated 7.3.2002, many of whom he referred to and identified in his deposition. He had also not named these accused in his further statement recorded by SIT.

19. Rafikmohammad Abdulbhai Khalifa, PW-104, exh.240 was the resident of Surivali Bhagol. He resided there with his family which comprised of family of his brother also in a two-storeyed building. He was trading in timber. Because of tension in the village on 1st March, he had returned home by noon. Police had advised him not to go to Masjid for prayers. At about 1:30 in the afternoon, he heard shouts from veranda of the house. He saw people throwing stones. One of them threw a burning rag on his house. He saw the incident for about 10 minutes during which he could identify Prakashbhai Jashbhai - accused no.7, Devangbhai Harshadbhai -accused no.5, Ghanshyambhai Mangalbai (since deceased), Girishbhai Somabhai - accused no.6 and Dilipbhai Shanabhai - accused no.12. The witness identified the four accused before the Court. His house had caught fire. He tried to open the door to come out which was locked from outside

so that they could not escape. His children started crying upon which one police officer opened the door. They came out and the policeman took them to safety. The police had used teargas and also fire. The crowd had dispersed. Half the house collapsed after half an hour later. For lodging the complaint later, he was taken by the Head Constable Bhimsinhbhai and Constable Vinubhai to Khambholaj in the Government car where at about 4:15, his FIR was registered. House and all family members were burnt out. He had suffered huge loss.

Cross examination :-

In the cross examination, the defence questioned him about some of the omissions in the police statement particularly, with respect to having witnessed the incident from the veranda of his house.

20. Shafimiya Mohammadmiya Malek, PW-105, exh.242 was the resident of Purnima chowk, Piravali Bhagol. He resided there in a one room house with a tin roof with his wife, daughters and mother. He lost all his family members i.e his wife, mother, both daughters, sister and brother-in-law who had come to his house on the date of the incident, during the riots. His house was situated next to that of Sikandermiya Usmanmiya. On 1st March, he was at home along with his family members. Because of the tension in the village, he had not gone to Masjid for prayers. His brother Kalumiya Mohammadmiya who had gone also returned. At about 4:30, a mob mostly of Patels from the

village came there shouting “kill the Muslim and burn them alive”. They had burning rags, pouches and other deadly weapons. They came to Purnima chowk where his house is situated, They started setting the house of Sikandermiya on fire. These people of the house therefore, came to the house of Muradmiya. Witness identified the following accused in the mob – Hemantbhai Gokalbhai Bin Satabhai – accused no.22, Sanatkumar Ranchodbhai – accused no.26, Dilipbhai Vinubhai- accused no.17, Dharmendrakumar Natubhai-accused no.30, Vinubhai Chanabhai – accused no.32, Natubhai Mangalbhai -accused no.40 and Atulbhai Dahyabhai -accused no.2. He identified all these accused before the Court, except Natubhai Mangalbhai -accused no.40.

He and his family members, to save their lives went to the house of his uncle Muradmiya Bhulamiya. The mob was setting this house also on fire. They were throwing burning rags and pouches on the house of his uncle Mustufamiya Umravmiya also. House caught fire. He and his family members and family of both his uncles went on the upper floor of house of Muradmiya Bhulamiya. They were worried that this house also may catch fire soon. They therefore, made a hole in the wall of house of Akbarkhan Bhikhankhan and entered that house. They found themselves unsafe there also and therefore, he, his sister-in-law Mahemudabibi, his nephews Salimmiya Majidmiya and Imtiazmiya Majidmiya and his niece Setajbanu Majidmiya, once again came back to the house of

Muradmiya. Rest of the family members stayed back in the house of Akbarkhan Bhikhankhan which was on fire. After this the house of Muradmiya Bhulamiya also started burning. They all came down and sat in a corner where the water-pots were kept. It was about 4:30 at that time. They hid there quietly to save their lives. At about 6:00 to 6:30, his brother Majidmiya Muradmiya came shouting for them. They came out. At that time, body of Sikandermiya Usmanmiya fell. They all went inside Pathan Mohalla. From there they went to Bhalej. After spending three days with his sister, he joined the Bhalej camp. He had received compensation of Rs. 5 lacs for death of each member of the family. He had also filed an application before SIT which was produced at exh. 243.

Cross examination :-

In his police statement dated 9.3.2002, he seems to have stated that his family members were missing and he had no idea about their whereabouts. The defence also suggested certain omissions and improvements particularly, being with respect to the role or the weapon attributed to individual accused. He had given certain details about the individual roles of the accused which he had not given to the police. Apparently, this witness had not given any further information in the statement that SIT recorded.

21. Maherajbibi Rasulkhan Pathan, PW-109, exh.251 was also the resident of Purnima chowk, Piravali Bhagol.

She is wife of Rasulkhan Umravkhan. Her house is known as Jhamplivalu Makan where she was residing with her family in the middle floor of the three-storeyed building, Her nephew occupied the ground floor. Top floor was used for storing agricultural implements and for storing tobacco and other stuff. On the date of the incident she was at home with her husband and two sons. Between 4:00 to 5:00, mob had come towards their house. They were Patels of her village. From the window, she could see a mob of about 1000 to 2000 people. People of the mob were throwing burning rags and pouches towards their house. She could identify Harishbhai Valabhbhai-accused no.10 (since deceased), Dilipbhai Valabhbhai-accused no.8, Bhupendrabhai @ Bhopo (no accused by that name), Dinubhai @ Badva (referring to Vinubhai Bhikhabhai-accused no.1) and Sanatbhai Ranchodbhai-accused no.26. She identified these persons except that she made a mistake in identifying Bhupendrabhai. According to her these people were throwing bottles and burning rags.

After the crowd dispersed, some of them came out of the house. Someone had thrown a stone which hit her on the head. They reached Pathan Mohalla. After sometime her nephew Gafurkhan, son of Akbarkhan came there in a badly burnt condition. She and other family members reached Bhalej later at night. She was treated at Government hospital at Bhalej.

Cross examination :-

In the cross examination, she admitted that name of the accused she had given before the Court she had not cited in the police statement. The defence also suggested certain other improvements and omissions which are however not of great significance.

22. Mahemudabibi Majidmiya Malek, PW-110, exh.252 was the resident of Purnima chowk. She was residing there with her family members. Her house was next to the house of Akbarkhan Bhikhankhan and that of Mustufamiya Umravmiya. At about 4:30, the mob had come towards their house shouting to kill, burn the Muslims etc. Soon the crowd swelled. They had sticks, dhariya, kerosene cans, burning rags. In the crowd she could identify the following persons – Dilipbhai Vinubhai -accused no.17, Sanatbhai Ranchodbhai -accused no.26, Manubhai Jethabhai -accused no.27, Dinubhai Bhikhabhai -accused no.1, Jayendrabhai Satabhai -accused no.14, Atulbhai Satabhai- accused no. 24, Vijaybhai Ravjibhai -accused no.3, Punambhai Laljibhai -accused no.29 (though she referred to this accused as Laljibhai Punambhai), Dharmendrabhai Natubhai -accused no.30, Hemantbhai Gokalbhai -accused no.22 (real name Hemantbhai Satabhai), Pravinbhai Mangalbhai -accused no. 45, Arvindbhai Ravjibhai -accused no.20. She identified all except Jayendrabhai Satabhai -accused no.14 and Punambhai Laljibhai -accused no.29.

This witness further deposed that since Sikandermiya's house caught fire, members of his family had come to her house. House of Mustufamiya Umravmiya also was set on fire. Shafimiya and the family members also came to her house. Her father-in-law was hit by a stone and started bleeding. She came to the upper floor. They made a hole in the wall and entered the house of Akbarkhan where Akbarkhan and his family members were already there which comprised of his son Gafurmiya and his wife Sakinabibi, son Asimkhan, Asimkhan's wife Mumtazbib and his daughters Raziabanu and Afsanabanu, his son Imtiazkhan, Gafurmiya's sister Ruksanabibi. Akbarkhan's house also caught fire. They started choking. She went back to her house. Her two sons and daughters also came back. Later Shafimiya also came. His mother tried to come out but could not make it. Rest of the people remained in the house of Akbarkhan. Those remained were crying and screaming. Later her house also caught fire. They came down and hid themselves in the corner where water-pots were kept. Later they went inside the bathroom to save themselves. At about 7 O' clock, when it became slightly dark, her husband had come. They all came out. They had seen the dead body of Sikandermiya and his daughter lying on the ground. They went to Pathan Mohalla. From there they reached Bhalej late at night. She had also gone back to village some six or seven days later when the police had used the JCB machine to collect the ashes.

Cross examination :-

In the cross examination, the defence sought to establish certain improvements and omissions were made. Apparently, she had given only six names in the police statement. However, she gave some more names in her statement recorded by SIT. Certain details with respect to entering the house of Akbarkhan and coming out again once the house started burning were not stated.

23. Aarifmiya @ Lala Jusabmiya Malek, PW-111, exh.254 was the resident of village Purnima chowk, Piravali Bhagol. He lived there with his family. At about 4:30 on 1st March, mob of 400 to 500 people had come there. The members of the mob had petrol pouches and cans and petrol bottles with them. They had seen the mob from outside his house. Mob had started setting on fire house of Sikander Usman and Gafurmiya by throwing burning rags. They were shouting to kill the Muslims. He had identified the following accused – Hemantbhai Gokalbhai -accused no.22, Sanatbhai Ranchodbhai – accused no.26, Dharmeshbhai Natubhai -accused no.30, Vinubhai Shanabhai -accused no.32, Dilipbhai Vinubhai -accused no.17, Pravinbhai Mangalbhai -accused no.45 and Dilipbhai Ranchodbhai – accused no.28.

These people had burnt the Jhamplivalu Makan and also houses of Sikandermiya, Shafimiya, Muradmiya and Ayubhai and also had thrown burning rags towards their house and started pelting stones. He had taken his wife

and children to Pathan Mohalla where he had one house. His house was also burnt. At night he went to Bhalej.

Cross examination :-

In the cross examination, it was suggested that in the evening of 1.3.2002, near Kabristan, he and four others had attacked Dilipbhai Ranchodbhai with sticks, pipes and dhariya for which criminal case was registered against him, suggesting that he had falsely implicated Dilipbhai Ranchodbhai – accused no.28 because of this animosity. Apparently, this witness had not given any details in his police statement. He denied that from his house he could not see the house of Akbarkhan Bhikhankhan or Jhamplivalu Makan. In his police statement, he had stated that when the mob came, to save their lives, he and his family at around 4:30 in the evening, had gone towards the fields and from there they went to Bhalej. Later he had heard that his house was burnt.

24. Mohammadkhan @ Gafurkhan Akbarkhan Pathan, PW-113, exh.259 was also the resident of Purnima chowk, Piravali Bhagol. He resided in the house called Jhamplivalu Makan. House of Ayubkhan Kasamkhan was next to his house. On the other side was the house of Muradmiya Bhulamiya. He lived in the said house with father Akbarkhan Bhikhankhan, mother Sakinabibi, his wife, three daughters and two sons. On the second floor of the house lived his brother Yasimkhan Akbarkhan with his family comprising of wife, two daughters and one son. Top

floor was used for storing agricultural implements, dry grass for cattle and firewood.

On 1st March, atmosphere in the village was tense. He was at home. His wife and children had gone to her parents' place. Rest of the members of the family were at home. Because of tension in the village, he did not go to Masjid for prayers. All the family members were sitting at home. At about 4 O ' clock, a mob of Hindu people came shouting "kill the Muslims". He saw from the gate of the house that mob was approaching them. There were about 1000 to 1500 people of Oad village. They were carrying burning rags, petrol pouches and kerosene cans and other deadly weapons. He had identified the following persons – Arvindbhai Ravjibhai Patel -accused no.20, Hemantbhai Gokalbhai Patel -accused no.22, Pareshbhai Ranchodbhai -accused no.19, Vinubhai Bhikhabhai – accused no.1, Vinubhai Shanabhai – accused no.32 and Dilipbhai Ranchodbhai – accused no.28. Another person by name Dilipbhai Ranchodbhai, (he was not named as accused), Hirubhai Ravjibhai Bin Devjibhai (not named as accused), Jayendrabhai Satabhai – accused no.14 and three more persons Kanjibhai Harmanbhai, Hareshbhai Harmanbhai and Chandrakant Ravjibhai Bin Manabhai who were not the accused.

The mob first set the house of Sikandermiya Usmanmiya on fire. After that house of Shafimiya Mohammadmiya was burnt. People of these houses went to the house of Muradmiya Bhulamiya. The mob also had burnt house of

Ayubkhan Kasamkhan. All of them had gone to the first floor of the house. The mob started throwing burning rags on their house also which caught fire. People from the next house made a hole in the wall of Muradmiya and entered in their house which included members of family of Muradmiya Shafimiya and Sikandermiya. His house also started catching fire, upon which, Mahemudabibi, her three children and Shafimiya went back the house. Wood and dry hay caught fire. He and his family went to the top floor of the house and got burn injuries. They went on the tin roof. People who were left behind the house were shouting for help. He and his father crossed over to the gallery of the house of Ravjibhai from the roof of Muradmiya. Both his feet got burnt. House of Muradmiya was already on fire. While jumping the gallery of Ravjibhai, his father's hand got fractured. His father told him to run away and save his life. His foot got tangled and his pants came off. He jumped and reached the ground floor where cow dung and hay was stocked. From there, he reached Pathan Mohalla. He did not know (at that time) what happened to his father. On that day, he had met Majidmiya Muradmiya who had told him that nobody was saved. All were burnt in front of his eyes. There he met Maherajbibi and Firozkhan Matbarkhan. Firozkhan and Majid had gone towards his house and brought his injured father. Firozkhan had taken him and his father to the fields on his scooter. They spent the night there. In the morning, in a tractor they reached Bhalej. Shafimiya, Muradmiya and family members of Sikandermiya and his own family

members were burnt in his house. At Bhalej, he and his father had taken treatment at a Government hospital. From there, they were referred to Karamsad hospital. He was treated there for three days.

His father was kept in the hospital for about seven days. Seven members of his family had died. Government had given compensation of Rs. 5 lacs for each death. He had filed application before SIT which was produced at exh. 260. His statement was also recorded by SIT.

Cross examination :-

In the cross examination, he was confronted with the police statement in which apparently he had declared that members of the family were missing. He had also not given the names of some of the accused whom he named and identified before the Court. The main omission pertained to minute details of the day's events.

It was also suggested to this witness that he had interacted with certain NGOs during which he had met one Teesta Setalvad and taken her guidance for filing application and affidavits before the Supreme Court. He agreed that under such guidance she had made the application. He firmly asserted that 23 people who were never found had died burning in front of his eyes. He gave names of such people.

Group-B witnesses :-

25. We now turn to Group B witnesses. Mehboobmiya @ Kalumiya Rasulmiya Shaikh, PW-43, exh.143 was residing at Sumravno chowk. He deposed that on 1.3.2002, there was tension in the village. He was at home with his family. At about 4 O' clock, mob of Hindu people of the village came from Surivali Bhagol. There were around 500 people. They were carrying sticks, dhariya and burning rags. The mob set the house of Bakshukhan Rasulkhan next to his house on fire. According to him, Chotubhai Ramabhai Patel - accused no.36, was part of this mob. He left the house at 7 in the evening and reached Bhalej late at night. Later he learnt that his house was ransacked, looted, his buffalo was also stolen.

He was confronted with the police statement in which apparently he had not named Chotubhai Ramabhai Patel - accused no.36. He has not given any further statement to SIT.

26. Sikandermiya Mohammadmiya Malek, PW-51, exh.153 was residing near milk parlour. He had seen the following four accused – Harishbhai Valabhbhai - accused no.10 (since deceased), Sanatbhai Ranchodbhai – accused no.26, Vinubhai Bhikhabhai – accused no.1 and Hemantkumar Gokalbhai – accused no.22.

In his cross examination however, he admitted that in his

police statement he had not named any of these accused.

27. Yasinmiya Mustufamiya Malek, PW-53, exh.155 was the resident of Navapura area of the Pole. In the afternoon when he was at home, he had seen smoke coming from the market area. He had gone to his uncle's house which was situated in Purnima chowk to fetch the family members. Many of his family members were trapped and killed in Jhamplivalu Makan. He saw the incident which took place at about 4:30. He referred to the following accused whom he saw in the mob – Sanatkumar Ranchodbhai -accused no.26, Hemantkumar Gokalbhai – accused no.22, Jayantibhai Ashabhai – accused no.37 and Pareshkumar Ranchodbhai Desaibhai – accused no.19.

In the cross examination, however he admitted that in his police statement, he had stated that at about 5 O' clock out of fear, he had locked the house and went towards Bhalej and learned about what happened at Oad the next day through other people and that he had not seen the incident himself. He had also not named the accused in his police statement.

28. Nabimiya Akbarmiya Malek, PW-65, exh.170 was the resident of Navapura behind Darga. According to him, he had seen the mob attacking their houses. Mob had come from Lingadia Vad area. The mob had first thrown stones and set the house on fire with inflammable substance. He referred to Dinubhai Bhikhabhai Patel – accused no.1, Punambhai Laljibhai Patel – accused no.29 and

Hemantbhai Gokalbhai Patel – accused no.22 as part of the mob.

Apparently, in the police statement he had disclosed that fearing rioting, he and his family left the house and reached Bhalej. He had also stated that he had not seen any of the members of the mob or identified them.

29. Ahmedmiya Abbasmiya Malek, PW-70, exh.177 was the resident of Navapura area of Oad village. According to him, at about 1 O' clock, he left with his family to reach Bhalej. Next day at about 10 O' clock, he came back to Oad. He referred to violence which took place during the death procession of Nishit Patel who had died in the police firing on the previous day. Since this incident was separately tried, this portion of his deposition of this witness is of no relevance. With respect to events of 1st March even before the Court according to his own deposition, he had left the village by 1 O' clock. He therefore, had no information to share about the later events of the day.

30. Kalumiya Rasulmiya Pathan, PW-98,exh.213 was also the resident of Navapura area of Oad. At about 1:30 on the date of the incident he had gone to Masjid for prayers. Maulvi however told them not to pray there because of tension in the village. He had gone to Piravali Bhagol where his brothers were residing. Mob of about 4000 to 5000 people had reached there in the afternoon. They had started throwing stones. He referred to Ravjibhai

Dhulabhai – accused no.46 and Budhabhai Dhulabhai – accused no. 47, Ramanbhai Dhulabhai and Ravjibhai Valabhbhai (both not named as accused) as forming part of the mob.

Apparently in his police statement he had not named any of these accused.

31. Mohammad Yunus Ismailbhai Vhora, PW-100, exh.219 was residing on the plot of Ramanbhai Motibhai at Upasana, Oad. On the date of the incident, markets were closed. Because of violence he was scared and stayed in the house. Later he called Sureshbhai whose house was near his house for help. Sureshbhai kept him and his family till about 11 O' clock. At about 11 O' clock, one Pareshbhai Pramodbhai Pandya – accused no.31 had called the mob and they had set his house on fire.

In the later part of his deposition, this witness turned hostile and did not own up to his police statement in which he referred to several other accused. Significantly, in his police statement out of several persons named, he referred to only one of them namely, Pareshbhai Pramodbhai Pandya – accused no.31 in his deposition before the Court. For rest of the accused, he had turned hostile. In the cross examination, he stated that after the incidents because of financial problem, he was forced to sale his plot where his house was situated, for which purpose, he had contacted Pareshbhai Pandya. It was this Pareshbhai Pandya who had ensured the sale of his house so that he

may not live in said house since there were only two houses of Muslim people in this locality.

32. Kalumiya Mohammadmiya Malek, PW-102, exh.228 was the resident of Navapura area of Oad. He was brother of Sikandermiya and Shafimiya- PW5. According to him Shafimiya lived with his mother at Purnima chowk. In the afternoon he had gone for prayers to Masjid. Police however turned him down. He had gone to house of his brother Shafimiya. He was there when the mob came there. He had named the following accused – Hirubhai Bhailalbai – accused no.25, Dilipbhai Valabhbhai – accused no.8, Harishbhai Valabhbhai – accused no.10 (since deceased), Dinubhai Bhikhabhai – accused no.1, Hemantbhai Satabhai – accused no.22, Pravinbhai Mangalbai – accused no.45 and Arvindbhai – accused no.20.

He had stated that the mob had burnt the houses. He had escaped from behind and reached his house from where he took his family to Bhalej.

From the cross examination we gather that in his police statement he had not named any of these accused, nor claimed to have witnessed the incident. However, in his further statement before SIT, he had named the four persons out of these accused.

33. Hasankhan Hasukhan Pathan, PW-112, exh.258 was the resident of Piravali Bhagol, Pathan Mohalla. He was at

home in the afternoon. At about 3:30, trouble had started at Surivali Bhagol area. At about 4:30, mob reached Jhamplivalu Makan, started setting the house on fire. He had seen the incident from the edge of the street. First, the house of Akbarkhan Bhikhankhan caught fire. He had seen the following persons in the mob – Dinubhai Bhikhabhai accused no.1, Hemantbhai Gokalbhai – accused no.22, Dilipbhai Ranchodbhai – accused no.28 and Kanubhai Ranchodbhai (not accused).

In his police statement, he had however given the version that he had gone for labour work in the morning and returned at about 4:00 to 4:30. He had left with his family when Mohammadkhan Akbarkhan had told him that trouble had started in the village and he reached Bhalej. In his police statement it was also stated that Mohammadkhan Akbarkhan had come to his house and told him to leave the family upon which at about 6 O' clock, he had gone to Bhalej through fields. This witness was also confronted with police case that he and others had allegedly beaten up Dilipbhai Ranchodbhai near Dargah. In his SIT statement he had stated that he had not witnessed the incidents of Malav Bhagol, Piravali Bhagol or Surivali Bhagol. In his police statement he had also not named any of the accused.

34. It can thus be seen that common thread amongst these witnesses is that they had named and mostly identified the accused in the deposition before the Court but had not named such accused in the police statements.

Group-C witnesses :-

35. We now turn to Group C witnesses who had turned hostile. Here the witnesses had in their police/SIT statements named the accused but did not support the prosecution in their depositions before the Court.
36. Sadrukhan Rasulkhan Pathan, PW-54, exh.156 was the resident of Surivali Bhagol. In the police statement, he claimed to have witnessed the incident and named several accused who were part of the mob. However, in his deposition before the Court he turned hostile and did not support the prosecution. Same is case with Firozkhan Kalukhan Pathan, PW-59, exh.161, Jafarkhan Bhikhankhan Pathan, PW-60, exh.162, ShAarifkhan Rasulkhan Pathan, PW-61, exh.163, Nabikhan Ashrafkhan Pathan, PW-73, exh.180, Mohammadbhai Rasulbhai Khalifa, PW-77, exh.184 and Ahmedmiya Ashrafmiya Pathan, PW-83, exh.190.
37. Case of Ruksanabanu @ Miya Malek. PW-90, exh.200 though is slightly different. She has not turned hostile but her evidence is hearsay. Further she had not given such details in her police statement. According to her deposition, she was at her in-laws place where her cousin Majidmiya had informed her about the incident at her matrimonial home.

Group-D witnesses :-

38. We may now turn to Group-D witnesses. This group contains those witnesses who are not eyewitnesses to the incidents but provide important related information. This group comprises of the following witnesses :-

39. Akbarbhai Husenbhai Saiyed, PW-12, exh.97 was the resident of Surivali Bhagol village. He was a matador driver. On the date of the incident he had returned to the village between 10:30 and 11. He had gone to mosque for prayers at about 12. At about 2 O' clock when he was returning, a mob had gathered which was coming towards him and others. He and others therefore, took shelter in Asthana Darga. These people had set the mosque on fire.

This witness had not named or identified any of the accused before the Court. In his cross examination he agreed that while he was in the camp for about six months there were discussions about the events of Oad. Discussions also revolved around the manner in which the complaint was to be filed.

40. Pujakhan Husenkhan Pathan, PW-20, exh.111. was residing 50 feet away from Purnima chowk, Piravali Bhagol. Milk cabin was also close to his house. On the date of the incident, he was at home when the trouble started at about 3:30 to 4:00. When Akbarkhan's house which was about 50 feet from his house started burning, he left with his family. He stated that mob was of about 1500 to 2000

Hindu people.

He also did not name or identify any accused before the Court. In the cross examination, he agreed that while he was in the camp, police often visited the camp site. Leading members of the community also were often present.

41. Haroonbhai Kadarbhai Meman (Vohra), PW-34, exh.132 was residing in Surivali Bhagol area. For our purpose, his deposition is limited to trouble started brewing up sometime in the afternoon. He had seen the properties burning in the lane of Rafikbhai Machhivala. He however, had not identified any of the persons from the mob. His properties were also damaged.

42. Kalumiya Bhikumiya Malek, PW-38, exh.136 was resident of Surivali Bhagol area. He had also not identified any of the persons from the mob.

43. Shabbirmiya Rasulmiya Shaikh, PW-39, exh.137 was the resident of Sumravno Chora area. At about 2 O' clock, when he was at home, mob of about 500 people shouting to kill had passed by his house. He had left his house at about 6:30 to reach Bhalej. His house was also burnt down.

In the cross examination, he agreed that when while he was at camp, discussions did revolve around the incidents of Oad. He also agreed that the leaders of the community were guiding about the nature of answers to be given and

complaints to be filed.

44. Gulamnabi Umravmiya Malek, PW-72, exh.179 was resident of Navapura. On the date of the incident, he and other family members had gone to the field of a Patel for labour work. In the evening they heard about the tension in the village and therefore, went to sleep at the farm itself. Next day also they did the labour work there. Since they had not taken their food with them Jayendrabhai Satabhai Patel had given them snacks.

In the cross examination, he agreed that he was referring to the same Jayendrabhai Satabhai Patel who was one of the accused.

45. Matbarkhan Bhikhankhan Pathan, PW-123, exh.288 was the resident of Pathan Mohalla. He was brother of Akbarkhan Bhikhankhan. On the date of the incident, he was at home. His brother Akbarkhan's house was set on fire. However since there were many people, he could not save the house. Akbarkhan's son Mohammadkhan had come in a burnt condition. His sons Firozkhan and Majidmiya Muradmiya had gone to the house. They found Akbarkhan in the bathroom and brought him out. From the house of Majidmiya also, his family members were found alive. Rest of the people in all 23 had died in the incident. Akbarkhan and Mohammadkhan were sent on a scooter to the fields. However, this information he had not given in the police statement.

Group-E witnesses :-

46. We now come to Group E witnesses who comprise of police and para-police witnesses.

47. Vinubhai Ramanbhai, PW-124, exh.293 was an unarmed police constable posted at Oad outpost at the relevant time. On the date of the incident, he was on duty. Due to Bandh call, village atmosphere was tense. He returned for duty at 8 O' clock in the morning. Besides him there were CPI Bhuva, Shri Rathod in-charge PSI, Khambholaj, Head constable Kanjibhai and unarmed police constable Aarif at the outpost. One ASI Bhimsinh was on sick leave. Under the instructions of Bhuva, he had gone to the house of Bhimsinh and asked him to report. Bhuva had reported at about 10 O' clock.

Under the instructions of CPI Bhuva, he along with ASI Bhimsinh, Head Constable Kanjibhai and unarmed police constable Aarifbhai had gone for patrolling. They received wireless message from Bhuva that they should reach Shili road which is part of the village. When they reached there, they saw a mob of about 1000 to 1500 people in the fields. They informed Bhuva by wireless message. He also therefore, came there. All of them thereafter had gone to Surivali Bhagol area where there were Muslim settlements. The mob had started coming towards these houses. Mob was of Hindu people from Oad village. These people had petrol bottles, burning rags,

weapons such as sticks and dhariya. They were shouting to kill Muslims and they had started burning the house with burning rags.

At that time, SP Vabang Zameer who was present had ordered Lathi charge and then teargas shelling, despite which, the crowd did not disperse. In fact, their numbers swelled. They continued throwing burning rags on Muslim houses. When the mob did not disperse, SP ordered firing whereupon police as well as SRP Jawans fired. Due to this the people from the mob started running. They could bring out the occupants of Muslim houses and collected them at Dharmashala.

When they were coming from Surivali Bhagol area to Virjikakani Khadki area, people started coming out from that area. They locked the house of Rafik Mohammad Khalifa which was situated nearby. Rakik Mohammad and his family members were inside the house. After locking the house, the people from the mob started throwing burning rags on the house. They were Hindu residents of Oad village. SP Vabang Zameer and CPI Bhuva had fired upon which mob started dispersing. They unlocked the house and brought out the people and sent them to Dharamshala. Rafik's house was burning at that time.

At night the relief work had started and Muslim people were sent to Sureli camp. He was on duty from 8 in the morning till 8 at night. He had seen the people in the mob but did not know anyone of them.

Cross examination :-

He denied that the mob of people at Shili road comprised of people from outside of the village trying to enter the village. He had heard that during police firing one Patel boy had died. He was not sure whether he died of the bullet firing by Aarif.

In the police statement, he stated that message about firing was sent to Khambholaj through Aarif. He had also stated that in order to save his relatives who were residing in Oad that Aarif had fired. He however, denied that only out of anger and without any reason, Aarif had started firing.

48. Jagdishbhai Budhabhai, PW-125, exh.296 was the police constable at Khambholaj. On 1.3.2002, he was posted at Oad. Anticipating trouble due to Bandh call, he had reached Oad village at about 7:30 in the morning on motorcycle. Another constable Ishwarbhai Valabhai had also come independently along with Head Constable Surjibhai Ranchodbhai. He was on duty in the afternoon. Being a Friday, some Muslim people had come to Masjid for prayers. However because of the tension in the village they returned without offering prayers. At 1:30 to quarter to 2:00 in the afternoon, in Surivali Bhagol and Virjibhaini Khadki area, mob had collected and started coming towards Masjid. They started throwing stones. They had burning rags, kerosene cans and other deadly weapons with them. This was mob of Hindu people of about 1000 to

1500. They were shouting to kill Muslims. In stone pelting, two home-guard Jawans got injured. Mob then started damaging the properties and set them on fire. In presence of ASP and CPI, they had first Lathi charged and then used teargas shells but failed to control the mob. They fired in air under the orders of ASP. Thereupon mob receded towards the village. Since there was excessive stone pelting and their number was very small (at 4 points in the village including SRPS there were only 10 policemen), they took shelter in the shop. Later in the evening they learned that their motorcycles were burnt. He remained on duty for 24 hours. Ishwarbhai's point was nearby but he came to them since home-guard Jawans had deserted. Next day he had filed the complaint about damage to the motorcycle.

Cross examination :-

In the cross examination, referring to his police statement, the defence tried to bring out certain minor omissions.

49. Ishwarbhai Valabhai, PW-126, exh.297 was the police constable stationed at Khambholaj. He was posted at Oad. He was present at 8 in the morning near milk parlour. Two home-guards were provided for his assistance. He had come with Head Constable Surjibhai and parked his motorcycle at Oad Government hospital. In the afternoon mob had started gathering shouting to kill. By evening both the home-guards had disappeared. He had taken shelter in a dairy because the mob was extremely aggressive and there were very few policemen. He stayed

there till about 8 O' clock and then reported the situation to the ASP and CPI. He remained on duty till midnight. His motorcycle was burnt.

Cross examination :-

In his cross examination also defence has tried to bring certain minor omissions.

50. Bhanusinh Bhagwansinh Chauhan, PW-92, exh.206 was the member of home-guard. He was posted at police station Khambholaj. He was instructed to go to Oad at the night of 28th February, 2002. He reached Oad at 9 in the morning. He was posted at a point near Surivali Bhagol. In the afternoon, the mob started gathering. Slowly, it became crowd of nearly 2000 people. They had kerosene cans and burning racks. He received injury on his eye due to stone pelting. Pravinsinh who was with him also got injured. He and Pravinsinh had to take shelter in a shop. He and Pravinsinh had taken treatment at Government Hospital, Shili Road.

51. Pravinsinh Chandrasinh Chauhan, PW-96, exh.211 was also a member of Home guard. He also reached Oad village on 1st March at about 9 O' clock. He had taken shelter in the shop along with Bhanusinh Bhagwansinh.

52. Bhimsinh Prabhatsinh Raulji, PW-150, exh.443 was posted at Oad outpost under Khambholaj police station as

ASI. He was on sick leave since 20 days before the date of incident because of Sabarmati Express massacre. He was asked to resume duty which he did on 1st March. He had come to Shili road at about 12:30 to 12.45 in the afternoon along with CPI Bhuva, ASP Vabang Zameer, Police Constable Vinubhai Ramanbhai and Head Constable Kanjibhai Maknabhai. There was a mob of 2000 people gathered in the fields. Anticipating that mob may go towards the village, they had reached in their guards to Surivali Bhagol area of the village. The mob had entered Muslim area pelting stones, throwing burning rags. They were carrying sticks and dhariyas. The police was forced to fire and had also used teargas shelling. In the incident, one youth had got injured. The mob had taken away the person who got injured in police firing and took him to the hospital. After this, mob had become uncontrollable and incidents of setting fire took place in different parts of the village. While they were at Surivali Bhagol, members of the mob had locked the house of Rafik Khalifa, PW-104, situated in Virjikakani Khadki from outside. This house was set on fire. They had saved people in the house and sent them to Asthana. Under the instructions of CPI Bhuva, he had taken Rafikmohammad Khalifa to Khambholaj police station to lodge the FIR. After escorting him to police station, he returned to Oad. On 1st March including the police officials stationed at Oad, there were 10 to 15 policemen on duty. At that time, incidents had taken place in Surivali Bhagol, Malav Bhagol and Piravali Bhagol areas of the village. Next day was the death

procession (of the youth who died). They were all sent for duty but nobody could reach. Policemen stationed at village also had run away out of fear. He was staying in the rented house in the village. He had called the family members of co-constable Vinubhai Ramanbhai to his house. He had asked for police protection for his house which was not provided. He had stayed home with his family. After protection was provided, he had gone to outpost for duty. At about 11:30 in the morning, the procession of the youth who had died in the police firing was taken out. There were about 10,000 to 15,000 people in the procession. He and other policemen had run away out of fear.

At about 4'O clock in the evening S.P. Shri Vaghela had come and asked him to take to the milk parlor. He had given information of dead body lying near the house of Sikandermiya Muradmiya. They searched from the ashes and found a half burnt body with whom was stuck the dead body of a small child. He was told that the bodies are those of Sikandermiya and his child. He had taken the body to the hospital. He had written a yadi to this effect to Khambholaj police station which was produced at exh.444. He also produced Yadis sent to Executive Magistrate and to the Chief Officer of Nagarpalika, requesting him to dispose the bodies at exh.445 and 446 respectively. He produced at exh.447 yadi prepared by constable Vinubhai handing over the dead bodies to one Salimsha Diwan.

Cross examination :-

In the cross-examination he denied that it was Aarifbhai who had fired causing the death of the youth from the mob. He stated that dead bodies collected by him were in half burnt condition. They were found from underneath ashes but were visible to the passers-by. He was told by the DSP that the dead bodies were those of Sikandermiya and Guddi. He did not remember who called Salimsha Diwan to whom dead bodies were handed over. He stated that the family members of Sikandermiya were not contacted for handing over the bodies since there were no Muslim people left in the village. Though nothing was found from the dead bodies from the nearby where the bodies were lying, chain of a wrist watch was found.

Group-F witnesses :-

53. We may now refer to Group-F witnesses who comprise of medical officers and FSL experts.
54. Dr. Umiya Jadavbhai Pipliya, PW-139, exh.380 was the Medical Officer at Oad Community Health Centre. Along with the yadi of the Magistrate, a skeleton was brought before her for postmortem. From the outward appearance, they appeared to be two different bodies. One of an adult person and another of a small child. The bodies were completely burnt. Only bones were left. One of the skeletons was barely 2 ft. long suggesting that it was a child. It was not possible to carry out postmortem. In

her opinion, the death was due to burning and suffocation. Postmortem note was prepared, which was signed by her and panel Doctor Ashish Patel, which was produced at exh. 232.

She had also taken the blood samples of Azaruddin Sikandermiya Usmanmiya for DNA testing. She had taken such blood samples. The police had also produced bones weighing about 100 gm from Oad village which was sent to Vadodara Anatomy Department.

Cross examination :-

In the cross examination, she stated that on the basis of postmortem, she had prepared a rough note. On the basis of such rough note she had prepared postmortem note Exh. 382 on 8th March. She admitted that it was not possible to ascertain the precise cause of death and her opinion in the postmortem report was on the basis of belief. She was unable to state whether skeleton was that of a male or a female.

55. Dr. Anilkumar Madhukant Mehta, PW-153, exh.455 was the Deputy Director of Forensic Science Laboratory, Gandhinagar at the relevant time. He had received various articles for DNA testing which he had sent to Central Forensic Science Laboratory, Chandigarh, for analysis. This included the samples supposedly of Sikandermiya and his daughter Guddi and the blood samples of Azaruddin, son of Sikandermiya. The police had also brought before him some 100 grams of bones recovered from Jhamplivalu

Makan. Because of the condition, however, no DNA could be collected. It is not possible to ascertain whether bones were humans or not.

56. Dr. Ashish Manibhai Patel, PW-141. Exh.393, was part of panel of doctors who had carried out the postmortem of dead bodies supposedly those of Sikandermiya and his daughter Guddi. He was also present at the burial ground when the dead bodies were exhumed from the grave. According to him, both the skeletons were brought out from the same grave. It was not possible to decide whether the skeleton was of a male or female.

57. Dr. Sanjiv Narendranath Sighla, PW-147, exh.424, was the Scientific officer at the Central Scientific Science Laboratory, Chandigarh. On 14.08.2002, the laboratory had received bones supposed to be of Sikandermiya and Guddi, blood samples of Azaruddin, son of Sikandermiya. From the bones of Sikandermiya, human DNA was not detected but from other two articles, viz., bones of Guddi, blood samples of Azaruddin, human DNA was found. Comparison of two DNAs showed that they were brother and sister. Their matching ratio was 6 ½ times more than what would be in case of unrelated people.

Cross examination :-

In the cross examination, he agreed that he was not 100% sure about the two being brother and sister and the DNA

analysis would show merely a possibility of such relation. He agreed that if the matching percentage are 40 to 50 times of unrelated person, such opinion could be more than certain. DNA test in case of father-son would be more reliable.

58. Dr. Ashokbhai Babulal Sharma, PW-142, exh.398, was the Medical Officer at the Primary Health Centre, Bhalej. At 12.30, Mohammadkhan A. Pathan had come to him for treatment with police yadi. He gave the history of being attacked and got burnt. He had noticed burn injuries on cheeks, hands and elbow and also on his feet. The injuries were less than 24 hours old. After giving preliminary treatment, he had referred him to hospital at Karamsad. On the same date, he had also treated Akbarkhan Pathan. He gave history of being attacked with sticks and receiving burn injuries. He had noticed several bruises and cuts and burn injuries on various parts of the body. After preliminary treatment, he had referred the patient to Karamsad hospital for further treatment. On the same day, he had also treated Mahemudabibi Pathan who had received blunt injuries.

Cross examination :-

In the cross examination, the defence pointed out that in the history, none of the persons had given names of the people who had attacked them.

59. Dr. Bhavin Somabhai Sharma, PW-145, exh.416, was posted at Karamsad Shree Krishna Hospital. At Karamsad hospital, Dr. Nehal Patel had treated Akbarkhan Bhikhankhan and Mohammadkhan Akbarkhan Pathan. Dr. Meet Desai and Dr. M. Vinod Kurier had carried out postmortem of Nishit Patel. However, all these three doctors had left the country and gone to USA. He was therefore called as a witness. He produced necessary documents from the hospital record.
60. Narayanbhai Ramjibhai Chaudhary, PW-149, exh.437, was the Medical Officer at Shili Primary Health Centre. Pravinsinh Chandrasinh Chauhan and Bhanusinh Bhagwansinh Chauhan, two home-guards were treated by him when brought with police Yadi. He had recorded injuries on their bodies.
61. Dr. Chaganbhai Jinvarsha Raibarkar, PW-144, exh.414, was the Professor of Anatomy in Karamsad Medical College. Some bones were sent to him to decide whether they were human bones, but he was unable to give a definite opinion. Dr.Pankaj Haridas Barai, PW-148, exh.426, to him also, some bones were sent for identification. He was sent certain bones for identification, whether they were all human bones or not, but such identification was not possible. His opinion was also sought for that at which temperature human bones would turn into ashes. He had given opinion, which was produced at Exh.430 by relying upon book of Dr.Narayan Reddy. In such opinion he had stated that if human body is kept

under temperature of 1000° Centigrade, within one to one and half hours, it would be deduced to ashes weighing 2 – 3 Kgs.

Group-G witnesses :-

62. Now we come to Group-G witnesses who comprised of Investigating Officers.
63. Kadarkhan Peerkhan Pathan, PW-152, exh.453 was posted at Umreth Police Station. He was posted in Modes Operating Bureau. Under the instructions of Vabang Zameer, he was handed over the investigation into 28 missing persons. He had recorded statements of relatives of such missing persons. On the basis of such statements, it was revealed that these people have been burnt. He made such a report to the ASP which is produced at exh.545.
64. Ranchodbhai Gopalbhai Patel, PW-155, exh.490, was PSI at Khambholaj Police Station at the relevant time. He was on leave for family reasons. He was asked to report for duty. He reported to the duty at Khambholaj police station in afternoon on 1st March. He had taken charge of investigation on 02.03.2002 at night. He reached Oad village at 10:30 and visited different affected areas. During such visit, he could not find victims or eyewitnesses. He called the police party next day for drawing panchnama. From early morning next day he had started drawing panchnama of different places which were riot affected. He gave details of such panchnama and produced copy

thereof. This included panchnama of the scene of incident from where the dead bodies supposedly of Sikandermiya and his daughter were recovered and later on he also had drawn panchnama of exhumation of these bodies for sending them to DNA testing. He stated that he had under his investigation in all, seven cases of Oad and nearby villages all situated within Khambholaj Police Station area. He stated that there were 16 villages within the jurisdiction of Khambholaj Police Station. There were two outposts, one of them at Oad. At that time, in all, there were 34 police officers discharging their duties. These included persons employed as drivers, clerks, PSO etc. Oad outpost had staff of one PSI and three constables. There were six villages within this Oad outpost jurisdiction. Oad village had population of about 20,000 people. There were two complaints registered in relation to Oad incident being C.R.No. 23 of 2002 and 27 of 2002. C.R.No. 27 of 2002 was in relation to incidents taking place at Malav Bhagol area on 1st March.

Through the deposition of this witness the prosecution brought on record contents of police statement of hostile witnesses.

Cross examination :-

In the cross-examination he denied that panchnama was drawn by him while sitting in Oad outpost. He had received papers in relation to handing over the bodies for burial to Salimsha Diwan. He admitted that at that time only he had

learned that bodies were of Sikandermiya and of his daughter. He had made an attempt to prevent Salimsha Diwan from disposing of the bodies so that DNA testing can be carried out. Though he knew that Salimsha Diwan was available, he had not recorded his statement. He denied that there is no such person like Salimsha Diwan and that documents showing handing over the bodies to Salimsha Diwan were got-up documents.

He admitted that during his investigation it was revealed that firing due to which a Patel died was ordered by ASP Vabang Zameer and that as per the statement of Aarif Vohra, firing was done by him. In the statement of constable Vinubhai also this fact was revealed.

Through this witness, the defence brought on record, certain improvements and contradictions in the statements of witnesses. It is not necessary to record all of them here. However, we would take note of most significant omissions and improvements and contradictions while evaluating the evidences of the witnesses. While doing so in some cases, he also explained what witness had actually stated in the police statement. He agreed that in his statement Firozkhan Matbarkhan Pathan, PW-99, had not stated that these very people were also responsible for lighting fire and when my uncle Akbarkhan Bhikhankhan Pathan's house was set on fire, everything had got burnt at which time, Akbarkhan and all his family members were inside the house. However, Firozkhan in his police statement has stated to the effect that these people and the people from

the mob had set the house of Akbarkhan Bhikhankhan Pathan on fire by throwing burning rags and kerosene. In this house my uncle and his family members were trapped inside.

Again in relation to the police statement of Firozkhan, he clarified that this witness had stated that when he shouted for his brother and father, from inside, his uncle Akabarkhan had said that he was in the bathroom and asked him to save him upon which, he entered the bathroom by breaking open the door and he had brought out Akbarkhan. He had got burn injuries on his leg, face and hands. No other person from the family could be brought out from the house.

He stated that witness Kalumiya Mohammadmiya, PW-102 in his statement had stated that at about 4.30 on 1st March, he was at the house of younger brother Shafimiya when trouble had started upon which he had gone to his house at Navapura. He had also stated that he had not seen the persons setting his brother's house on fire and the members of his brother's family are still missing. This witness had also stated that next day, he came to know that his house and house of Navapura were damaged and set on fire. This statement of Kalumiya Mohammadmiya he had recorded on 10th March. No further statement was recorded. In the statement of 10th March, he had not disclosed names of any of the accused.

He stated that Majidmiya Muradmiya Malek, PW-103 had

not given names of his family who had died. However, in his police statement before SIT recorded on 11.05.2008, he had given such details.

In his statement, Shafimiya Mohammadmiya Malek, PW-105 had stated that his mother, wife, daughters, sister and brother-in-law were missing. He agreed that Shafimiya in his statement had not given details of various accused who were part of the mob carrying specific weapon or inflammable items. He however clarified that witness had given names of all the accused he had identified. However, Shafimiya did not give the names of Vinubhai Shanabhai – accused no.32 and Atulbhai Dahyabhai-accused no.2 in his statement. In relation to statement of Shafimiya, he clarified that this witness had stated that when the room in which he, his uncle Muradmiya, Sugrabibi and some five people were hiding. They had made a hole in the wall and went into the house of Akbarkhan Bhikhankhan. When they were so hiding in the house of Akbarkhan, Majidmiya had shouted that let all of us get out otherwise we all would get burnt alive.

In relation to statement of Mahemudabibi Majidmiya Malek, PW-110, he clarified that this witness had stated before him that they were shouting for help and except few people, rest remained in the house of Akbarkhan. Those who remained there were shouting and screaming for help. This witness had also stated that Sikandermiya Usmanmiya and his one and half year old daughter Guddi had during that time fallen from the upper floor in a

completely burnt condition which he had seen.

He agreed that Mohammadkhan @ Gafurkhan Akbarkhan Pathan, PW-113, in his statement had stated that the members of the family who were inside the house are missing and he still does not know what has happened to them. In relation to this statement of this witness, he clarified that this witness had stated before him that when the house next to them started burning, they made a hole in the wall and Muradmiya Bhalamiya, Madinabibi Mohammadmiya, Jaitunbibi Usmanmiya, Sikandermiya Usmanmiya, Hasinaben Sikandermiya, Karishma and Guddi, Sugrabibi Muradmiya, Afsanabanu Bashirmiya, Sattarmiya Hasammiya (and several people whose names he gave) came to the second floor of the house. This witness had also stated that to save their lives, he and his father had gone into gallery of Ravjibhai Master by running on the tin roof of house of Muradmiya Bhulamiya, which was already on fire and then jumped from there. He also clarified in his statement that Firozkhan, PW-99 and others had brought out his father and taken him to Bhalej on scooter.

65. Keshubhai Rambhai Bhuva, PW-156, exh, 515 was Circle Police Inspector, Anand. Under his jurisdiction were five police stations including Khambholaj. Oad was part of Khambholaj police station area. At about 12.30 in the afternoon, he was present at Oad on 1st March. He was at Surivali Bhagol area. They went to Ahima Road and dispersed the mob which had started gathering there and

again went back to Surivali Bhagol. By 1.30, big crowd started gathering there. They were throwing stones and burning Muslim properties. Vabang Zameer was also present. They first Lathi charged the crowd. When the trouble continued, they resorted to firing. One boy who was injured in this firing, the people from the mob took him away. During this time, the mob had also gathered near Virjikakani Khadki. They had blocked the house of complainant Rafikmohammad Khalifa, PW-104 and set the house on fire. The police had dispersed the house and brought the family members outside. Rafikmohammad was sent to Khambholaj police station with ASI Bhimsinh for lodging the complaint. He had stayed at Oad village till 5 O'clock next morning. Investigation of the CR No.23/2002 filed by Rafikmohammad Khalifa, PW-104, was conducted by PSI R.G. Patel. Since R.G. Patel was on leave between 16.03.2002 to 22.03.2002, he had carried out the investigation. Thereafter, he had again took charge of investigation on 14.04.2002 when PSI R.G. Patel was transferred and continued investigation till filing of the charge-sheet.

On 1st March, there were about 15 to 20 policemen posted at Oad. These included six policemen who were constables and head constables. All six people had ran away from duty on 1st March itself.

Cross examination :-

Through this witness, the defence brought on record

certain omissions, improvements and contradictions in statements of the witnesses. He had recorded statement of Sikandermiya Mohammadmiya PW-51, in which he had stated that before the trouble had started in their area, he had left the house and therefore, had not identified any of the persons in the crowd. He agreed that this witness had not given names of Harishbhai Vallabhbhai, Sanatbhai Ranchoddbhai, Vinubhai Bhikhabhai and Hemantkumar Gokalbhai in his police statement.

He had also recorded statement of the Nabimiya Akbarmiya and agreed that in his statement Nabimiya had stated that when they realised that there are lot of disturbances in the village and they may be attacked, he and his family members locked the house and reached Bhalej. He learnt that mob had set on fire shops and houses of Muslim people in Surivali Bhagol and Malav Bhagol area but he had not seen the incident himself.

66. Himanshubhai Chandravadanbhai Pathak, PW-157, exh.519 was Dy.S.P. Anand, in the year 2008. He was handed over further investigation of the case by SIT constituted by Supreme Court. He had applied and got permission from Sessions Court, Anand, for further investigation on 12.04.2008. Soon after this permission was granted, appointment of Shri G.H. Patel, Dy.S.P. was made in special investigation on 23.04.2008. He had handed over investigation to Shri Patel. Search was taken in a well and a steep well in the village. The bones found

from search was sent for opinion whether they were human bones.

67. Girishbhai Haribhai Patel, PW-158, exh.540, had taken charge of further investigation on 23.04.2008. In his investigation, it was found that the two accused had gone abroad, who had died. In case of three accused, there were discrepancies in the names. They were one Punam Lalji, accused No. 29 whose real name was Kaushikbhai Jasbhai, Sureshbhai Bhailalbai, accused No.16 whose real name was Suryakant Bhailal and Bhura Ravji (deceased) whose real name was Arvind Ravji. This witness gave details of steps undertaken by him during the course of such further investigation. This included a yadi of Forensic Science Laboratory exh. 546 in which opinion was sought on melting points of certain metals and what effect the temperature at which such metals are melted would have on plasters of a wall of the building. Opinion was also sought at which temperature and within what time the human bones would turn into ashes. In response to this, he had received the report of one J.K.Patel, Scientific Officer, Director of FSL, in which it was stated that melting point of aluminum vessel was 660.1° Centigrade, melting points of other vessels of copper, zinc, brass or mixed metals would be in the range of 950° Centigrade to 1050° Centigrade depending on composition. At this heat, the plaster of the wall would become brittle and could crumble. Regarding the last question he advised seeking opinion of forensic medicine department.

Rival contentions :-

68. In background of such evidence, we may record the contentions of learned advocates for both the sides. The defence arguments were led by Shri Yogesh Lakhani. His contentions were as under:

(1) He referred to the peculiar background, in which SIT was constituted under the orders of the Supreme Court pursuant to which, further investigation was carried out several years after the incident. This included recording of statements of witnesses. In this context, he also criticized the role played by certain NGOs who were closely connected with the process of constitution of SIT and had also established close link with the witnesses while they were in relief camps. Counsel also criticized the role played by the leaders of the community. By referring to the depositions of the witnesses, he contended that the members of the NGO and leaders of the community were regularly visiting various relief camps. This would have certainly influenced the witnesses and in some cases, even prompted them to include persons who were not actually involved in the incident.

(2) Counsel took us painstakingly through the evidence on record to contend that looking to the geography of the village and the relative positions of different areas, in many cases, it can be established that the witnesses could not have seen the incidents, as claimed. In other words, the

contention of the counsel was that many of the witnesses who claimed to be eyewitnesses were not reliable.

(3) Counsel referred to the deposition of witnesses particularly the police witnesses who had referred to the gathering of the crowd at Shili road in the first half of the afternoon of 1st March which the police had tried to control. Contention of the counsel was that it is entirely possible that the members of the mob were outsiders. It is this very mob which had then spread through the village causing damage. His contention therefore was that culprits being residents of villages other than Oad was the real possibility.

(4) No specific role, overt act or weapon was attributed to any of the accused. When the accused were the residents of the same village and in majority of the cases, of the same area from where the incidents were reported, their mere presence at the time of the incident even if believed, would not be sufficient to hold that they were members of the unlawful assembly. Their presence was natural, since even out of curiosity they could have ventured out of the house and may have been spotted by the witnesses. Counsel submitted that the Trial Court wrongly applied section 149 of the IPC against the accused. There was no evidence that accused were part of unlawful assembly or that this unlawful assembly had a common object which these accused shared. Counsel contended that conspiracy theory was not established. To establish the conspiracy, there had to be prior meeting of minds. There was no

evidence of any such prior meeting of minds amongst the members of the unlawful assembly.

(5) Counsel contended that the individual witnesses claiming to be eyewitnesses are not reliable. He highlighted the improvements, omissions and contradictions in the depositions of these witnesses, which in many cases, were crucial. He submitted that the witnesses who had made such large scale improvements and contradictions would not be reliable. The possibility of personal animosity or vendetta also cannot be ruled out. Looking to the nature of incident and the nature of evidence brought on record, in any case, one witness theory cannot be applied.

(6) Regarding the death of Sikandermiya and his daughter Guddi, counsel contended that evidence on record was not conclusive. There are number of contradictions and improbabilities in the prosecution version.

(7) There was no evidence that 23 people who were residents of Piravali Bhagol area had died when their houses were set on fire. All that has come on record is that these people had gone missing.

(8) Counsel submitted that some of the accused were not given the benefit of set-off though available. This issue, we will elaborate when we take up the same for our comments.

(9) In support of his counsel relied upon the following decisions:

(a) In case of **Kali Ram v. State of Himachal Pradesh** reported in (1973) 2 Supreme Court Cases 808 to contend that burden of proving guilt of accused is always on the prosecution. If two views are possible, one favouring the accused should be adopted by giving benefit of doubt since consequences of conviction of innocent person are very grave.

(b) In case of **Rai Sandeep alias Deepu v. State (NCT of Delhi)** reported in (2012) 8 Supreme Court Cases 21 in which it was observed that a sterling witness should be of a very high quality and caliber whose version should be unassailable.

(c) In case of **Masalti v. The State of Uttar Pradesh** reported in AIR 1965 Supreme Court 202 to contend that where a criminal Court has to deal with evidence pertaining to the commission of an offence involving a large number of offenders and a large number of victims the correct test to be adopted is to confirm the conviction only when it is supported by two or more witnesses giving consistent account of the incident. For the same purpose, reference was also made to decisions in case of **State of U.P. v. Dan Singh and others** reported in (1997) 3 Supreme Court Cases 747, **Binay Kumar Singh v. State of Bihar** reported in (1997) 1 Supreme Court Cases 283,

Inder Singh and others v. State of Rajasthan reported in (2015) 2 Supreme Court Cases 734, **Chandra Shekhar Bind and others v. State of Bihar** reported in (2008] 1 Supreme Court Cases 690.

(d) In case of **Dilavar Hussain and ors v. State of Gujarat and another** reported in (1991) 1 Supreme Court Cases 253 to contend that sentiments or emotions howsoever strong are not relevant in course of law.

(e) Reference was made to decision in case of **Mohd. Iqbal M. Shaikh and others v. State of Maharashtra** reported in (1998) 4 Supreme Court Cases 494 to highlight the principles to be employed while assessing the evidence of witnesses.

(f) Case of **Pandurang Chandrakant Mhatre and others v. State of Maharashtra** reported in (2009) 10 Supreme Court Cases 773 to contend that in cases involving group enmities, it is not unusual to detain persons other than those who are actually involved.

(g) Reference was made in case of **Eknath Ganpat Aher and others v. State of Maharashtra and others** reported in (2010) 6 Supreme Court Cases 519 to contend that in absence of specific allegations and only on the basis of vague and omnibus allegations, conviction should not be recorded. For the same purpose, reference was also made to decision in case of **Bijoy Singh and another vs. State**

of Bihar reported in (2002) 9 Supreme Court Cases 147.

(h) Case of **Sherey and others v. State of U.P.** reported in 1991 Supreme Court Cases (Cri) 1059 was cited to contend that conviction could be recorded in cases only where the accused are cited in the FIR and consequentially referred in depositions.

(i) Case of **Shahid Khan v. State of Rajasthan** reported in (2016) 4 Supreme Court Cases 96 was cited to contend that delay in recording the statements of witnesses without explanation would be fatal to the prosecution. For the same purpose reference was also made to decision in case of **State of Orissa v. Mr. Brahmananda Nanda** reported in (1976) 4 Supreme Court Cases 288 and decision in case of **Maruti Rama Naik v. State of Maharashtra** reported in (2003) 10 Supreme Court Cases 670.

(j) In aid of appreciation of evidence following judgements were cited:

(i) **Ram Asrey Pandey v. State of Bihar** reported in 1977 Supreme Court Cases (Cri) 374.

(ii) **Muluwa son of Binda and others v. The State of Madhya Pradesh** reported in (1976) 1 Supreme Court Cases 37.

(iii) **B.Virupakshaiah v. State of Karnataka and others**

reported in (2016) 4 Supreme Court Cases 595.

(iv) **Shingara Singh v. State of Haryana and another** reported in (2003) 12 Supreme Court Cases 758.

(v) **Din Dayal v. Raj Kumar alias Raju and others** reported in AIR 1999 Supreme Court 537.

(vi) **Mohinder Singh and another v. State of Punjab and others** reported in AIR 2003 Supreme Court 4399.

(vii) **Ganesh Bhavan Patel and another vs. State of Maharashtra** reported in AIR 1979 Supreme Court Cases 135.

(k) In support of his contention that by mere presence even if cited in the unlawful assembly, person does not become part of such unlawful assembly, following judgements were cited:

(i) **Baladin and others v. State of Uttar Pradesh** reported in AIR 1956 S.C. 181.

(ii) **Ramesh Baburao Devaskar and others v. State of Maharashtra** reported in (2007) 13 Supreme Court Cases 501.

(iii) **Akbar Sheikh and others v. State of West Bengal** reported in (2009) 7 Supreme Court Cases 415.

(iv) **Kuldip Yadav and others v. State of Bihar** reported

in (2011) 5 Supreme Court Cases 324.

(v) **Nagesar v. State of Chhattisgarh** reported in (2014) 6 Supreme Court Cases 672.

(vi) **Rabindra Kumar Pal alias Dara Singh v. Republic of India** reported in AIR 2011 Supreme Court 1436

(l) To repel the conspiracy theory of the prosecution counsel relied on the following judgements:

(i) **State through Superintendent of Police, CBI/SIT v. Nalini and others** reported in (1999) 5 Supreme Court Cases 253.

(ii) **State of Kerala v. P.Sugathan and another** reported in (2000) 8 Supreme Court Cases 203.

(iii) **P.K. Narayanan v. State of Kerala** reported in (1995) 1 Supreme Court Cases 142.

(iv) **State of Madhya Pradesh v. Sheetla Sahai and others** reported in (2009) 8 Supreme Court Cases 617.

(m) Decision in case of **Rabindra Kumar Pal alias Dara Singh v. Republic of India** reported in 2011 Supreme Court 1436 was cited to contend that in case of acquittal, presumption of innocence of the accused gets further reimposed. The Court would therefore be extremely slow in reversing the acquittal. Particularly, when two views are possible and one which has been adopted by the Trial

Court, the Appellate Court would not overturn such findings.

69. Rest of the advocates for defence adopted the arguments of Shri Yogesh Lakhani. Shri Yogendra Thakore appearing for the acquitted accused in the State acquittal appeals and State enhancement appeals, in addition to adopting such arguments, relied on a recent judgement of this Court in case of **State of Gujarat v. Bilal Ismail Abdul Majid Sujela @ Bilai Haji** reported in (2017) 0 Supreme (Guj) 1723 to contend that death penalty is not warranted.
70. Ms. Manisha Luvkumar Shah, Special Public Prosecutor highlighted the applications filed by some of the victims complaining about inadequacy in police investigation and formation of SIT which carried on further investigation pursuant to the judgement of Supreme Court. She submitted that the incident was unusual and extraordinary in nature. She submitted that soon after the riots' relief camps were set up by the Government in which large number of displaced Muslim families were kept. Merely because some leading members of the community visited the camp would not mean tutoring of the witnesses. Visiting of the police officers at the camp site also cannot be stated to be unusual. Their visits were not necessarily for recording the statements of the witnesses. Mere minor delay in recording the statements of witnesses would not be fatal to the case of the prosecution. Counsel highlighted the evidence of the investigating officer in which while agreeing to the suggestion of the defence that certain

details may not have been given by the witnesses in his police statement as stated before the Court, nevertheless the gist of the information disclosed remains the same. She therefore contended that these cannot be categorized as instances of improvements or contradictions.

Counsel submitted that witnesses were local residents of the area. The accused were also residents of the same village. Familiarity between the witnesses and the accused therefore permitted them to identify members of the mob. Their identification therefore cannot be distrusted. No case of animosity or previous rivalry has been brought out by the defence in the cross examination of any of the witnesses. The Court therefore, correctly believed the depositions of these witnesses particularly, when these witnesses had consistently named the accused in the police statements and also before the Court and subsequently identified them. All the accused were attributed active role and participation. Witnesses were not merely referring to their presence in the mob. The fact that unlawful assembly was formed is undisputable. The manner in which, the incident took place manifested the common object of such unlawful assembly. When it was established that the accused were part of such unlawful assembly, had actively participated in furtherance of such common object, their convictions with the aid of section 149 of IPC was perfectly legitimate. It was thereafter not necessary to establish precisely on account of whose action the death actually took place.

Counsel submitted that the conspiracy theory is writ large on the face of the record. To establish conspiracy, it is normally not possible neither necessary that prior meeting of minds to prove the eyewitnesses' accounts. As long as such prior meeting of minds can be established through circumstances, same would be sufficient. Prior meeting of minds can happen even on spur of moment.

Counsel opposed the defence theory that no death were proved. She pointed out that there were eyewitnesses who saw the dead bodies of Sikandermiya and his daughter Guddi falling from the upper floor. This was established through DNA testing where DNA of Guddi matched with the son of Sikandermiya i.e. Aarif. Even otherwise there was sufficient evidence to prove that some 21 more people were trapped in the house which was completely gutted. Mere fact that the dead bodies or even skeletons were not found would not be significant since evidence established that houses were caught in raging fire which went on for long time. Houses were completely gutted. Metal utensils had melted due to high temperature generated by fire. Medical evidence suggests that in such fire human bodies would be burnt into ashes in a matter of couple of hours.

Supporting the State's appeal for acquittal and enhancement of the sentence counsel particularly contended as under:

(1) The Trial Court committed a serious error in

acquitting the remaining accused though there was sufficient evidence against them.

(2) Looking to the manner in which the heinous crimes were committed against helpless people including women, children and old people counsel pressed for death penalties for all the accused who were convicted for offence punishable under section 302 of IPC read with section 149.

(3) With respect to those accused who were convicted for offence punishable under section 307 read with section 149 besides other lesser offences, counsel submitted that sentence of seven years of rigorous imprisonment was inadequate. She pressed for higher punishment.

In support of her contentions counsel relied on the following judgements:

(a) To contend that creditworthiness of evidence of injured eyewitness must be weighed and accepted, she referred on the following judgements:

(i) **Suresh Sitaram Surve v. State of Maharashtra** reported in (2002) 10 Supreme Court Cases 28.

(ii) **Bhagwan Jagannath Markad and others v. State of Maharashtra** reported in (2016) 10 Supreme Court Cases 537.

(iii) **Baleshwar Mahto and another v. State of Bihar and**

another reported in (2017) 3 Supreme Court Cases 152.

(b) In support of the conviction of the accused with the aid of section 149 of IPC, counsel relied on the following judgements:

(i) **Masalti v. The State of Uttar Pradesh** reported in AIR 1965 Supreme Court 202.

(ii) **State of UP v. Dan Singh and others** reported in (1997) 3 Supreme Court Cases 747.

(iii) **Madan Singh v. State of Bihar** reported in (2004) 4 Supreme Court Cases 622.

(iv) **Sunil Kumar and another v. State of Rajasthan** reported in (2005) 9 Supreme Court Cases 283.

(v) **Vyas Ram alias Vyas Kahar and others v. State of Bihar** reported in (2013) 12 Supreme Court Cases 349.

(vi) **Akbar Sheikh and others v. State of West Bengal** reported in (2009) 7 Supreme Court Cases 415.

(vii) **Najabhai Desurbhai Wagh v. Valerabhai Deganbhai Vagh and others** reported in (2017) 3 Supreme Court Cases 261.

(c) In support of conspiracy theory, counsel relied on following judgements:

(i) **Yash Pal Mittal v. State of Punjab** reported in (1977) 4 Supreme Court Cases 540.

(ii) **Shivnarayan Laxminarayan Joshi and others v. State of Maharashtra** reported in (1980) 2 Supreme Court Cases 465.

(iii) **State of Himachal Pradesh v. Krishan Lal Pardhan and others** reported in (1987) 2 Supreme Court Cases 17.

(iv) **Ajay Aggarwal v. Union of India and others** reported in (1993) 3 Supreme Court Cases 609.

(v) **State of Maharashtra and others v. Som Nath Thapa and others** reported in (1996) 4 Supreme Court Cases 659.

(vi) **State through Superintendent of Police, CBI/SIT v. Nalini and others** reported in (1999) 5 Supreme Court Cases 253.

(vii) **State (NCT of Delhi) v. Navjot Sandhu alias Afsan Guru** reported in (2005) 11 Supreme Court Cases 600.

(viii) **Mohmed Amin Alias Amin Chotteli Rahim Miyan Shaikh and another v. Central Bureau of Investigation through its Director** reported in (2008) 15 Supreme Court Cases 49.

(d) Counsel contended that evidence of solitary eyewitness need not be discarded. If otherwise witnesses

are found to be credible, conviction can be recorded even on the basis of sole eyewitness as was done in the following cases:

(i) **Krishna Mochi and others v. State of Bihar** reported in (2002) 6 Supreme Court Cases 81.

(ii) **State of Rajasthan v. Om Prakash** reported in (2007) 12 Supreme Court Cases 381.

(iii) **Kunju alias Balachandran v. State of Tamil Nadu** reported in (2008) 2 Supreme Court Cases 151.

(iv) **Ravi v. State represented by Inspector of Police** reported in (2008) 15 Supreme Court Cases 115.

(v) **Namdeo v. State of Maharashtra** reported in (2007) 14 Supreme Court Cases 150.

(vi) **Gulam Sarbar v. State of Bihar (now Jharkhand)** reported in (2014) 3 Supreme Court Cases 401.

(vii) **Shankarbhai @ Nandan Karnappan Darbar v. State of Gujarat** reported in 2017(4) GLR 2989.

(e) Counsel submitted that merely because the dead bodies of victims were not found, it will not shake the unimpeachable evidence brought on record by the prosecution when large number of persons had died during the incident. In support of this contention counsel relied on the following decisions:

(i) **Rama Nand and others v. State of Himachal Pradesh** reported in (1981) 1 Supreme Court Cases 511.

(ii) **Raj Bahadur alias Denny and another etc. v. State** reported in 1996 Cri.L.J. 2364.

(iii) **Lal Bahadur and others v. State (NCT of Delhi)** reported in (2013) 4 Supreme Court Cases 557.

(iv) **Delhi Administration v. Tribhuvan Nath and others** reported in (1996) 8 Supreme Court Cases 250.

(f) With respect to contention of defence on applicability of the provisions for set-off, counsel relied on decision in case of **Atul Manubhai Parekh v. Central Bureau of Investigation** reported in (2010) 1 Supreme Court Cases 603 in which it was observed that section makes it clear that period of sentence on conviction is to be reduced by the extent of detention already undergone by the convict during investigation, enquiry or trial of the same case.

(g) In support of her demand for capital punishment counsel relied on the following judgements:

(i) **Machhi Singh and others v. State of Punjab** reported in (1983) 3 Supreme Court Cases 470.

(ii) **Vikram Singh alias Vicky and another v. Union of India and others** reported in (2015) 9 Supreme Court

Cases 502.

Assessment of evidence :-

71. Before we take up the assessment of evidence, we may make certain general observations and lay down broad principles which may be applied in facts of the present case for assessing the evidence. In the process, we would also deal with some of the contentions of the counsel for the defence.

72. As can be gathered from the evidence, it was an unprecedented situation that the State was experiencing and law enforcement agency was encountering due to ghastly incident of train burning at Godhra station during which large number of Karsevaks returning home were burnt alive. Situation across the State was extremely tense. Certain politico-religious outfits had given a Bandh call on 1st March protesting against such incident. Communal backlash was most likely fall out. However, for ordinary police force as the events unfolded, such anticipation was of little help. We have noticed the inadequate number of police officials available to control the vast areas and large population. In Khambholaj police station itself, according to the witness Bhimsinh Prabhatsinh Raulji, PW-150, there were in all about 35 police officers which included PSO, writers, drivers, etc. Within Khambholaj police station, there were several villages of sizeable population, Oad being one of them with population of 20,000, majority being the population of Hindu community. Village also

housed small pockets of Muslim establishments. Despite full anticipation of trouble, the State machinery could allot handful of policemen to control the situation at Oad against the mobs which were reported to be anywhere between 1500 to 2000 people. There were not more than 15 policemen available at the site. According to the same witness Bhimsinh Prabhatsinh Raulji, PW-150, six of them deserted the duty out of fear.

73. It is not unknown that communal violence in the State did not happen only on 1st March, 2002, but went on affecting different parts of the State at some time or the other for months thereafter. During such riots which took place on 1st March and thereafter, large number of people lost their lives. Properties were destroyed on large scale.

74. Under such circumstances, even otherwise obviously the law enforcement agency would be under severe stress. On one hand, police would be continuously required to monitor law and order situation, at the same time, it would also be called upon to carry out investigations into reported offences. With meager staff, one or the other, or may be both tasks would suffer. In the present case, in number of investigations, complaints were made by the victims of police lethargy, tardiness or at times downright bias. Many of these complaints reached Supreme Court. Materials were produced before the Supreme Court to prima facie show inadequacies in the police investigations. Supreme Court took note of all these events, materials on record and unusual situation arising out of such events. In the

meantime, the trial of infamous Baroda incident of Best Bakery case was completed resulting into acquittal of all the accused. High Court having confirmed the acquittals, the matter reached the Supreme Court. Supreme Court taking serious note of the manner in which investigation was carried out and trial completed, ordered retrial, an extremely rare, if not unprecedented action in criminal law, by making observations about the role of the Presiding Officer in trial and making serious criticism against the investigating agency. While forming SIT and selecting nine cases across the State where large scale violence and death toll had taken place, Supreme Court took the material on record and also noted observations made in case of **Zahira Habibulla H. Sheikh and another v. State of Gujarat and others** reported in (2004) 4 Supreme Court Cases 158 (Best bakery case). The entire situation therefore, has to be viewed in the background of such peculiar facts.

75. The criticism of the counsel for the defence of the statements of witnesses being recorded after a few days and in some cases after a gap of two months is too harsh in the background of such facts. This was a case where large number of people had died during the incident, number of accused were involved, large number of witnesses had been completely dispersed and uprooted from their normal place of residence and had taken shelter at various places such as relatives' houses and different relief camps set up by the Government. If the investigating agency therefore, took some time in tracing out the

witnesses and recording their statements, such phenomena cannot be equated with ordinary situation of criminal investigation where recording of a statement after delay of a witness who was readily available without explanation, is viewed by Courts with suspicion. To discard the further statements of witnesses which were recorded by SIT because of time-lag would also not be correct. Firstly, the witnesses had complained before the Supreme Court that investigation was not being appropriately carried out and in some cases, statements were not truthfully recorded. The very purpose of setting up of SIT would be destroyed, if further statements of the SIT were to be discarded merely on account of delay in recording the statements.

76. It is undisputed that all the victims who were eyewitnesses were residents of the affected area. The accused are also residents of the same village. In all cases, the accused and the witnesses have been residing in the same village since several years, if not since generations. In many cases, the accused and the witnesses were residents of the same area. It should therefore, not be surprising that the witnesses were familiar with the faces and names of the accused. The identification of such accused by the witnesses need not be doubted. Wherever the witness was found to be truthful and reliable, his evidence consistent, his identification before the Court of a particular accused, should not be a matter of concern.

77. We cannot uniformly either apply or reject one

witness theory. We must appreciate that we are dealing with a situation where large number of people were involved in commission of crime. At the same time, large number of witnesses had the occasion to see the incidents as they unfolded. The incident did not happen suddenly nor did it last for barely a few minutes giving little time to the witnesses to spot the accused or to identify them. This was a case where the mob gathered over a period of time. The members of the unlawful assembly moved from place to place setting the properties and houses on fire. The incident lasted for over a couple of hours. The victims were mostly present at the site. The incidents also happened during the broad day light. Witnesses therefore, had ample opportunity to identify the people from the mob whom they knew. None of the witnesses have relied merely on description of a person whom he or she did not know to identify the accused at a later point of time. At the same time we also must be cautious when we evaluate the evidence of large number of witnesses involving equally large number of accused. Under the circumstances, we would neither apply uniform thumb-rule of accepting one witness theory nor discard such a theory. To the extent, witness is found to be reliable, the deposition dependable, the witness being consistent and the identification before the Court being found believable and reliable and additionally, in absence of any evidence suggesting any personal animosity, vendetta, rivalry or past instances, suggesting possibility of false accusation, the depositions of such witnesses can as well be utilised for convicting the

accused even though the witness may be an isolated witness to name certain accused.

78. However, if we find that there are inconsistencies in the statements of the witnesses and particularly, when we find that accused was named before the Court for the first time, we would certainly give benefit of doubt to the accused. We are conscious that present case is a peculiar one where initial police investigation was under cloud. However all the witnesses had ample opportunity to give their further statements before SIT. Vast publicity was given to constitution of SIT and its proceedings. Many witnesses appeared before SIT to give their statements or further statements. Despite which, if a particular witness did not volunteer to give his statement, his reference to the involvement of an accused for the first time before the Court would not inspire confidence. Mere minor variation in details between the police statement and the deposition before the Court by the witnesses however, cannot be fatal to the prosecution nor cannot be stated that the witness is wholly unreliable and the evidence should be discarded in its entirety. Law does not expect that every minutest detail must be provided by the witness and must be recorded by the police in the police statement. While giving such finer details before the Court or stating the same fact varying slightly in different sequence of language, would neither amount to contradiction nor improvements, at any rate, it would not be material improvements.

79. These broad principles, we would apply while

assessing the evidence of individual witnesses. Before that few more areas can be cleared. From the evidence of the prosecution witnesses, prosecution case in sequence as it emerges is thus. On 1.3.2002, due to Bandh call following Godhra train burning incident, there was tension in the village. Oad village had the population of about 15,000 to 20,000 people predominantly of Hindu community. There were certain pockets of Muslim establishments mainly at Survivali Bhagol area, at Sumrav Chora and Piravali Bhagol, Purnima Chowk . At about 12:30 in the afternoon, the crowd had started gathering in the fields around Shili road. The police officers reached the area, tried to disperse the mob in which they got partial success. The mob entered the main village area and reached Surivali Bhagol where Muslim shops and houses were damaged. House of the complainant was locked from outside and set on fire. Police however, dispersed the crowd, opened the house and took the members of the family to safety. In the process, the police had to resort to Lathi charge, teargas shelling and when everything failed, to firing in which one young boy Nitish Patel received bullet injuries. Members of the crowd took him to the hospital but he died due to such injuries. From there, the mob went towards Sumrav Chora area where also they set the Muslim houses on fire. From there, in the later part of the afternoon, at about 4:30, the mob entered the Purnima Chowk area of Piravali Bhagol where in bunch of houses, Muslim families were residing. These houses were set on fire one after another. Jhamplivalu Makan was a three-storeyed house where

number of people had taken shelter. Some of them entered from adjoining house by making a hole in the wall. Some of these people soon realised that they were not safe there also. They came out and tried to escape through other routes. These houses caught fire. All those who remained inside were badly trapped and met ghastly fate. Fire was so strong that entire house was gutted.

80. We may discard the defence theory of no deaths having taken place or, at any rate, having been established by the prosecution. We may recall, in this context, the defence had adopted two pronged strategy. First was that there was no evidence that anyone died in Jhamplivalu Makan. Suggestion was that these people were reported missing which would mean that prosecution witnesses also believed they could be alive and could have escaped. The second limb of the argument of the defence was that the reported death of Sikandermiya and his daughter Guddi was also not established. We are unable to accept either of these two arguments.

81. In the context of several people dying while Jhamplivalu Makan was set on fire, we may recall, witness after witness who were present there, had closely encountered the entire riotous situation and had, by stroke of luck, escaped the gruesome fate which some of their other family members met, had given graphic details of the events of the evening. All these witnesses essentially pointed out that large number of members of families

residing in the Purnima Chowk had taken shelter in Jhamplivalu Makan and entered the house where they were trapped inside when the mob surrounded the area and set the houses on fire. Initially, some of them thinking that they would be safe inside Jhamplivalu Makan, broke open the adjacent wall and entered the house and joined people who were already inside the house. Soon even this house started going up in flames. Some of these people escaped from the same hole and were saved. Those, who stayed back or were unable to get out before the heat became too strong, remained trapped there. Soon the house was completely engulfed by flames. The burning fire went on for long time. We would discuss the evidence of these witnesses individually a while later. However, as we shall see later, the combined effect of evidence of these witnesses is that as many as 23 people were trapped in this house which was turned into a burning inferno. Those people who had not escaped, there was no possibility that any of them would have survived. Merely because their bodies or even skeletons were not found, would not mean that they survived the fire. The prosecution has brought on record the evidence of the experts which suggests that the metal utensils would melt at temperature of 950° Centigrade to 1050° Centigrade. The prosecution has also brought on record, the medical evidence suggesting that the human body would be turned into ashes at such temperature within one to one and half hour. Opinion of Dr.Pankaj Haridas Barai, PW-148, was sought as to at which temperature human bones would turn into ashes.

He had given such opinion in writing which was produced at Exh 430. Relying on the book of Dr. Narayan Reddy, he had opined that if human body is kept under temperature of 1000° Centigrade, within one to one and half hour, it would be reduced to ashes weighing barely two to three kilograms. It was also pointed out that such high temperature could severely damage the plasters of the walls. Evidence in this respect also suggests that next day, when the police visited the site, the house was turned into rubble. Even the metal utensils had melted. The Investigating Agency could only collect some ashes from the place.

82. The defence had tried to project the theory that initially, some of the witnesses had suggested that their family members were missing and they did not know their whereabouts. In fact, the defence counsel before the Trial Court had put preposterous suggestion to the witnesses hinting at the relatives being still alive and known to the witnesses and the false theory of them having died during the riots was put forth only in order to receive sizeable compensation being given by the Government for such deaths. We must therefore, reject the defence version on this count.

83. In the context of reported death of Sikandermiya and his daughter Guddi, the prosecution had produced two sets of evidence; one was the eyewitnesses who saw them falling from upper floor of the house when they were

present and the other was the collection of the dead bodies by the police and matching of the DNA of Guddi with the son of Sikandermiya namely Azaruddin. In this context, the defence counsel had argued that the witnesses who reported having seen Sikandermiya and his daughter Guddi falling from the upper floor in semi-burnt condition, were not reliable. They had not given this version in their police statements. This was a major omission on their part. This improvement in their deposition before the Court therefore be discarded. In the context of recovery of the dead bodies and matching of the DNA, defence had argued that there were many holes in the prosecution version. He would point out that in his deposition witness Bhimsinh Prabhatsinh Raulji, PW-150, ASI, had stated that he was told by the DSP that dead bodies were those of Sikandermiya and Guddi. This was already known to the police even before the dead bodies were collected. The source of this information is not brought on record. The dead bodies were collected without drawing any panchnama. These dead bodies were handed-over to one Salimsha Diwan. There is no indication why the bodies were handed-over to an unknown person who was not a relative of the family. This person has not been examined by the prosecution. Exhumation of the dead bodies was also doubted. Dr.Umiya Jadavbhai Pipliya, PW-139, who was part of the panel of doctors who had performed the postmortem, had stated in her deposition that the postmortem note was prepared on 8th March on the basis of rough note which was destroyed. According to the

counsel, even the DNA analysis was not reliable. Firstly, because there was no evidence that Azaruddin was the son of deceased Sikandermiya. Secondly, Dr. Sanjiv Narendranath Sighla, PW-147, the DNA expert had admitted that the matching of the DNA between the blood samples of Azaruddin and DNA samples of skeleton of the young child would not conclusively establish the relationship of the brother and sister. It only indicated the higher probability.

84. Here we can accept the defence version only partially. We do understand that there were a few crucial gaps in the prosecution theory of the skeletons of Sikandermiya and his daughter Guddi being recovered from the site of the incident in the manner, in which, it was sought to be proved. Principally, we are concerned about the dead bodies being handed-over to Salimsha Diwan. There is no indication as to who this person was and why these bodies were handed over to him and under what circumstances. It is perfectly understandable that the immediate family members of Sikandermiya and Guddi would not be available considering the fact that the entire Muslim population of the village had deserted from the place. However, if the prosecution had examined this person, we would have got more confidence about the circumstances under which, he was entrusted this task. Equally importantly, nowhere had we found that any witness had deposed that Sikandermiya had a son Azaruddin who survived the massacre. Even the matching of the DNA

samples between Azaruddin and the dead body of the young child did not conclusively establish their relations.

85. However, all these observations would not mean that two people as reported by the witnesses had not died at the said site. Even if the matching of the DNA was inconclusive and therefore, we may not with confidence hold that the bodies were those of Sikandermiya and his daughter Guddi, that still does not take away anything from the prosecution case that two people had died at the said site. Following witnesses had claimed to have seen the incident:

1. Firozkhan Matbarkhan Pathan, PW-99
2. Majidmiya Muradmiya Malek, PW-103
3. Shafimiya Mohammadmiya Malek, PW-105
4. Mahemudabibi Majidmiya Malek, PW-110

While we discuss their evidence individually, we will comment on the nature of their deposition and the reference to the death of Sikandermiya and Guddi. However, at this stage, we may briefly state that the evidence of all these witnesses cannot be discarded though some of them, had made no mention of this fact in their police statements and therefore, their depositions in this respect cannot be of much use. Firozkhan Matbarkhan Pathan, PW-99 had referred to this incident before the Court but in his police statement, he had not given any such details. However, we find no such improvements, omissions with respect to this incident insofar as witnesses Majidmiya Muradmiya Malek, PW-103, Shafimiya

Mohammadmiya Malek, PW-105 and Mahemudabibi Majidmiya Malek, PW-110 are concerned. The defence also raised doubt about identification of these two dead persons by the eye-witnesses. We share their concern. The possibility of the witnesses identifying two completely charred bodies was remote. This however does not mean the witnesses did not see these bodies falling from the upper floor of the house. Our conclusions in this respect therefore are even if the prosecution may not have been able to establish beyond all doubts that the charred bodies of an adult man and young child were those of Sikandermiya and Guddi respectively, this still does not take away the fact that two people had died in the said incident.

86. The defence has also argued that the possibility of the outsiders having caused the trouble cannot be discarded. The defence would refer to the depositions of 1) Vinubhai Ramanbhai, PW-124, 2) Bhimsinh Prabhatsinh Raulji, PW-150 and, 3) Keshubhai Rambhai Bhuva, PW-156 in this respect. All these three were part of the police force stationed at Oad village. According to them, by afternoon, the mob had started gathering at the Shili road area in open fields. They tried to control the mob upon which, the mob entered the village and went towards Muslim establishments. Firstly, mere reference to gathering of the mob at Shili road would not mean that all the members of this unlawful assembly were from other villages. There is nothing to suggest that Shili road area is

situated way outside the village premises. Secondly, even if some outsiders may have mixed with the local population which eventually comprised the unlawful assembly would not help the defence. As long as the deposition of the witnesses referring to presence and participation of the accused is reliable, mere possibility of some of the outsiders having mixed with the local population would be of no consequence.

87. The defence had also put considerable stress on the incident of police firing in which a young man Nishit Patel from the mob died. Suggestion was that due to this, the people in the mob were enraged which may have led to more serious events. There was also a hint that the direct cause of Nishit's injuries were the bullet fired by Aarif, who was part of the police force. They also suggested the in-laws of Aarif were residing in the village and he might have overreacted due to his concern about their safety. The evidence on record undoubtedly establishes that in order to control the mob, after first resorting to lathi charge and teargas shelling, under the order of superior officer Vabang Zammer, the police had resorted to firing. During such firing, Nishit Patel, who was part of the mob, had died. We are also prepared to accept that there was some evidence to suggest the possibility of Nishit having died on account of bullet fired by Aarif. However, there is no evidence suggesting that the police firing was not required or was an over-reaction. We also accept the defence argument that death of Nishit Patel would have further enraged the mob.

However, this is neither here nor there. The situation undoubtedly was tense and if the police had resorted to firing after taking all precautions including first having tried to control the mob through lathi charge and teargas shelling, the same was perfectly understandable. It was not even suggested by the defence that firing by the police was either unnecessary or an overreaction. The death of a member of the assembly during police firing cannot be an excuse for the events that followed.

88. We now come to assessment of evidence of the eyewitnesses and the other important witnesses. Bashirmiya Hasanmiya Malek, PW-42, Exh.142 was the resident of Purnima Chowk. According to him, when he was at home on the date of the incident, between 3 and 4 in the afternoon, a mob had come there and set his house on fire. They were carrying petrol cans, dhariya and deadly weapons. There is nothing in the cross-examination to shake the evidence of this witness. There are no material contradictions in his deposition. He had no enmity with any of the accused persons so as to falsely implicate them. This witness had consistently named the following four accused in his police statement, in his deposition before the Court as being part of the mob and also identified them before the Court :

- 1) Pravinbhai Mangalbhai Patel- accused no.45
- 2) Sanatkumar Ranchodbhai Patel- accused no.26
- 3) Hemantbhai Satabhai @ Gokalbhai Patel- accused no.22
- 4) Vinubhai Shanabhai Patel -accused no.32

89. Ayubkhan Kasamkhan Pathan, PW-93, exh.207 was the resident of Piravali Bhagol area. The mob had set his house on fire when he was at home. He had seen the people in the mob from the upper floor of the house. After the mob set the houses on fire, it went towards the milk parlour when he got the chance to escape from the house. They (him and his family members) went inside Pathan maholla which was at a distance of about 50 steps from his house. This witness had given the names of following persons in his police statement as also in his deposition before the Court and had also successfully identified them before the Court:

1. Vinubhai Bhikhabhai Patel- accused no.1
2. Hemantbhai Satabhai @ Gokalbhai Patel - accused no.22,
3. Dilipbhai Vinubhai Patel-accused no.17,
4. Sureshbhai Bhailalbhai Patel- accused no.16,
5. Vijaybhai Ravjibhai Patel- accused no.3

Though in his police statement he had referred to Vinubhai Shanabhai Patel, accused no. 32 also in his deposition before the Court, he had not referred to this accused. We may record that before the Court he had also referred to Arvindbhai Ravjibhai Patel, accused No. 20 but had not named him in his police statement. We would, therefore, discard this version to this limited extent. Barring this, we find no major contradictions in his evidence. The defence has not brought any reason why this witness should falsely

implicate any of the accused. He had ample opportunity to see the members of the unlawful assembly. The accused were residents of the same village. His identification therefore, need not be distrusted.

90. Firozkhan Matbarkhan Pathan, PW-99, Exh 216, was also the resident of Pathan Mohalla near Piravali Bhagol. The place was close to Purnima Chowk. At about 4 O'clock, he saw a mob coming towards his house. He went towards Purnima chowk. He was standing near the edge of the street. He saw the mob setting house of his uncle Akabarkhan on fire. He had named following accused in his police statement, in his deposition before the Court and also successfully identified them before the Court:

1. Vinubhai Bhikhabhai Patel, accused No.1
2. Pareshbhai Ranchhodbhai Patel, accused No. 19
3. Vinubhai Shanabhai Patel, accused No. 32
4. Hemantbhai Satabhai @ Gokalbhai Patel, accused No. 22

This witness had referred to Sureshbhai Bhailalbhair Patel, accused No. 16 in his deposition but not named in the police statement. We have therefore, not relied on this part of his version. In case of this witness also, the defence has not brought on record contradicting material, so as to discard his version. He had no enmity with any of the accused. There was no reason for him to falsely identify the accused.

91. Kalumiya Jivamiya Malek, PW-101, Exh 222 was the resident of Sumrav Chora. According to him, a mob had gathered between 3 and 4 in the afternoon and set the house of Sabirkhan Bakshukhan on fire and then the house of Kalumiya Mohammadmiya. He had a bullock cart which was lying in the chowk. The mob pushed the bullock cart in the fire. This witness had identified and named the following accused in his police statement, in his deposition before the Court and also identified them before the Court:

1. Sanatkumar Ranchhodbhai Patel, accused No. 26
2. Pareshbhai Ranchhodbhai Patel, accused No. 19
3. Arvinbhai Ravjibhai Patel, accused No. 20
4. Atulbhai Dahyabhai Patel, accused No. 2

In absence of any major contradictions and any reason for the witness to falsely involve any of the accused, his version which is consistent all throughout needs to be accepted.

92. Majidmiya Muradmiya Malek, PW-103, Exh 238 was the resident of Purnima Chowk, Piravali Bhagol. His house was next to the house of Mustufamiya Umravmiya on one side and Akabarmiya Umravkhan on the other side. Opposite his house were the houses of Safirmiya Mohammadmiya and Sikandermiya Usmanmiya. He had gone to the field. At about 4:30, he had gone towards his house. His house was burning. Since his family was at home, he tried to go closer. He went to Pathan Mohalla

where his uncle Jasubmiya Bhulamiya's house was situated from where he saw the mob throwing burning rags and pouches on his house and on the house of Ayubbbhai. This witness in his deposition before the Court had involved as many as nine people. In his police statement, he had named only one of them namely, Punambhai Laljibhai, accused No. 29. This witness had filed affidavit before the Supreme Court. His two statements were recorded by SIT on 11.05.2008 and 19.09.2008. In none of these statements he had named any of the accused whom he had referred to before the Court. We would therefore not rely on the involvement of the different accused by this witness including of Punambhai Laljibhai, accused No. 29 who was named by him in the police statement. This is so because since this witness had made such material and large scale improvements, his reliability gets shaken.

93. Rafikmohammad Abdulbhai Khalifa, PW-104, was the resident of Surivali Bhagol. His house was locked by the mob from outside and then set on fire. The police had to disperse the mob, open the door and rescue the family. The house had collapsed after sometime due to fire. He had lodged the complaint about this incident. In his complaint as well as deposition before the Court, he had named following accused whom he had also identified:

1. Prakashbhai Jashbhai Patel, accused No.7
2. Devangbhai Harshadbhai Patel, accused No. 5
3. Girishbhai Somabhai Patel, accused No. 6
4. Dilipbhai Shanabhai Patel, accused No. 12

94. The manner, in which the incident was reported, was also supported by the Police witnesses who were present there. There was no reason for this witness to falsely implicate any of the accused. Though the defence would argue that this witness had made certain improvements with respect to the manner in which he might have seen the incident from the veranda of the house, this by itself would not be significant or shake the very foundation of the deposition of the witness. Version of this witness was supported by police officials present there. Though these police persons since they were not familiar with the people of the village, may not have identified any of the members of the mob, they did refer to the incident when the mob had locked the house of this witness from outside and set the house on fire. Vinubhai Ramanbhai, PW-124, Unarmed Police Constable had referred to this incident in his deposition when the members of the mob had locked the house of Rafikmohammad from outside and after locking the house they had set the house on fire by throwing burning rags. The police had to use force to disperse the mob before unlocking the house and taking the residents to safety. Similar version was given by Bhimsinh Prabhatsinh Raulji, PW-150.

95. Safimiya Mohammadmiya Malek, PW-105 was the resident of Purnima Chowk. His house was situated next to that of Sikandermiya Usmanmiya. On the date of the incident, he was at home along with his family members.

He had seen the mob setting the house of Sikandermiya Usmanmiya on fire. To save their lives, he and his family members went to the house of uncle Muradmiya. They all went to the upper floor of the house to escape from the mob. They made a hole in the wall of the house of Akabarkhan Bhikhankhan and entered the house. There also they found themselves unsafe. Some of them i.e. he himself, his sister-in-law Mahemudabibi, his nephews Salimmiya Majidmiya and Imtiazmiya Majidmiya and his niece Setajbanu Majidmiya came back to the house of Muradmiya. The rest of the family was still in the house of Akabarkhan which was set on fire. This witness had in his police statement as well as before the Court named the following persons whom he had also identified.

1. Hemantbhai Satabhai @ Gokalbhai Patel, accused No. 22
2. Sanatkumar Ranchhodbhai Patel, accused No. 26
3. Dilipbhai Vinubhai Patel, accused No. 17
4. Dharmeshkumar Natubhai Patel, accused No. 30
5. Vinubhai Shanabhai Patel, accused No. 32
6. Atulbhai Dahyabhai Patel, accused No.2

96. Though he had named Natubhai Mangalbai, accused No. 40 in his police statement and also before the Court, he could not identify this accused. We would therefore not involve this accused with the aid of the testimony of this witness. For the rest, we have no hesitation in accepting the evidence of this witness. He was present at the site where the maximum trouble took place.

He and his family members tried all means to save their lives. In the process, they also broke part of the wall between the two houses and entered the house of Akabarkhan. Some of them came back through the same passage and managed to save their lives. The rest who stayed behind were trapped and died. This witness had ample opportunity to see the members of the unlawful assembly. Being the resident of the same village, he would naturally be familiar with many of the residents of the area. His identification of the accused was therefore natural. He was consistent in naming these accused before the police, before the Court. He was also successful in identifying all except one.

97. Maherajbibi Rasulkhan Pathan, PW-109, Exh 251 was the resident of Purnima Chowk. Though this witness had named a few accused in her deposition and also identified them, as admitted in her cross-examination, she has not named any of them in the police statement. We would therefore not rely on her testimony in this respect.

98. Mahemudabibi Majidmiya Malek, PW-110 was the resident of Purnima Chowk. Her house was next to the house of Akabarkhan Bhikhankhan and Mustifamiya Umravmiya. She had named the following three accused in her police statement recorded on 7th March 2013 and also in her statement before the SIT on 11.05.208 as also before the Court. She also identified these accused.

1. Dilipbhai Vinubhai Patel, accused No. 17
2. Sanatkumar Ranchhodbhai Patel, accused No. 26
3. Manubhai Jethabhai Patel, accused No. 27

She had named several other accused before the Court. However, she had not named them in her two early police statements. In some of these cases, she had also not been successful in identifying them. We may therefore not rely on her deposition with respect to rest of the accused named by her.

99. Aarifmiya @ Lala Jasubmiya Malek, PW-111 was the resident of Purnima Chowk, Piravali Bhagol. He had seen the mob burning the Jhamplivalu Makan and other houses nearby. He had named the following accused in his police statement as well as before the Court and successfully identified them also.

1. Hemantbhai Satabhai @ Gokalbhai, accused No. 22
2. Sanatkumar Ranchoddbhai, accused No. 26
3. Dharmeshkumar Natubhai, accused No.30
4. Vinubhai Shanabhai, accused No. 32
5. Dilipbhai Vinubhai, accused No. 17
6. Pravinbhai Mangalbai, accused No. 45

He had also named one Dilipbhai Ranchhodbhai, accused No. 28 in his deposition but neither named him in the police statement nor identified him before the Court. For the rest of the accused, we have no reason to discard his version. In the cross-examination, defence did suggest his

involvement in incident which took place in the evening of 1st March 2002 near Kabrastan where three or four other persons had allegedly attacked Dilipbhai with sticks and pipes which could be the motive for falsely implicating Dilipbhai, accused No. 28. Though he denied, apparently in his police statement, he had stated that from the mob, some people came towards his street. He was afraid that they would set them also on fire. Therefore, he with his family members at about 4:30 in the evening went away and crossing the fields reached Bhalej at 10 O'clock at night. He had further stated that next day evening, he had heard that his house and belongings was burnt. This raises serious doubt about his presence at the scene of the incident and his deposition before the Court that he had seen the incident. We would therefore not rely on his deposition in this respect.

100. Mohmmadkhan @ Gafurkhan Akbarkhan Pathan, PW-113 was residing in Jhampalivalu Makan situated at Purnima chowk, Piravali Bhagol. His house is next to the house of Ayubkhan Kasamkhan and Muradmiya Bhulamiya. He lived with father Akabarkhan Bhikhankhan and other family members. He had seen the mob setting the house of Sikandermiya Usmanmiya on fire and then of Safirmiya Mohammadmiya, Safirmiya Mohammadmiya and Ayubkhan Kasamkhan. People from the next house made a hole in the wall and entered his house. He and his father went to the tin roof and crossed over the gallery of the house of Ravjibhai. From the roof of the house of

Muradmiya while jumping, his father got injury on the hand which was fractured. From there, he went alone leaving his father behind. He managed to save himself. Later, he and others also found his father in an injured condition. They were both treated at the Hospital at Bhalej and thereafter, at Government Hospital. He had named the following accused in his police statement recorded on 07.03.2002 and also before the Court. He also identified them:

1. Arvindhbai Ravjibhai Patel, accused No. 20
2. Hemantbhai Satabhai @ Gokalbhai Patel, accused No. 22
3. Pareshbhai Ranchhodbhai Patel, accused No. 19
4. Vinubhai Shanabhai Patel, accused No. 32
5. Dilipbhai Ranchhodbhai Patel, accused No. 28
6. Jayendrabhai Satabhai Patel, accused No. 14

His statement was recorded by SIT in which also, he had named these accused. He had also named one Vinubhai Bhikhabhai, accused No.1 in his deposition before the Court. However, he had not named this accused in his police statement recorded on 07.03.2002. He had filed an affidavit before the Supreme Court in which also, he had not named this accused. Though he named and referred in his statement recorded before the SIT on 10.05.2008, we have not relied on his deposition, in relation to this accused Vinubhai Bhikhabhai, accused no. 1.

For the rest, we have no reason to discard his evidence. He was present where maximum violence took place. By stroke of luck, he managed to save himself by getting out of the burning house and jumping over to the house of the neighbour. During the process, he had received minor injuries for which, he was treated at the Government hospitals. Supporting evidence is also produced on record. His father also likewise escaped and had also received injuries and similarly treated at the hospitals. No major contradictions have been extracted by the defence in his cross-examination. This witness had no reason to falsely implicate any of the accused. Being the resident of the same village, he had every reason to identify familiar people of the same village.

101. These are the main witnesses. These were the eyewitness who were largely consistent in their version all throughout. We have referred to the involvement of the accused to the extent the same has remained consistent. We have not taken into account deposition of any of the other witnesses who named the accused before the Court and also may have identified them but had not named accused in the previous statements. They were the witnesses clubbed in Group B. We have also briefly referred to the evidence of the hostile witnesses who had referred to the involvement of the accused in the police statements but before the Court had not supported the prosecution. A few witnesses, who formed part of Group B are as follows:

1) Mohammad Yunus Ismailbhai Vhora, PW-100, had named Pareshbhai Pramodbhai Pandya, accused No. 31. Though in his police statement, this witness had named several other persons, in his deposition before the Court he identified only one of them Pareshbhai Pandya. For rest, he turned hostile. From the cross examination, we gather that after the incident he was forced to sale the plot on which his house was situated due to financial crisis and it was this Pareshbhai Pandya who had been instrumental in such sale. Clearly therefore, this witness had every reason to falsely implicate Pareshbhai Pandya. His deposition in this respect therefore is not believed.

2) Kalumiya Mohammadmiya Malek, PW-102, had named seven people before the Court and also identified them. However, in his police statement recorded on 10.03.2002, he had not named any of these accused. In his statement recorded by SIT on 06.12.2009, he had named some of them. In the police statement, he has also not claimed to have witnessed the incident. These inconsistencies would make it unsafe to rely on his deposition to pin down the involvement of the two accused whom he referred to in his SIT statement without any explanation why he did not name them earlier.

3) Hasankhan Hasukhan Pathan, PW-112 named three accused before the Court:

1. Vinubhai Bhikhabhai Patel -accused no.1
2. Hemantbhai Satabhai @ Gokalbhai Patel – accused no.22
3. Dilipbhai Ranchodbhai Patel– accused no.28

From these accused, he failed to identify Dilipbhai Ranchhodbhai before the Court. In his police statement recorded on 10.03.2002, he had not named any of these accused though he had named all of them in his SIT statement recorded on 10.03.2008. In his affidavit, that he has filed before the Supreme Court, he had not referred to them. We have therefore not relied on his testimony in this respect.

102. The scenario that emerges from the evidence of the eyewitness whom we have found reliable and the extent to which the involvement of the accused is believed by us witness-wise is as under:

1. Bashirmiya Hasanmiya Malek, PW-42

Pravinbhai Mangalbhai Patel, Accused No. 45
 Sanatkumar Ranchhodbhai Patel, Accused No. 26
 Hemantbhai Satabhai @ Gokalbhai Patel, Accused No. 22
 Vinubhai Shanabhai Patel, Accused No. 32

2. Ayubkhan Kasamkhan Pathan, PW-93

- Vinubhai Bhikhabhai Patel, Accused No. 1
- Hemantbhai Satabhai @ Gokalbhai Patel, Accused No. 22
- Dilipbhai Vinubhai Patel, Accused No. 17

- Sureshbhai Bhailalbai Patel, Accused No. 16
- Vijaybhai Ravjibhai Patel, Accused No. 3

3. Firozkhan Matbarkhan Pathan, PW-99

Vinubhai Bhikhabhai Patel, Accused No. 1
 Pareshbhai Ranchhodbhai Patel, Accused No. 19
 Vinubhai Shanabhai Patel, Accused No. 32
 Hemantbhai Satabhai @ Gokalbhai Patel, Accused
 No. 22

4. Kalumiya Jivamiya Malek, PW-101

Sanatkumar Ranchhodbhai Patel, Accused No. 26
 Pareshbhai Ranchhodbhai Patel, Accused No. 19
 Arvindbhai Ravjibhai Patel, Accused No. 20
 Atulbhai Dahyabhai Patel, Accused No. 2

5. Rafikmohammad Abdulbhai Khalifa, PW-104

Prakashbhai Jashbhai Patel, Accused No. 7
 Devangbhai Harshadbhai Patel, Accused No.5
 Girishbhai Somabhai Patel, Accused No. 6
 Dilipbhai Shanabhai Patel, Accused No. 12

6. Shafimiya Mohammadmiya Malek, PW-105

Hemantbhai Satabhai @ Gokalbhai Patel, Accused
 No. 22
 Sanatkumar Ranchhodbhai Patel, Accused No. 26
 Dilipbhai Vinubhai Patel, Accused No. 17
 Dharmeshkumar Natubhai Patel, Accused No. 30
 Vinubhai Shanabhai Patel, Accused No. 32
 Atulbhai Dahyabhai Patel, Accused No. 2

7. Mahemudabibi Majidmiya Malek, PW-110

Dilipbhai Vinubhai Patel, Accused No. 17
 Sanatbhai Ranchhodbhai Patel, Accused No. 26
 Manubhai Jethabhai Patel, Accused No. 27

8. Mohammadkhan @ Gafurkhan Akbarkhan Pathan, PW-113

Arvindbhai Ravjibhai Patel, Accused No. 20

Hemantbhai Satabhai @ Gokalbhai Patel, Accused No. 22

Pareshbhai Ranchhodbhai Patel , Accused No. 19

Vinubhai Shanabhai Patel, Accused No. 32

Dilipbhai Ranchhodbhai Patel , Accused No. 28

Jayendrabhai Satabhai Patel, Accused No. 14

After collecting such information and projecting our above conclusions accused wise, following scenario emerges.

Name of the Accused	Referred by Prosecution Witnesses whose deposition we have believed
Vinubhai Bhikhabhai Patel, Accused No.1	Ayubkhan Kasamkhan Pathan, PW-93 Firozkhan Matbarkhan Pathan, PW-99
Atulbhai Dahyabhai Patel, Accused No.2	Kalumiya Jivamiya Malek, PW-101 Shafimiya Mohammadmiya Malek, PW-105
Vijaybhai Ravjibhai Patel, Accused No.3	Ayubkhan Kasamkhan Pathan, PW-93
Devangbhai Harshadbhai Patel, Accused no.5	Rafikmohammad Abdulbhai Khalifa, PW-104
Girishbhai Somabhai Patel, Accused No.6	Rafikmohammad Abdulbhai Khalifa, PW-104
Prakashbhai Jashbhai Patel, Accused no.7	Rafikmohammad Abdulbhai Khalifa, PW-104
Dilipbhai Shanabhai Patel, Accused No. 12	Rafikmohammad Abdulbhai Khalifa, PW-104
Jayendrabhai Satabhai Patel, Accused No. 14	Mohammadkhan @ Gafurkhan Akbarkhan Pathan, PW-113
Sureshbhai Bhailalbhai Patel, Accused No. 16	Ayubkhan Kasamkhan Pathan, PW-93
Dilipbhai Vinubhai Patel, Accused No.17	Ayubkhan Kasamkhan Pathan, PW-93 Shafimiya Mohammadmiya Malek, PW-105 Mahemudabibi Majidmiya Malek, PW-110

Pareshbhai Ranchhodbhai Patel, Accused No.19	Firozkhan Matbarkhan Pathan, PW-99 Kalumiya Jivamiya Malek, PW-101 Mohammadkhan @ Gafurkhan Akbarkhan Pathan, PW-113
Arvinbhai Ravjibhai Patel, Accused No.20	Kalumiya Jivamiya Malek, PW-101 Mohammadkhan @ Gafurkhan Akbarkhan Pathan, PW-113
Hemantbhai Satabhai @ Gokalbhai Patel, Accused No.22	Bashirmiya Hasanmiya Malek, PW-42 Ayubkhan Kasamkhan Pathan, PW-93 Firozkhan Matbarkhan Pathan, PW-99 Shafimiya Mohammadmiya Malek,PW-105 Mohammadkhan @ Gafurkhan Akbarkhan Pathan, PW-113
Sanatkumar Ranchhodbhai Patel, Accused No.26	Bashirmiya Hasanmiya Malek, PW-42 Kalumiya Jivamiya Malek, PW-101 Shafimiya Mohammadmiya Malek,PW-105 Mahemudabibi Majidmiya Malek, PW-110
Manubhai Jethabhai Patel Accused No. 27	Mahemudabibi Majidmiya Malek, PW-110
Dilipbhai Ranchhodbhai Patel, Accused no.28	Mohammadkhan @ Gafurkhan Akbarkhan Pathan, PW-113
Dharmeshkumar Natubhai Patel, Accused No. 30	Shafimiya Mohammadmiya Malek,PW-105
Vinubhai Shanabhai Patel, Accused No. 32	Bashirmiya Hasanmiya Malek, PW-42 Firozkhan Matbarkhan Pathan, PW-99 Shafimiya Mohammadmiya Malek,PW-105 Mohammadkhan @ Gafurkhan Akbarkhan Pathan, PW-113
Pravinbhai Mangalbhai Patel, Accused No. 45	Bashirmiya Hasanmiya Malek, PW-42

103. These conclusions can now be projected incident-wise. The picture that emerges is thus :

(A) Involvement of the following accused is established in connection with the incident at Jhamplivalu Makan for offence punishable under section 302 of IPC and other related offences :

- 1) Vinubhai Bhikhabhai Patel, Accused No.1
- 2) Vijaybhai Ravjibhai Patel, Accused No.3
- 3) Jayendrabhai Satabhai Patel, Accused No. 14
- 4) Sureshbhai Bhailalbai Patel, Accused No. 16
- 5) Dilipbhai Vinubhai Patel, Accused No.17
- 6) Pareshbhai Ranchhodbhai Patel, Accused No.19
- 7) Arvindbhai Ravjibhai Patel, Accused No.20
- 8) Hemantbhai Satabhai @ Gokalbhai Patel, Accused No.22
- 9) Sanatkumar Ranchhodbhai Patel, Accused No.26
- 10) Manubhai Jethabhai Patel Accused No. 27
- 11) Dilipbhai Ranchhodbhai Patel, Accused no.28
- 12) Dharmeshkumar Natubhai Patel, Accused No. 30
- 13) Vinubhai Shanabhai Patel, Accused No. 32
- 14) Pravinbhai Mangalbai Patel, Accused No. 45

(B) Involvement of the following accused is established in connection with the incident at Surivali Bhagol for offence under section 307 and other related offences :

- 1) Devangbhai Harshadbhai Patel, Accused no.5
- 2) Girishbhai Somabhai Patel, Accused No.6
- 3) Prakashbhai Jashbhai Patel, Accused no.7
- 4) Dilipbhai Shanabhai Patel, Accused No. 12

(C) Involvement of the following accused is established for the incident at Sumravno Chora for offence punishable under section 436 and other related offences :

Atulbhai Dahyabhai Patel -Accused no.2

We may clarify that the Trial Court has believed the involvement of three more accused for this very incident namely, Devangbhai Harshadbhai Patel -accused no.5, Girishbhai Somabhai Patel - accused no.6 and Prakashbhai Jashbhai Patel - accused no.7 in the main incident of Jhamplivalu Makan, for which sentence has been awarded. Their names are not again mentioned in the this list. We have confirmed such conclusion of Trial Court of these accused. Names of these accused are already included in List-A above and not repeated in this list for these reasons.

104. We are of the opinion that the Trial Court committed an error in convicting the following accused :

- 1) Dilipbhai Valabhbhai Patel -Accused no.8,
- 2) Punambhai Laljibhai -Accused no.29
- 3) Natubhai Mangalbhai- Accused no.40

In case of Dilipbhai Valabhbhai Patel -accused no.8, we notice that he was referred by only one witness namely, Maherajbibi Rasulkhan Pathan, PW-109. However as discussed earlier while evaluating her evidence, we have not believed her testimony in connection with the involvement of the accused since in the cross examination she had admitted that she had not named any of these persons whom she referred to in the Court in her police statement.

With respect to Punambhai Laljibhai -accused no.29, he was referred to by two witnesses Majidmiya Muradmiya Malek, PW-103 and Mahemudabibi Majidmiya Malek, PW-110. While evaluating the evidence of Majidmiya Muradmiya Malek, PW-103, we had recorded that this witness had involved as many as nine accused before the Court. In his police statement, he had named only one of them i.e. Punambhai Laljibhai. Witness had filed affidavit before the Supreme Court. Two statements were recorded by SIT. In none of these statements, he had named several accused whom he referred before the Court. We had therefore, found it unsafe to rely on his testimony even with respect to Punambhai Laljibhai even though he was mentioned in the police statement of this witness. We may also record that Mahemudabibi Majidmiya Malek, PW-110 had referred to Laljibhai Punambhai which according to the prosecution was an inadvertent error and the real reference being to Punambhai Laljibhai – accused no.29. However, the Court recorded that this witness had identified one Kaushikbhai Jasbhai as Laljibhai Punambhai (or Punambhai Laljibhai as the case may be). Through evidence of neither of these two witnesses, involvement of this accused is proved.

With respect to Natubhai Mangalbai Patel - accused no.40, his involvement is sought to be established by the prosecution through Majidmiya Muradmiya Malek, PW-103 for discarding whose testimony we have cited reasons and

so far as Shafimiya Mohammadmiya Malek, PW-105 is concerned, though he named Natubhai Mangalbai Patel accused no.40 in the deposition, failed to identify him before the Court.

105. Harishbhai Valabhbhai Patel – accused no.10 having died, the appeal qua him stands abated. We have therefore, not discussed his involvement separately.

106. We may now deal with some of the contentions of Shri Lakhani which we had purposedly not touched before taking up evaluation of the evidence of eyewitnesses. We would club his three contentions for common consideration. He had argued that no specific role or overt act was attributed to any of the accused. Being resident of the same locality even if their presence was established, this would not necessarily imply that they were the members of the unlawful assembly. It was argued that the conspiracy theory was not established. There was no prior meeting of minds, one of the major requirement of conspiracy theory. He had also argued that formation of unlawful assembly, causing death and destruction being the common objects of such unlawful assembly, were also not proved.

107. We have gathered the evidence of the witnesses. These witnesses include the victims who themselves suffered the loss of property, belongings, whose family members were killed before their own eyes and who were

residing in the same or nearby areas who could witness the events. The witnesses also include police officers who were posted at the village to maintain law and order situation. All these witnesses, had referred to the Bandh call given by certain organizations across the State on 01.03.2002 which happened to be a Friday when the prayers would be offered at the mosque. The village had pockets of Muslim establishments but had otherwise predominantly Hindu population. The trouble had started brewing up since early afternoon when the mob gathered first on Shili road. When the police tried to disperse them, they went in more thickly populated areas. They targeted Muslim settlements and other establishments. They started burning the houses on fire. The police used lathi charge, teargas shells and then fired to disperse the mob. The mob moved, rampaged and caused maximum damage at Purnima Chowk, Piravali Bhagol. Several people who had taken shelter in Jhamplivalu Makan could not come out timely. This house itself started catching fire. They were trapped inside and burnt to death.

108. The sequence of events, the manner in which the same happened as recounted by the witnesses before the Court, leaves no manner of doubt that the unlawful assembly was formed and the main object of the unlawful assembly was to cause death. The members of the unlawful assembly were carrying burning rags, kerosene cans, sticks and dhariyas. They were shouting slogans like 'Kill the Muslims', 'Burn them'. The incident did not

happen on the spur of the moment. The mob went from place to place causing destruction, setting properties belonging to the Muslims on fire till finally they focused their maximum fury around Jamplivalu Makan where many people residing in the locality had taken shelter thinking that they would be safer there. The entire sequence of the events lasted for more than one and half to two hours.

109. The mob was not a small one comprising barely of a handful people of about 100 or 200 people. By all accounts, there were more than 1000 people in the mob. The accused whose involvement is referred by various witnesses, were stated to be part of such mob. In many cases, witnesses have referred to their active participation though may not be the specific role or precise overt acts. They were at any rate not innocent or mere bystanders. Prudent human conduct of an ordinary innocent citizen would be to remain indoor under such extremely violent circumstances. When we have believed the presence and involvement of the different accused through reliable witness accounts, it is not possible to give them benefit of doubt or acquit them on the suggestion of the defence that being a resident of the same village, they could have been innocent bystanders.

110. It is by now well settled that conspiracy amongst co-conspirators is always hatched in secrecy and therefore, direct ocular evidence of such hatching of conspiracy

would rarely be available. This would necessarily require proving conspiracy through circumstances brought on record and successfully proved by the prosecution. In case of ***Shivnarayan Laxminarayan Joshi and ors vs. State of Maharashtra*** reported in **(1980) 2 Supreme Court Cases 465** it was observed that “it is manifest that a conspiracy is always hatched in secrecy and it is impossible to adduce direct evidence of the same. The offence can be only proved largely from the inferences drawn from acts or illegal omission committed by the conspirators in pursuance of a common design.....”

In case of ***Mohmed Amin @ Amin Choteli Rahim Miyan Shaikh and anr vs. Central Bureau of Investigation*** reported in **(2008) 15 SCC 49** it was observed that for proving a charge of conspiracy, it is not necessary that all the conspirators know each and every detail of the conspiracy. So long as they are co-conspirators in the main object of the conspiracy, it is not necessary that all conspirators should participate from the inception of the conspiracy to its end.

111. In the context of the evidence on record, we may recall, the entire incident was, by way of an aftermath of the Godhra train burning incident. Due to the State wide Bandh call, there was palpable tension in the village since the morning. The first trouble was reported at Shili road in the afternoon where a mob had gathered. The police officials deployed at the village, dispersed the mob which

then went towards the residential localities of the village and started targeting Muslim establishments. This mob, with some additions and subtractions of people forming part of this unlawful assembly, went from place to place till finally at about 4:30 in the evening they surrounded a small Muslim establishment where in a bunch of about seven houses, few families lived. This area was completely surrounded by this mob and then set on fire. The evidence led by the prosecution would thus show that there was clear pre-meditation, pre-meeting of minds. The members of this mob were carrying weapons, burning rags and inflammable substances. They were shouting slogans 'kill Muslims', 'burn them'. These circumstances successfully established by the prosecution, would leave little doubt that there was pre-meeting of minds to the ultimate objective of not only causing extensive damage to the properties, belongings of a particular community but also to cause death. The conspiracy theory was thus, in our opinion, correctly believed by the Trial Court.

112. The defence counsel had also criticized the role of the NGOs and leading members of the community. We have recorded the background in which, the Supreme Court formed SIT to carry out further investigation in select riot cases, the present one being one of them. It is true that the members of the NGO and may be some leading members of the community also had played active part in such constitution of SIT. However, this does not mean that the evidence itself was manipulated or that the witnesses were

tutored by such members of the NGO. We have largely believed the involvement of the accused where the concerned witnesses had named them in their initial police statement. Some of these statements were recorded by the police barely a few days after the incident took place. In some cases, the statements were recorded about eight weeks later. We have given our reasons to discard the defence argument that there was delay in recording the statements giving chance to involve innocent people. In the background of the present case, the scale of communal violence across the State and difficult law and order situation, we have recorded that we do not find that such delay was gross or fatal to the prosecution. At that initial stage, perhaps the NGOs in question had not even got involved.

113. Regarding identity of accused Nos.1, 16 and 29, we may recall, the criticism of the defence was that the witnesses had given names of these accused which are different from or aliases of these accused. There was no evidence, according to the defence, to establish that the witnesses in their police statements were referring to these very persons. According to the defence, it was only the Investigating Officer's oral deposition that these accused were also known by some other names. We are unable to accept this contention. It is true that these accused have been named by some of the eyewitnesses by a different description in their police statements. However, these witnesses had explained that the accused were also named

by other names. These accused have also aliases and even if there was some minor mis-description in the name of a particular accused in the police statement recorded by the Investigating Agency, if we find that the prosecution witnesses are otherwise reliable, had no past enmity or any of the reason for false implication, mere minor difference in the description would not be a sufficient ground to acquit them. All the witnesses so also the accused were residents of the same village and, in some cases, of the same locality. Identification of the concerned accused by these witnesses before the Court would therefore, be an important factor.

114. Under the circumstances, we find that the Trial Court committed no error in convicting accused Nos. 1, 2, 3, 5, 6, 7, 12, 14, 16, 17, 19, 20, 22, 26, 27, 28, 30, 32 and 45. However, with respect to accused Nos.8, 29 and 40, the Trial Court erred in convicting them.

115. Coming to the State Appeal against acquittals, the same is possible of a summary disposal. The Trial Court has acquitted those accused who were not named by any of the witnesses. This would include the witnesses who turned hostile. They may have named some of the accused in the police statements. In absence of supporting evidence before the Court, such accused were rightly not convicted. We find no evidence against any of these accused. We have no hesitation in confirming their acquittals.

116. The State has also sought enhancement of the

sentences. Whenever the accused are convicted for offence under section 302 of IPC, the State's prayer is for capital punishment. For other offence under section 307 of IPC, the State's argument was that sentence of seven years of RI is inadequate. Both sides have made detailed arguments with respect to adequacy of sentence. Both sides had also cited large number of judgements which we have perused.

117. In case of **Bachan Singh vs. State of Punjab** reported in **(1980) 2 SCC 684**, Constitution Bench of the Supreme Court suggested taking into account aggravating and mitigating circumstances. Aggravating circumstances would be such as the offence being pre-planned, calculated, cold blooded murder, extreme cruelty etc.

118. In case of **Machhi Singh and others v. State of Punjab** reported in **(1983) 3 SCC 470**, the Supreme Court highlighted certain factors which should go into consideration before deciding whether or not capital punishment should be awarded. This include (1) Manner of commission of murder; (2) Motive for commission of murder; (3) Anti Social or socially abhorrent nature of the crime; (4) Magnitude of Crime; (5) Personality of Victim of murder. The Court gave further guidelines in tune with the judgement of the Supreme Court in case of **Bachan Singh** (supra) and observed as under:

“38. In this background the guidelines indicated in Bachan Singh's case (supra) will have to be culled out and

applied to the facts of each individual case where the question of imposing of death sentences arises. The following propositions emerge from Bachan Singh's case:

(i) the extreme penalty of death need not be inflicted except in gravest cases of extreme culpability;

(ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration alongwith the circumstances of the 'crime'.

(iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances has to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

39. In order to apply these guidelines inter-alia the following questions may be asked and answered:

(a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?

(b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender ?

40. If upon taking an overall global view of all the circumstances in the light of the aforesaid proposition and taking into account the answers to the questions posed here in above, the circumstances of the case are such that

death sentence is warranted, the court would proceed to do so.”

119. The accused were undoubtedly involved in commission of extremely serious offences. The manner of commission of such offence is also extremely gruesome. Large number of people were burnt alive. These were helpless innocent residents of the villages. Many of these people were old people and women and children. Riot was a result of communal frenzy. Despite such factors, we do not think this is rarest of rare case where capital punishment should be awarded. Our reasons for the same are as follows:

a) The incident undoubtedly had Godhra train burning background. Due to such unfortunate incident, population of the village was even otherwise uneasy and tense. There was Bandh call given by certain organizations on 1st March. Mob had started gathering when in police firing one of them died. This surely would have further enraged the members of the mob who, in any case, carried criminal intent.

b) No specific role or precise overt acts are attributed to any of the accused. We have of-course accepted their involvement, believed them to be the members of the unlawful assembly and sharing the common object to the unlawful assembly. Nevertheless, absence of any evidence of their precise actions would be one more factor which could be considered.

c) None of the accused have past criminal history. They are residing in the village since long with their families, engaged in agricultural activities or some other related activity.

d) We do not find that the accused are beyond reformation. There is nothing to suggest that when eventually released after serving out the entire sentence, they would still be a threat to the society. In other words, we do not find a situation where death is the only option, snuffing out the human life the only possibility.

120. Likewise, with respect to the adequacy of sentence for lesser offences such as sections 307 and 436 of IPC, we find no reason for enhancement. The Trial Court has awarded seven years of rigorous imprisonment in each case.

121. Last surviving issue is one raised by the defence regarding set-off not being granted to accused Nos. 1, 3, 8 and 14. The facts from record would suggest that these accused were arrested in connection with FIR No. I-23/2002 registered on 1.3.2002 and released on bail shortly thereafter on 11.3.2002. After the SIT took over the investigation, the case of death occurred on 02.03.2002 during the procession of Nishit's cremation ceremony, was separated out. These accused were re-arrested in connection with this case on 18.3.2002. They were, later

on, released on bail on 20.3.2002. They have been acquitted by the Trial Court in such case by a separate judgement. They have, however, been convicted in the present case. Their request is that the time spent by them as under trial prisoners in the case relating to the incident of 02.03.2002, may be considered for set-off for the sentence in the present case.

122. Their request is plainly opposed to the provision of section 428 of CRPC which provides that where an accused person has, on conviction, been sentenced to imprisonment for a term, not being imprisonment in default of payment of fine, the period of detention, if any, undergone by him during the investigation, inquiry or trial of the same case and before the date of such conviction, shall be set-off against the term of imprisonment imposed on him on such conviction, and the liability of such person to undergo imprisonment on such conviction shall be restricted to the remainder of the term of imprisonment imposed on him. This section thus refers to the set-off being granted to a convict for the term of imprisonment, he suffered during investigation, inquiry or trial of the same case. Section 428 of C.R.P.C does not permit set-off of period of imprisonment undergone by the accused in one case for the purpose of sentence awarded to him in connection with the conviction of another case. The Supreme Court in case of **Atul Manubhai Parekh v. Central Bureau of Investigation (supra)** held and observed that the benefit of set-off is only available in

relation to the period of detention already undergone in respect with the same case. The convict in a given case cannot be granted set-off against the period of detention or imprisonment undergone by him in connection with other cases.

123. We have seen senselessness of violence and loss of innocent human lives. We cannot imagine the pain suffered by the victims who perished in the raging fire. We cannot judge the depth of sorrow and despair that the members of the families of the victims would have felt while helplessly watching their relatives being killed in front of their eyes in most gruesome manner. While we were hearing these appeals we have also seen kind of doom and despair that such incidents bring on the members of the families of the accused. Everyday, we saw old ladies, young housewives with children in toes standing before us with folded hands pleading for temporary release of their son, husband or father citing reasons of death of a near relative, financial crisis in the family, serious illness of the children or such like and simply waiting for the outcome of these appeals. This was only to highlight the kind of sorrow and pain that such mindless and needless violence leaves behind. This phenomena which we often describe as communal frenzy turn perfectly normal human beings momentarily into murderous monsters leaving nothing but trail of death and destruction for the victims and his own family alike. There is nothing within our powers to reduce pain and agony of the relatives of the victims or those of the accused. We

have only tried to give our judgement as soon as possible to at-least reduce the anxiety arising out of the uncertainty.

124. In the result, Criminal Appeals are disposed of in following terms :

1) Conviction and sentence imposed by the trial Court against the following accused for offences punishable under sections 302 and 307 read with sections 120B and 149 of the Indian Penal Code, as also for offences punishable under sections 143, 144, 147, 148, 153A, 435, 436 427 and 440 of the IPC read with section 149 thereof is confirmed :

- 1) Vinubhai Bhikhabhai Patel, Accused No. 1
- 2) Vijaybhai Ravjibhai Patel, Accused No.3
- 3) Jayendrabhai Satabhai Patel, Accused No. 14
- 4) Sureshbhai Bhailalbai Patel, Accused No. 16
- 5) Dilipbhai Vinubhai Patel, Accused No.17
- 6) Pareshbhai Ranchhodbhai Patel, Accused No.19
- 7) Arvindbhai Ravjibhai Patel, Accused No.20
- 8) Hemantbhai Satabhai @ Gokalbhai Patel, Accused No.22
- 9) Sanatkumar Ranchhodbhai Patel, Accused No.26
- 10) Manubhai Jethabhai Patel Accused No. 27
- 11) Dilipbhai Ranchhodbhai Patel, Accused no.28
- 12) Dharmeshkumar Natubhai Patel, Accused No. 30
- 13) Vinubhai Shanabhai Patel, Accused No. 32
- 14) Pravinbhai Mangalbai Patel, Accused No. 45

Appeals of these accused are dismissed.

2) Conviction and sentence of the following accused recorded by the trial Court for offences punishable under sections 302 and 307 read with sections 120B and 149 of the Indian Penal Code, as also for offences punishable under sections 143, 144, 147, 148, 153A, 435, 436 427 and 440 of the IPC read with section 149 is set aside. They are acquitted of all charges and shall be released forthwith if not required in any other case :

- 1) Dilipbhai Valabhbhai Patel -Accused no.8,
- 2) Punambhai Laljibhai Patel -Accused no.29
- 3) Natubhai Mangalbhai Patel - Accused no.40

Their appeals are allowed and disposed of.

3) Conviction and sentence of the following accused for offence under section 307 read with sections 120B and 149 of the IPC, besides the offences punishable under sections 143, 144, 147, 148, 153A, 435, 436, 427, 440 read with section 149 of the IPC is confirmed :

- 1) Devangbhai Harshadbhai Patel, Accused no.5
- 2) Girishbhai Somabhai Patel, Accused No.6
- 3) Prakashbhai Jashbhai Patel, Accused no.7
- 4) Dilipbhai Shanabhai Patel, Accused No. 12

Appeals of these accused are dismissed.

4) Conviction and sentence of accused no.2 Atulbhai Dahyabhai Patel for offences punishable under sections 143, 144, 147, 148, 153A, 435, 436, 427, read with section 149 of the IPC is confirmed. His appeal is dismissed.

5) State appeal against acquittal is dismissed so also State's appeal for enhancement.

R&P may be sent back to the concerned Trial Court.

(AKIL KURESHI, J)

(B.N. KARIA, J)

(raghu/jyoti)