IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NOS. 446-449/2004
(Arising out of SLP (Crl.) No. 538-541/2004)

Zahira Habibulla H. Sheikh and Anr. … Appellants

Versus

State of Gujarat and Ors. … Respondents

WITH
CRIMINAL APPEAL NOS. 450-452/2004
(Arising out of SLP (Crl.) Nos. 1039 – 1041/2004)

J U D G E M E N T

ARIJIT PASAYAT, J.

Leave granted.

The present appeals have several unusual features and some of them pose very serious questions of far-reaching consequences. The case is commonly to be known as "Best Bakery case". One of the appeals is by Zahira who claims to be an eye-witness to macabre killings allegedly as a result of communal frenzy. She made statements and filed affidavits after completion of trial and judgement by the trial court, alleging that during trial she was forced to depose falsely and turn hostile on account of threats and coercion. That raises an important issue regarding witness protection besides the quality and credibility of the evidence before court. The other rather unusual question interestingly raised by the State of Gujarat itself relates to improper conduct of trial by the public prosecutor. Last, but not the least, that the role of the investigating agency itself was perfunctory and not impartial. Though its role is per-

ceived differently by the parties, there is unanimity in their stand that it was tainted, biased and not fair. While the accused persons accuse it for alleged false implication, the victims' relatives like Zahira allege its efforts to be merely to protect the accused.

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

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

Between 8.30 p.m. of 1.3.2002 and 11.00 a.m. of 2.3.2002, a business concern known as "Best Bakery" at Vadodara was burnt down by an unruly mob of large number(s) of people. In the ghastly incident, 14 persons died. The attacks were stated to be a part of retaliatory action to avenge killing of 56 persons burnt to death in the Sabarmati Express. Zahira was the main eye-witness who lost family members including helpless women and innocent children in the gruesome incident. Many persons other than Zahira were also eye-witnesses. Accused persons were the perpetrators of the crime. After investigation, charge sheet was filed in June 2002.

When a large number of witnesses have turned hostile it should have raised a reasonable suspicion that the witnesses were being threatened or coerced.

During trial, the purported eye-witnesses resiled from the statements made during investigation. Faulty and biased investigation as well as perfunctory trial were said to have marred the sanctity of the entire exercise undertaken to bring the culprits to book. By judgement dated 27.6.2003, the trial court directed acquittal of the accused persons.

Zahira appeared before the National Human Rights Commission (in short the "NHRC") stating that she was threatened by powerful politicians not to depose against the accused persons. On 7.8.2003, an appeal not up to the mark and neither in conformity with the required care, appears to have been filed by the State against the judgement of acquittal before the Gujarat high court. NHRC moved this Court and its Special Leave Petition (SLP) has been treated as a petition under Article 32 of the Constitution of India, 1950 (in short the "Constitution").

Zahira and another organisation – *Citizens for Justice and Peace* filed SLP (Crl.) No. 3770 of 2003 challenging judgement of acquittal passed by the trial court. One Sahera Banu (sister of appellant-Zahira) filed the aforenoted Criminal Revision No. 583 of 2003 before the high court questioning the legality of the judgement returning a verdict of acquittal. Appellant-State filed an application (Criminal Misc. Application No. 7677 of 2003) in terms of Sections 391 and 311 of the Code for permission to adduce addi-

tional evidence and for examination of certain persons as witness. Criminal Miscellaneous Application No. 9825 of 2003 was filed by the State to bring on record a document and to treat it as corroborative piece of evidence. By the impugned judgement the appeal, revision and the applications were dismissed and rejected.

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

When a large number of witnesses have turned hostile it should have raised a reasonable suspicion that the witnesses were being threatened or coerced. The public prosecutor did not take any step to protect the star witness who was to be examined on 17.5.2003 especially when four out of seven injured witnesses had on 9.5.2003 resiled from the statements made during investigation. Zahira Sheikh – the star witness – had specifically stated on affidavit about the threat given to her and the reason for her not coming out with the truth during her examination before court on 17.5.2003.

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

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

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

Statement of one eye-witness was recorded on 4.3.2002 by PI Baria at SSG Hospital, Vadodara disclosing names of five accused persons and when he was sought to be examined before the court summons were issued to this person on 27.4.2003 for examination on 9.5.2003. It could not be served on the ground that he had left for his native place in Uttar Pradesh. Therefore, fresh summons were issued on 9.6.2003 for recording his evidence on the next day, i.e., on 10.6.2003 giving only one day('s) time. When it could not be served, then summons were issued on 13.6.2003 for remaining present before the court on 16.6.2003. It could not be also served for the same reasons.

Ultimately, the public prosecutor gave *Purshis* for dropping him as witness and surprisingly the same was granted by the trial court. This goes to show that both the public prosecutor as well as the court were not only oblivious but also failed to discharge their duties. An important witness was not examined by the prosecutor on the ground that he, Sahejadkhan Hasankhan (PW-48) was of unsound mind. Though the witness was present, the public prosecutor dropped him on the ground that he was not mentally fit to depose. When such an application was made by the prosecution for dropping on the ground of mental deficiency, it was the duty of the learned trial judge

to make at least some minimum efforts to find out as to whether he was actually of unsound mind or not, by getting him examined (by) the civil surgeon or a doctor from the psychiatric department.

This witness (PW-48) has received serious injuries and the doctor Meena (PW-9) examined him. She has not stated in her evidence that he was mentally deficient. The police has also not reported that this witness was of unsound mind. During investigation also it was never stated that he was of unsound mind. His statement was recorded on 6.3.2002.

Sahejadkhan Hasankhan – the witness – was unconscious between 2nd-6th of March 2002. When he regained consciousness, his statement was recorded on 6.3.2002. He gave names of four accused persons i.e. A-5, A6, A-8 and A-11. This witness has also filed an affidavit before this Court in a pending matter narrating the whole incident. This clearly shows that the person was not of unsound mind as was manipulated by the prosecution to drop him.

In the case of one Shailun Hasankhan Pathan summons were issued on 9.6.2003 requiring his presence on 10.6.2003, which could not be served on him. He disclosed the names of three accused persons, i.e., A-6, A-8 and A-11. This witness was also surprisingly treated to be of deficient mind without any material and even without taking any efforts to ascertain the truth or otherwise of such serious claims.

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

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

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

The affidavit filed by different witnesses before this Court highlighted as to how and why they have been kept unfairly out of trial. Lalmohamad Khudabax Sheikh (PW-15) was hurriedly examined on 27.5.2003 though summons was issued to him for remaining present on 6.6.2003. No reason has been indicated as to why he was examined before the date stipulated.

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

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

According to Mr. Sibal, learned counsel appearing for the appellant-Zahira, the high court has not considered the stand taken by the appellant and the State of Gujarat in the proper perspective. Essentially, two contentions were raised by the State before the high court, in addition to the application filed by the appellant-Zahira highlighting certain serious infirmities in the entire exercise undertaken. The State had made prayers for acceptance of certain evidence under Section 391 of the Code read with Section 311 of the Code. So far as the acceptance of additional evidence is concerned, the same is related to affidavits filed by some injured witnesses who on account of circumstances indicated in the affidavits were forced not to tell the truth before the trial court, making justice a casualty.

The affidavits in essence also highlighted the atmosphere that prevailed in the trial court. The affidavits, in fact, were not intended to be used as evidence. A prayer was made that the witnesses who had filed affidavits before this Court should be examined, so that the truth can be brought on record. The high court surprisingly accepted the extreme stand of learned counsel for the accused persons that under Section 386 of the Code the court can only peruse the record of the case brought before it in terms of Section 385(2) of the Code and the appeal has to be decided on the basis of such record only and no other record can be entertained or taken into consideration while deciding the appeal.

It was the stand of the learned counsel for the accused before the high court that by an indirect method certain materials were sought to be brought on record which should not be permitted. The high court while belittling and glossing over the serious infirmities and pitfalls in the investigation as well as trial, readily accepted the said stand and held that an attempt was being to bring on record the affidavits by an indirect method, though they were not part of the record of the trial court.

It further held that no one, including the State, can be allowed to take advantage of its own wrong(s) and thereby making capricious exercise of powers in favour of the prosecution to fill in the lacuna overlooking completely the obligation cast on the courts also to ensure that the truth should not become a casualty and substantial justice is not denied to victims as well. With reference to these conclusions it was submitted that the high court did not keep in view the true scope and ambit of Section 391 as also the need or desirability to resort to Section 311 of the Code and virtually rendered the provisions otiose by nullifying the very object behind those provisions.

The conclusion that the appeal can be decided only on the basis of records brought before the high court in terms of Section 385(2) would render Section 391 of the Code and other allied powers conferred upon courts to render justice completely nugatory.

Further, after having held that the affidavits were not to be taken on record, the high court has recorded findings regarding contents of those affidavits, and has held that the affidavits are not truthful, and false. Unfortunately, the high court has gone to the extent of saying that the appellant-Zahira has been used by some persons with oblique motives. The witnesses who filed affidavits have been termed to be of un-

sound mind, untruthful and capable of being manipulated, without any material or reasonable and concrete basis to support such conclusions.

In any event, the logic applied by the high court to discard the affidavits of Zahira and others that they have fallen subsequently into the hands of some who remained behind the curtain, can be equally applied to accept the plea that accused or persons acting at their behest only had created fear on the earlier occasion before deposing in court by threats, in the minds of Zahira and others.

After having clearly concluded that the investigation was faulty and there were serious doubts about the genuineness of the investigation, it would have been proper for the high court to accept the prayer made for additional evidence and/or re-trial. Abrupt conclusions drawn about false implication not only cannot stand the test of scrutiny but also lack judicious approach and objective consideration, as is expected of a court.

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

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

It was submitted by the appellants that in view of the atmosphere in which the case was tried originally there should be a direction for a trial outside the state in case this Court thinks it so appropriate to direct, and evidence could be recorded by video conferencing so that a hostile atmosphere can be avoided. It is further submitted that the fresh investigation should be directed as investigation already conducted was not done in a fair manner and the prosecutor did not act fairly.

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

Mr. Rohtagi, learned additional solicitor general appearing for the State of Gujarat in the appeal filed by it, submitted that the application under consideration of the high court was in terms of Section 311 and Section 391 of the Code. Though the nomenclature is really not material, the prayer was to permit the affidavits to be brought on record, admit and take additional evidence of the persons filing the affidavit by

calling/re-calling them in addition to certain directions for re-trial if the high court felt it to be so necessary after considering the additional evidence.

Though there was no challenge to Zahira's *locus standi* to file an appeal, it is submitted that prayer for re-hearing by another high court and/or for trial outside the state cannot be countenanced and it is nobody's case that the courts in Gujarat cannot do complete justice and such moves do not serve anybody's purpose.

There is no proper reason indicated by the high court to refuse to take on record the affidavits and the only inferable reason as it appears, i.e., that the affidavits were also filed in this Court in another proceeding is no reason in the eye of law. Admissibility of material is one thing and what is its worth is another thing and relates to acceptability of the evidence. Since they were relevant, being filed by alleged eye-witnesses, there was no basis for the high court to discard them. Even if the appellant-Zahira has taken different stands as concluded by the high court, it was obligatory for the court to find out as to what is the correct stand and real truth which could have been decided and examined by accepting the prayer for additional evidence.

The high court has, without any material or sufficient basis, come to hold that the FIR was manipulated, and the fax message referred to by the State could also have been manipulated. There is no basis for coming to such a conclusion. There was no material before the trial court to conclude that the FIR was lodged by one Rahish Khan, though the statement of the appellant-Zahira was anterior in point of time. The stand of the State was that it was relying on Zahira's version to be the FIR. The State had filed the application for acceptance of additional evidence as it was of the view that the FIR registered on the basis of Zahira's statement was an authentic one and no evidence *aliunde* was necessary.

In the absence of even any material the abrupt conclusion about manipulation and the other conclusions of the high court are perverse and also contradictory in the sense that after having said that affidavit were not to be brought on record it went on to label it as not truthful. The high court should not have thrown out the application as well as the materials sought to be brought on record even at the threshold and yet gone on to surmise on reasons, at the same time, professing to decide on its correctness.

The stands taken before the high court to justify acceptance of additional evidence and directions for re-trial were reiterated.

Mr. Sushil Kumar, learned senior counsel for the accused submitted that it is not correct to say that application under Section 391 of the Code was not admitted. It was in fact admitted and rejected on merits. It is also not correct to say that the investigation was perfunctory. The affidavits sought to be brought on record were considered on their own merits. While Zahira's prayer was for fresh investigation, the State's appeal in essence was for fresh trial. The four persons whose affidavits were pressed into service were PWs 1, 6, 47 and 48. They were examined as PWs and there was no new evidence. There can be no re-examination on the pretext used by the State for re-trial. The original appeal filed by the State was

Appeal No. 956 of 2003. There was first an amendment in September 2003 and finally in December 2003. The stand got changed from time to time.

What essentially was urged or sought for, related to fresh trial on the ground that investigation was not fair. The stand taken by the State in its appeal is also contrary to evidence on record. Though one of the grounds seeking fresh trial was the alleged deficiencies of the public prosecutor in conducting the trial and for not bringing on record the contradictions with reference to the statements recorded during investigation, in fact it has been done. There was nothing wrong in treating (the) statement of Rahish Khan as the FIR. The high court has rightly concluded that Zahira's statement was manipulated as if she had given information at the first point of time which is belied by the fact that it reached the concerned court after three days. The high court, after analysing the evidence, has correctly come to the conclusion that the police manipulated in getting false witnesses to rope in wrong people as the accused. Irrelevant and out of context submissions are said to have been made, and grounds taken and reliefs sought for by Zahira in her appeal.

Mr. KTS Tulsi, learned senior counsel also appearing for the accused persons in the appeal filed by the State submitted that in Section 311 the key words are "if his evidence appears to it to be essential to the just decision of the case". Therefore, the court must be satisfied that the additional evidence is necessary and it is not possible to arrive at a just conclusion on the basis of the records. For that purpose it has to apply its mind to the evidence already on record and thereafter decide whether it feels any additional evidence to be necessary.

Right from the inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying (the) existence of courts of justice.

For that purpose, the court has to come to a *prima facie* conclusion that an appeal cannot be decided on the basis of materials existing on record. Therefore, before dealing with an application under Section 391 the court has to analyse the evidence already existing. Since the high court in the instant case has analysed the evidence threadbare and come to the conclusion that the trial was fair and satisfactory and a positive conclusion has been arrived at after analysing the evidence, the question of pressing into service Section 391 of the Code does not arise.

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

- For the purpose of exercise of power under Section 391 of the Code, the court has to come to a conclusion about the necessity for additional evidence which only could be done after examining evidence on record. In other words, the court must arrive at a conclusion that the existing material is insufficient for the purpose of arriving at a just decision.
- The high court has undertaken an elaborate exercise for the purpose of arriving at the conclusion as to whether additional evidence was necessary after examining every relevant aspect. It has come to a definite conclusion that the trial of the case was fair, satisfactory and neither any illegalities were committed nor any evidence

was wrongly accepted or rejected. The extraneous factors have been kept out of consideration as these may have influenced the witnesses in changing their evidence and giving a go-by to substantive evidence tendered in court.

- A need for giving finality to trial in criminal proceedings is paramount as otherwise prejudice is caused to the accused persons and in fact it would be a negation of the fundamental rule of law to make the accused undergo trial once over which has the effect of derailing (the) system of justice.

Elaborating the points, it is submitted that if the court feels that additional evidence is not necessary after analysing the existing evidence and the nature of materials sought to be brought in, it cannot be said that the court has acted in a manner contrary to law. In fact, the high court has felt that extraneous materials are now sought to be introduced and it is not known as to whether the present statement of the witnesses is correct or what was stated before the trial court original(ly) was the truth.

The court analysed the evidence of the material witnesses and noticed several relevant factors to arrive at this conclusion. The necessity and need for additional evidence has to be determined in the context of the need for a just decision and it cannot be used for filling up a lacuna. Reference is made to the decisions of the court in *Jamatraj Kewalji Govani vs. The State of Maharashtra (1967 (3) SCR 415)* and *Mohanlal Shamji Soni v. Union of India and Another (1991 Supp (1) SCC 271).* The high court has also come to definite conclusion that the submissions of the State and Zahira cannot be accepted because non-examination of certain persons was on account of the circumstances indicated by the trial court and that conclusion has been arrived at after analysing the factual background.

There is no guarantee, as rightly observed by the high court, that the subsequent affidavits are true. On the contrary, in the absence of any contemporary grievance having been made before the court about any pressure or threat, the affidavits and the claims now sought to be made have been rightly discarded.

Right from the inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying (the) existence of courts of justice. The operating principles of a fair trial permeate the common law in both civil and criminal contexts.

Application of these principles involves a delicate judicial balancing of competing interests in a criminal trial, the interests of the accused and the public and to a great extent that of the victim have to be weighed not losing sight of the public interest involved in the prosecution of persons who commit offences.

In 1846, in a judgement which Lord Chancellor Selborne would later describe as "one of the ablest judgements of one of the ablest judges who ever sat in this court," vice chancellor Knight Bruce said:

> "The discovery and vindication and establishment of truth are main purposes certainly of the existence of courts of justice; still, for the obtaining of these objects, which however valuable and important, cannot be usefully pursued without moderation, cannot be either usefully or creditably pursued, unfairly or gained by

unfair means, not every channel is or ought to be open to them. The practical inefficacy of torture is not, I suppose, the most weighty objection to that mode of examination. Truth, like all other good things, may be loved unwisely – may be pursued too keenly – may cost too much."

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

If a criminal court is to be an effective instrument in dispensing justice, the presiding judge must cease to be a spectator and a mere recording machine by becoming a participant in the trial.

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

"It is the merit of the common law that it decides the case first and determines the principle afterwards… It is only after a series of determination on the same subject matter, that it becomes necessary to "reconcile the cases", as it is called, that is, by a true induction to state the principle which has until then been obscurely felt. And this statement is often modified more than once by new decisions before the abstracted general rule takes its final shape. A well settled legal doctrine embodies the work of many minds, and has been tested in form as well as substance by trained critics whose practical interest is to resist it at every step."

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

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

"It is desirable that the requirement of fairness be separately identified since it transcends the content of more particularised legal rules and principles and provides the ultimate rationale and touchstone of the rules and practices which the common law requires to be observed in the administration of the substantive criminal law."

This Court has often emphasised that in a criminal case the fate of the proceedings cannot always be left entirely in the hands of the parties, crimes being public wrongs

in breach and violation of public rights and duties, which affect the whole community as a community and (are) harmful to society in general. The concept of fair trial entails familiar triangulation of interests of the accused, the victim and society and it is the community that acts through the State and prosecuting agencies.

Interests of society is not (to) be treated completely with disdain and as *persona non grata*. Courts have always been considered to have an over-riding duty to maintain public confidence in the administration of justice – often referred to as the duty to vindicate and uphold the "majesty of the law". Due administration of justice has always been viewed as a continuous process, not confined to determination of the particular case, protecting its ability to function as a court of law in the future as in the case before it.

If a criminal court is to be an effective instrument in dispensing justice, the presiding judge must cease to be a spectator and a mere recording machine by becoming a participant in the trial evincing intelligence, active interest, and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth and administer justice with fairness and impartiality both to the parties and to the community it serves.

Courts administering criminal justice cannot turn a blind eye to vexatious or oppressive conduct that has occurred in relation to proceedings, even if a fair trial is still possible, except at the risk of undermining the fair name and standing of the judges as impartial and independent adjudicators.

The principles of rule of law and due process are closely linked with human rights protection. Such rights can be protected effectively when a citizen has recourse to the courts of law. It has to be unmistakably understood that a trial which is primarily aimed at ascertaining truth has to be fair to all concerned. There can be no analytical, all-comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind, viz., whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted.

It will not be correct to say that it is only the accused who must be fairly dealt with. That would be turning Nelson's eyes to the needs of society at large and the victims or their family members and relatives. Each one has an in-built right to be dealt with fairly in a criminal trial. Denial of a fair trial is as much injustice to the accused as (it) is to the victim and society. Fair trial obviously would mean a trial before an impartial judge, a fair prosecutor and atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated. If the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial. The failure to hear material witnesses is certainly denial of fair trial.

While dealing with the claims for the transfer of a case under Section 406 of the Code from one state to another this Court in *Mrs. Maneka Sanjay Gandhi and Anr. Vs. Ms. Rani Jethmalani (1979 (4) SCC 167),* emphasised the necessity to ensure fair trial, observing as hereunder:

"Assurance of a fair trial is the first imperative of the dispensation of justice and the central criterion for the court to consider when a motion for transfer is made is not the hypersensitivity or relative convenience of a party or easy availability of legal services or like mini-grievances. Something more substantial, more compelling, more imperilling, from the point of view of public justice and its attendant environment, is necessitous if the court is to exercise its power of transfer. This is the cardinal principle although the circumstances may be myriad and vary from case to case. We have to test the petitioner's grounds on this touchstone bearing in mind the rule that normally the complainant has the right to choose any court having jurisdiction and the accused cannot dictate where the case against him should be tried. Even so, the process of justice should not harass the parties and from that angle the court may weigh the circumstances.

"A more serious ground which disturbs us in more ways than one is the alleged absence of congenial atmosphere for a fair and impartial trial. It is becoming a frequent phenomenon in our country that court proceedings are being disturbed by rude hoodlums and unruly crowds, jostling, jeering or cheering and disrupting the judicial hearing with menaces, noises and worse. This tendency of toughs and street roughs to violate the serenity of court is obstructive of the course of justice and must surely be stamped out. Likewise, the safety of the person, of an accused or complainant, is an essential condition for participation in a trial and where that is put in peril by common tumult or threat on account of pathological conditions prevalent in a particular venue, the request for a transfer may not be dismissed summarily. It causes disquiet and concern to a court of justice if a person seeking justice is unable to appear, present one's case, bring one's witnesses or adduce evidence. Indeed, it is the duty of the court to assure propitious conditions which conduce to comparative tranquility at the trial. Turbulent conditions putting the accused's life in danger or creating chaos inside the court hall may jettison public justice. If this vice is peculiar to a particular place and is persistent, the transfer of the case from that place may become necessary. Likewise, if there is general consternation or atmosphere of tension or raging masses of people in the entire region taking sides and polluting the climate, vitiating the necessary neutrality to hold detached judicial trial, the situation may be said to have deteriorated to such an extent as to warrant transfer. In a decision cited by the counsel for the petitioner, Bose J. observed:

Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. It is inherent in the concept of due process of law that condemnation should be rendered only after the trial in which the hearing is a real one, not sham or mere farce and pretence.

> '… But we do feel that good grounds for transfer from Jashpurnagar are made out because of the bitterness of local communal feeling and the tenseness of the atmosphere there. Public confidence in the fairness of a trial held in such an atmosphere would be seriously undermined, particularly among reasonable Christians all over India not because the judge was unfair or biased but because

> the machinery of justice is not geared to work in the midst of such conditions. The calm detached atmosphere of a fair and impartial judicial trial would be wanting, and even if justice were done it would not be 'seen to be done'.' *(A.X. Francis v. Banke Behari Singh AIR 1958 SC 309).*

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

"Nevertheless, we cannot view with unconcern the potentiality of a flare-up and the challenge to a fair trial, in the sense of a satisfactory participation by the accused in the proceedings against her. Mob action may throw out of gear the wheels of the judicial process. Engineered fury may paralyse a party's ability to present his case or participate in the trial. If the justice system grinds to a halt through physical manoeuvres or sound and fury of the senseless populace, the rule of law runs aground. Even the most hated human anathema has a right to be heard without the rage of ruffians or huff of toughs being turned against him to unnerve him as party or witness or advocate. Physical violence to a party, actual or imminent, is reprehensible when he seeks justice before a tribunal. Manageable solutions must not sweep this Court off its feet into granting an easy transfer but uncontrollable or perilous deterioration will surely persuade us to shift the venue. It depends. The frequency of mobbing manoeuvres in court precincts is a bad omen for social justice in its wider connotation. We, therefore, think it necessary to make a few

cautionary observations which will be sufficient as we see at present to protect the petitioner and ensure for her a fair trial."

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

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

Time has come when serious and undiluted thoughts are to be bestowed for protecting witnesses so that ultimate truth is presented before the court and justice triumphs and the trial is not reduced to mockery.

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

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

Broader public and societal interests require that the victims of the crime, who are not ordinarily parties to prosecution and the interests of State represented by their prosecuting agencies, do not suffer even in slow process but irreversibly and irretrievably, which if allowed would undermine and destroy public confidence in the administration of justice, which may ultimately pave way for anarchy, oppression and injustice resulting in complete breakdown and collapse of the edifice of rule of law, en-

shrined and jealously guarded and protected by the Constitution. There comes the need for protecting the witness.

Time has come when serious and undiluted thoughts are to be bestowed for protecting witnesses so that ultimate truth is presented before the court and justice triumphs and the trial is not reduced to mockery. The State has a definite role to play in protecting the witnesses, to start with, at least, in sensitive cases involving those in power, who have political patronage and could wield muscle and money power, to avert trial(s) getting tainted and derailed and truth becoming a casualty.

As a protector of its citizens, it has to ensure that during a trial in court the witness could safely depose truth without any fear of being haunted by those against whom he has deposed. Some legislative enactments like the Terrorist and Disruptive Activities (Prevention) Act, 1987 (in short, the "TADA Act") have taken note of the reluctance shown by witnesses to depose against dangerous criminals-terrorists. In a milder form also the reluctance and the hesitation of witnesses to depose against people with muscle power, money power or political power has become the order of the day.

If ultimately truth is to be arrived at, the eyes and ears of justice have to be protected so that the interest of justice does not get incapacitated in the sense of making the proceedings before courts mere mock trials as are usually seen in movies.

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

The courts have to take a participatory role in a trial. They are not expected to be tape recorders to record whatever is being stated by the witnesses. Section 311 of the Code and Section 165 of the Evidence Act confer vast and wide powers on presiding officers of court to elicit all necessary materials by playing an active role in the evidence collecting process. They have to monitor the proceedings in aid of justice in manner that something, which is not relevant, is not unnecessarily brought into record. Even if the prosecutor is remiss in some ways, it can control the proceedings effectively so that ultimate objective, i.e., truth is arrived at. This becomes more necessary where the court has reasons to believe that the prosecuting agency or the prosecutor is not acting in the requisite manner. The court cannot afford to be wishfully or pretend to be blissfully ignorant or oblivious to such serious pitfalls or dereliction of duty on the part of the prosecuting agency. The prosecutor who does not act fairly and acts more like a counsel for the defence is a liability to the fair judicial system, and courts could not also play into the hands of such prosecuting agency showing indifference or adopting an attitude of total aloofness.

The power of the court under Section 165 of the Evidence Act is in a way complementary to its power under Section 311 of the Code. The Section consists of two parts i.e. (i) giving discretion to the court to examine the witness at any stage and (ii) the mandatory portion which compels the court to examine a witness if his evidence appears to be essential to the just decision of the court. Though the discretion given to the court is very wide, the very width requires a corresponding caution. In *Mohan Lal v. Union of India (1991 Supp (1) SCC 271)* this Court has observed, while considering the scope and ambit of Section 311, that the very usage of the word such as, "any court" "at any stage", or "any enquiry or trial or other proceedings" "any person" and "any such person" clearly spells out that the Section has expressed in the widest possible terms and do not limit the discretion of the court in any way.

However, as noted above, the very width requires a corresponding caution that the discretionary powers should be invoked as the existence of justice requires and exercised judicially with circumspection and consistently with the provisions of the Code. The second part of the Section does not allow any discretion but obligates and binds the court to take necessary steps if the fresh evidence to be obtained is essential to the just decision of the case – "essential", to an active and alert mind and not to one which is bent to abandon or abdicate.

Legislative measures to emphasise prohibition against tampering with witness, victim or informant have become the imminent and inevitable need of the day. Conducts which illegitimately affect the presentation of evidence in proceedings before the courts have to be seriously and sternly dealt with.

(The) object of the Section is to enable the court to arrive at the truth irrespective of the fact that the prosecution or the defence has failed to produce some evidence which is necessary for a just and proper disposal of the case. The power is exercised and the evidence is examined neither to help the prosecution nor the defence, if the court feels that there is necessity to act in terms of Section 311 but only to subserve the cause of justice and public interest. It is done with an object of getting the evidence in aid of a just decision and to uphold the truth.

It is not that in every case where the witness who had given evidence before court wants to change his mind and is prepared to speak differently, that the court concerned should readily accede to such request by lending its assistance. If the witness who deposed one way earlier comes before the appellate court with a prayer that he is prepared to give evidence which is materially different from what he has given earlier at the trial with the reasons for the earlier lapse, the court can consider the genuineness of the prayer in the context as to whether the party concerned had a fair opportunity to speak the truth earlier and in an appropriate case, accept it. It is not that the power is to be exercised in a routine manner, but being an exception to the ordinary rule of disposal of appeal on the basis of record(s) received in exceptional cases or extraordinary situation(s) the court can neither feel powerless nor abdicate its duty to arrive at the truth and satisfy the ends of justice.

The court can certainly be guided by the metaphor, separate the grain from the chaff, and in a case which has (the) telltale imprint of reasonableness and genuineness in the prayer, the same has to be accepted, at least to consider the worth, credibility and the acceptability of the same on merits of the material sought to be brought in.

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

Section 391 of the Code is another salutary provision which clothes the courts with the power to effectively decide an appeal. Though Section 386 envisages the normal and ordinary manner and method of disposal of an appeal, yet it does not and cannot be said to exhaustively enumerate the modes by which alone the court can deal with an appeal. Section 391 is one such exception to the ordinary rule and if the appellate court considers additional evidence to be necessary, the provisions in Section 386 and Section 391 have to be harmoniously considered to enable the appeal to be considered and disposed of also in the light of the additional evidence as well.

For this purpose, it is open to the appellate court to call for further evidence before the appeal is disposed of. The appellate court can direct the taking up of further evidence in support of the prosecution; *a fortiori* it is open to the court to direct that the accused persons may also be given a chance of adducing further evidence. Section 391 is in the nature of an exception to the general rule and the power under it must also be exercised with great care, specially on behalf of the prosecution lest the admission of additional evidence for the prosecution operates in a manner prejudicial to the defence of the accused.

The primary object of Section 391 is the prevention of (a) guilty man's escape through some careless or ignorant proceeding before a court or vindication of an innocent person wrongfully accused. Where the court, through some carelessness or ignorance, has omitted to record the circumstances essential to elucidation of truth, the exercise of power under Section 391 is desirable.

The legislative intent in enacting Section 391 appears to be the empowerment of the appellate court to see that justice is done between the prosecutor and the persons prosecuted and if the appellate court finds that certain evidence is necessary in order to enable it to give correct and proper findings, it would be justified in taking action under Section 391.

There is no restriction in the wording of Section 391 either as to the nature of the evidence or that it is to be taken for the prosecution only or that the provisions of the Section are only to be invoked when formal proof for the prosecution is necessary. If the

appellate court thinks that it is necessary in the interest of justice to take additional evidence, it shall do so. There is nothing in the provision limiting it to cases where there has been merely some formal defect. The matter is one of discretion of the appellate court.

As re-iterated supra the ends of justice are not satisfied only when the accused in a criminal case is acquitted. The community acting through the State and the public prosecutor is also entitled to justice. The cause of the community deserves equal treatment at the hands of the court in the discharge of its judicial functions.

In *Rambhau and Anr. v. State of Maharashtra (2001 (4) SCC 759)* it was held that the object of Section 391 is not to fill in lacuna, but to subserve the ends of justice. The court has to keep these salutary principle(s) in view. Though wide discretion is conferred on the court, the same has to be exercised judicially and the Legislature has put a safety valve by requiring recording of reasons.

Need for circumspection was dealt with by this Court in *Mohanlal Shamji Soni's case (supra) and Ram Chander v. State of Haryana (1981 (3) SCC 191)* which dealt with the corresponding Section 540 of Code of Criminal Procedure, 1898 (in short, the "Old Code") and also in *Jamatrai's case* (supra). While dealing with Section 311 this Court in *Rajendra Prasad v. Narcotic Cell thr. Its Officer in Charge, Delhi (1999 (8) SCC 110)* held as follows:

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

Whether a re-trial under Section 386 or taking up of additional evidence under Section 391 is the proper procedure will depend on the facts and circumstances of each case for which no straight-jacket formula of universal and invariable application can be formulated.

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

Though justice is depicted to be blind-folded, as popularly said, it is only a veil not to see who the party before it is while pronouncing judgement on the cause brought before it by enforcing law and administer(ing) justice and not to ignore or turn the mind/attention of the court away from the truth of the cause or lie before it, in disregard of its duty to prevent miscarriage of justice.

When an ordinary citizen makes a grievance against the mighty administration, any indifference, inaction or lethargy shown in protecting his right guaranteed in law will tend to paralyse by such inaction or lethargic action of courts and erode in stages faith in-built in (the) judicial system, ultimately destroying the very justice delivery system of the country itself. Doing justice is the paramount consideration and that duty cannot be abdicated or diluted and diverted by manipulative red herrings.

The courts, at the expense of repetition we may state, exist for doing justice to the persons who are affected. The trial/first appellate courts cannot get swayed by abstract technicalities and close their eyes to factors which need to be positively probed and noticed. The court is not merely to act as a tape recorder recording evidence, overlooking the object of trial, i.e., to get at the truth. It cannot be oblivious to the active role to be played for which there is not only ample scope, but sufficient powers conferred under the Code.

It has a greater duty and responsibility, i.e., to render justice, in a case where the role of the prosecuting agency itself is put in issue and is said to be hand in glove with the accused, parading a mock fight and making a mockery of the criminal justice administration itself.

As pithily stated in *Jennison v. Backer (1972 (1) All E.R. 1006)*: "The law should not be seen to sit limply, while those who defy it go free and those who seek its protection lose hope." Courts have to ensure that accused persons are punished and that the might or authority of the State are not used to shield themselves or their men. It should be ensured that they do not wield such powers which under the Constitution have to be held only in trust for the public and society at large.

If deficiency in investigation or prosecution is visible or can be perceived by lifting the veil trying to hide the realities or covering the obvious deficiencies. Courts have to deal with the same with an iron hand appropriately within the framework of law. It is as much the duty of the prosecutor as of the court to ensure that full and material facts are brought on record so that there might not be miscarriage of justice. (*See Shakila Abdul Gafar Khan (Smt.) v. Vasant Raghunath Dhoble and Anr. (2003 (7) SCC 749).*

This Court, in *Vineet Narain v. Union of India (1998 (1) SCC 226)*, has directed that steps should be taken immediately for the constitution of (an) able and impartial

agency comprising persons of unimpeachable integrity to perform functions akin to those of the Director of Prosecution in England. In the United Kingdom, the Director of Prosecution was created in 1879. His appointment is by the Attorney General from amongst the members of the Bar and he functions under the supervision of (the) Attorney General. The Director of Prosecution plays a vital role in the prosecution system. He even administers "Witness Protection Programmes".

Several countries, for example, Australia, Canada and USA have enacted legislation in this regard. The Witness Protection Programmes are imperative as well as imminent in the context of alarming rate of somersaults by witnesses with ulterior motives and purely for personal gain or fear for security. It would be a welcome step if something on those lines is done in our country. That would be a step in the right direction for a fair trial.

Expression of concern merely in words without really the mind to concretise it by positive action would be not only useless but also amounts to betrayal of public confidence and trust imposed.

Witness Protection programmes are imperative as well as imminent in the context of alarming rate of somersaults by witnesses with ulterior motives and purely for personal gain or fear for security. It would be a welcome step if something on those lines is done in our country.

Though it was emphasised with great vehemence by Mr. Sushil Kumar and Mr. KTS Tulsi that the high court dealt with the application under Section 391 of the Code in detail and not perfunctorily as contested by learned counsel for the appellants; we find that nowhere the high court has effectively dealt with the application under Section 391 as a part of the exercise to deal with and dispose of the appeal. In fact, the high court dealt with it practically in one paragraph, i.e., Paragraph 36 of the judgement, accepting the stand of learned counsel for the accused that the consideration of the appeal has to be limited to the records sent up under Section 385(2) of the Code for disposal of the appeal under Section 386.

This perception of the powers of the appellate court and misgiving(s) as to the manner of disposal of an appeal per se vitiates the decision rendered by the high court. Section 386 of the Code deals with the manner and disposal of the appeal in the normal or ordinary course. Section 391 is in the nature of exception to Section 386. As was observed in *Rambhau's case (*supra), if the stand of learned counsel for the accused, as was accepted by the high court, is maintained, it would mean that Section 391 of the Code would be a dead letter in the statute book. The necessity for additional evidence arises when the court feels that some evidence which ought to have been before it is not there or that some evidence has been left out or erroneously brought in.

In all cases it cannot be laid down as a rule of universal application that the court has to first find out whether the evidence already on record is sufficient. The nature and quality of the evidence on record is also relevant. If the evidence already on record is shown or found to be tainted, tailored to suit to help a particular party or side

and the real truth has not and could not have been spoken or brought forth during trial, it would constitute merely an exercise in futility, if it considered first whether the evidence already on record is sufficient to dispose of the appeals. Disposal of appeal does not mean disposal for statistical purposes but effective and real disposal to achieve the object of any trial. The exercise has to be taken up together.

It is not that the court has to be satisfied that the additional evidence would be necessary for rendering a verdict different from what was rendered by the trial court. In a given case, even after assessing the additional evidence, the high court can maintain the verdict of the trial court and similarly the high court on consideration of the additional evidence can upset the trial court's verdict. It all depends upon the relevance and acceptability of the additional evidence and its qualitative worth in deciding the guilt or innocence of the accused.

Merely because the high court permits additional evidence to be adduced, it does not necessarily lead to the conclusion that the judgement of the trial court was wrong. That decision has to be arrived at after assessing the evidence that was before the trial court and the additional evidence permitted to be adduced. The high court has observed that (the) question of accepting application for additional evidence will be dealt with separately, and in fact dealt with it in a cryptic manner, practically in one paragraph, and did not think it necessary to accept the additional evidence.

The entire approach of the high court suffers from serious infirmities, its conclusions lopsided, and lacks proper or judicious application of mind. Arbitrariness is found writ large on the approach as well as the conclusions arrived at in the judgement under challenge.

But at the same time (it) made threadbare analysis of the affidavits as if it had accepted this as additional evidence and was testing its acceptability. Even the conclusions arrived at with reference to those affidavits do not appear to be correct and seem to suffer from apparent judicial obstinacy and avowed determination to reject it.

For example, to brand a person as not truthful because a different statement was given before the trial court unmindful of the earliest statement given during investigation and the reasons urged for turning hostile before court negates the legislative intent and purpose of incorporating Section 391 in the Code. The question of admission of evidence initially or as additional evidence under Section 391 is distinct from the efficacy, reliability and its acceptability for consideration of claims in the appeal on merits.

It is only after admission, (which) the court should consider in each case, whether on account of earlier contradiction before court and the testimony allowed to be given as additional evidence, which of them or any one part or parts of the depositions are creditworthy and acceptable, after a comparative analysis and consideration of the probabilities and probative value of the materials for adjudging the truth.

To reject it merely because of contradictions and that too in a sensitised case like the one before court, with a horror and terror oriented history of its own, would

amount to conspicuous omission and deliberate dereliction of discharging functions judiciously and with a justice-oriented mission.

In a given case, when the court is satisfied that for reasons on record the witness had not stated truthfully before the trial court and was willing to speak the truth before it, the power under Section 391 of the Code is to be exercised. It is to be noted at this stage that it is not the prosecution which alone can file an application under Section 391 of the Code. It can also be done, in an appropriate case, by the accused to prove his innocence.

Therefore, any approach without pragmatic considerations defeats the very purpose for which Section 391 of the Code has been enacted. Certain observations of the high court like, that if the accused persons were really guilty they would not have waited for long to commit offences or that they would have killed the victims in the night taking advantage of the darkness and/or that the accused persons had saved some persons belonging to the other community were only immaterial for the purpose of adjudication of application for additional evidence but such surmises could have been carefully avoided at least in order to observe and maintain the judicial calm and detachment required of the learned judges in the high court.

When the ghastly killings take place in the land of Mahatma Gandhi, it raises a very pertinent question as to whether some people have become so bankrupt in their ideology that they have deviated from everything which was so dear to him.

The conclusions of the high court that 65 to 70 persons belonging to the attacked community were saved by the accused or others persons to be based on the evidence of the relatives of the accused who were, surprisingly, examined by prosecution. We shall deal with the propriety of examining such persons, infra. These aspects could have been, if at all permissible to be done, considered after accepting the prayer for additional evidence. It is not known as to what extent these irrelevant materials have influenced the ultimate judgement of the high court, in coming (out) with such a strong and special plea in favour of a prosecuting agency which has miserably failed to demonstrate any creditability by its course of action.

The entire approach of the high court suffers from serious infirmities, its conclusions lopsided, and lacks proper or judicious application of mind. Arbitrariness is found writ large on the approach as well as the conclusions arrived at in the judgement under challenge, in unreasonably keeping out relevant evidence from being brought on record.

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

In the case of a defective investigation, the court has to be circumspect in evaluating the evidence and may have to adopt an active and analytical role to ensure that

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

In *Paras Yadav and Ors. v. State of Bihar (1999 (2) SCC 126)*, it was held that if the lapse or omission is committed by the investigation agency or because of negligence, the prosecution evidence is required to be examined *de hors* such omissions to find out whether the said evidence is reliable or not. The contaminated conduct of officials should not stand in the way of the courts getting at the truth by having recourse to Section 311, 391 of the Code and Section 165 of the Evidence Act at the appropriate and relevant stages and evaluating the entire evidence; otherwise designed mischief would be perpetuated with a premium to the offenders and justice would not only be denied to the complainant party but also made an ultimate causalty.

If one even cursorily glances through the records of the case, one gets a feeling that the justice delivery system was being taken for a ride and literally allowed to be abused, misused and mutilated by subterfuge. The investigation appears to be perfunctory and anything but impartial.

As was observed in *Ram Bihari Yadav v. State of Bihar and Ors. (1998 (4) SCC 517)* if primacy is given to such designed or negligent investigation, to the omission or lapses by perfunctory investigation or omissions, the faith and confidence of the people would be shaken not only in the law enforcing agency but also in the administration of justice in the hands of courts. The view was again reiterated in *Amar Singh v. Balwinder Singh and Ors. (2003 (2) Scc 518).*

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

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

When the ghastly killings take place in the land of Mahatma Gandhi, it raised a very pertinent question as to whether some people have become so bankrupt in their ideol-

ogy that they have deviated from everything which was so dear to him. When large number(s) of people, including innocent and helpless children and women, are killed in a diabolic manner, it brings disgrace to the entire society. Criminals have no religion. No religion teaches violence and cruelty-based religion is no religion at all, but a mere cloak to usurp power by fanning ill-feeling and playing on feelings aroused thereby.

The golden thread passing through every religion is love and compassion. The fanatics who spread violence in the name of religion are worse than terrorists and more dangerous than an alien enemy.

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

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

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

The golden thread passing through every religion is love and compassion. The fanatics who spread violence in the name of religion are worse than terrorists and more dangerous than an alien enemy.

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

The role of the state government also leaves much to be desired. One gets a feeling that there was really no seriousness in the State's approach in assailing the trial court's judgement. This is clearly indicated by the fact that the first memorandum of appeal filed was an apology for the grounds. A second amendment was done, that too after this court expressed its unhappiness over the perfunctory manner in which the appeal was presented and challenge made.

That also was not the end of the matter. There was a subsequent petition for amendment. All this sadly reflects on the quality of determination exhibited by the State and the nature of seriousness shown to pursue the appeal. Criminal trials should not be reduced to be the mock trials or shadow boxing of fixed trials. (The) judicial criminal administration system must be kept clean and beyond the reach of whimsical political wills or agendas

and properly insulated from discriminatory standards or yardsticks of the type, (as) prohibited by the mandate of the Constitution.

Those who are responsible for protecting life and properties and ensuring that investigation is fair and proper seem to have shown no real anxiety. Large number(s) of people had lost their lives. Whether the accused persons were really assailants or not could have been established by a fair and impartial investigation. The modern day "Neros" were looking elsewhere when Best Bakery and innocent children and women were burning, and were probably deliberating how the perpetrators of the crime can be saved or protected. Law and justice become flies in the hands of these "wanton boys". When fences start to swallow the crops, no scope will be left for survival of law and order or truth and justice. Public order as well as public interest become martyrs and monuments.

In the background of principles underlying Section 311 and Section 391 of the Code and Section 165 of the Evidence Act, it has to be seen as to whether the high court's approach is correct and whether it had acted justly, reasonably and fairly in placing premiums on the serious lapses of grave magnitude by the prosecuting agencies and the trial court, as well. There are several infirmities which are telltale even to the naked eye of even an ordinary common man. The high court has come to a definite conclusion that the investigation carried out by the police was dishonest and faulty. That was and should have been per se sufficient justification to direct a re-trial of the case.

There was no reason for the high court to come to the further conclusion of its own about false implication without concrete basis and that too merely on conjectures. On the other hand, the possibility of the investigating agency trying to shield the accused persons keeping in view the methodology adopted and out-turn of events can equally be not ruled out. When the investigation is dishonest and faulty, it cannot be only with the purpose of false implication. It may also be noted as this stage that the high court has even gone to the extent of holding that the FIR was manipulated. There was no basis for such a presumptive remark or arbitrary conclusion.

The high court has come to a conclusion that Zahira seems to have unfortunately for some reasons after the pronouncement of the judgement fallen into the hands of some who prefer to remain behind the curtain to come out with the affidavit alleging threat during trial. It has rejected the application for adducing additional evidence on the basis of the affidavit, but has found fault with the affidavit and hastened to conclude unjustifiably that they are far from truth by condemning those who were obviously victims.

The question whether they were worthy of credence, and whether the subsequent stand of the witnesses was correct needs to be assessed, and adjudged judiciously on objective standards which are the hallmark of a judicial pronouncement. Such observations, if at all, could have been only made after accepting the prayer for additional evidence. The disclosed purpose in the State Government's prayer with reference to the affidavits was to bring to (the) high court's notice the situation which prevailed during trial and the reasons as to why the witnesses gave the version as noted by the trial court.

Whether the witness had told the truth before the trial court or as stated in the

affidavit, were matters for assessment of evidence when admitted and tendered and when the affidavit itself was not tendered as evidence, the question of analysing it to find fault was not the proper course to be adopted. The affidavits were filed to emphasise the need for permitting additional evidence to be taken and for being considered as the evidence itself.

The high court has also found that some persons were not present and, therefore, question of their statement being recorded by the police did not arise. For coming to this conclusion, the high court noted that the statements under Section 161 of the Code were recorded in Gujarati language though the witnesses did not know Gujarati. The reasoning is erroneous for more reasons than one. There was no material before the high court for coming to a finding that the persons did not know Gujarati since there may be a person who could converse fluently in a language though not literate, to read and write.

Additionally, it is not a requirement in law that the statement under Section 161 of the Code has to be recorded in the language known to the person giving the statement. As a matter of fact, the person giving the statement is not required to sign the statement as is mandated in Section 162 of the Code. Sub-section (1) of Section 161 of the Code provides that the competent police officer may examine orally any person supposed to be acquainted with the facts and circumstances of the case.

It is no doubt true that the accused persons have been acquitted by the trial court and the acquittal has been upheld, but if the acquittal is unmerited and based on tainted evidence, tailored investigation, unprincipled prosecutor and perfunctory trial and evidence of threatened/terrorised witnesses, it is no acquittal in the eye of law.

Requirement is the examinations by the concerned police officer, Sub-section (3) is relevant, and it requires the police officer to reduce into writing any statement made to him in the course of an examination under this Section; and if he does so, he shall make a separate and true record of the statement of each such person whose statement he records. Statements made by a witness to the police officer during investigation may be reduced to writing. It is not obligatory on the part of the police officer to record any statement made to him. He may do so if he feels it necessary. What is enjoined by the Section is a truthful disclosure by the person who is examined.

In the above circumstance, the conclusion of the high court holding that the persons were not present is untenable. The reasons indicated by the high court to justify non-examination of the eye-witnesses is also not sustainable. In respect of one it has been said that whereabouts of the witnesses may not be known. There is nothing on record to show that efforts were made by the prosecution to produce the witness for tendering evidence and yet the net result was “untraceable”. In other words, the evidence which should have been brought before the court was not done with any meticulous care or seriousness.

It is true that the prosecution is not bound to examine each and every person who has been named as witness. A person named as a witness may be given up when there is material to show that he has been gained over or that there is no likelihood of the witness speaking the truth in court. There was no such material brought to the notice of the court below to justify non-examination. The materials on record are totally silent on this aspect.

Another aspect which has been lightly brushed aside by the high court is that one person who was to be examined on a particular date was examined earlier than the date fixed. This unusual conduct by the prosecutor should have been seriously taken note of by the trial court and also by the high court.

It is to be noted that the high court has found fault with DCP Shri Piyush Patel and has gone to the extent of saying that he has miserably failed to discharge his duties; while finding at the same time that police inspector Baria had acted fairly. The criticism according to us is uncalled for. (The) role of public prosecutor was also not in line with what is expected of him. Though a public prosecutor is not supposed to be a persecutor, yet the minimum that was required to be done to fairly present the case of the prosecution was not done.

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

In Shailendra Kumar v. State of Bihar and Ors. (2001 (8) Supreme 13), it was observed as under:

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

A somewhat unusual mode in contrast to the lapse committed by non-examining victims and injured witnesses adopted by the investigating agency and the prosecutor was examination of six relatives of accused persons. They have expectedly given a clean chit to the accused and labelled them as saviours. This unusual procedure was highlighted before the high court. But the same was not considered relevant as there is no legal bar.

When we asked Mr. Mukul Rohtagi, learned counsel for the State of Gujarat, as to whether this does not reflect badly on the conduct of (the) investigating agency and the prosecutor, he submitted that this was done to show the manner in which the incident had happened. This is a strange answer. Witnesses are examined by (the) prosecution to show primarily who is the accused. In this case it was nobody's stand that the incident did not take place. That the conduct of (the) investigating agency and the prosecutor was not bona fide, is apparent and patent.

So far as non-examination of some injured relatives are concerned, the high court has held that in the absence of any medical report, it appears that they were not present and, therefore, held that the prosecutor might have decided not to examine Yasminbanu because there was no injury. This is nothing but a wishful conclusion based on presumption. It is true that merely because the affidavit has been filed stating that the witnesses were threatened, as a matter of routine, additional evidence should not be permitted. But when the circumstances as in this case clearly indicate that there is some truth or *prima facie* substance in the grievance made, having regard to background of events as happened, the appropriate course for the courts would be to admit additional evidence for final adjudication so that the acceptability or otherwise of evidence tendered by way of additional evidence can be tested properly and legally tested in the context of probative value of the two versions.

The modern day "Neros" were looking elsewhere when Best Bakery and innocent children and women were burning, and were probably deliberating how the perpetrators of the crime can be saved or protected.

There cannot be (a) straight-jacket formula or rule of universal application when alone it can be done and when, not. As the provisions under Section 391 of the Code are by way of an exception, the courts have to carefully consider the need for and desirability to accept additional evidence. We do not think it necessary to highlight all the infirmities in the judgement of the high court or the approach of the trial court lest nothing credible or worth mentioning would remain in the process. This appears to be a case where the truth has become a casualty in the trial.

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

Prayer was made by the learned counsel for the appellant that the trial should be conducted outside the state so that the unhealthy atmosphere which led to failure or miscarriage of justice is not repeated. This prayer has to be considered in the background and keeping in view the spirit of Section 406 of the Code.

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

The high court appears to have miserably failed to maintain the required judicial balance and sobriety in making unwarranted references to personalities and their legitimate moves before the competent courts – the highest court of the nation, despite knowing fully well that it could not deal with such aspects or matters.

The apprehension must appear to the court to be a reasonable one. This position has been highlighted in *Gurcharan Das Chadha v. State of Rajasthan 1966 (2) SCR 678)* and *K. Ambazhagan v. The Superintendent of Police and others etc. (JT 2003 (9) SC 31).*

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

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

The fees and all other expenses of the public prosecutor who shall be entitled to assistance of one lawyer of his choice shall initially be paid by the state of Maharashtra, who will thereafter be entitled to get the same reimbursed from the state of Gujarat. The state of Gujarat shall ensure that all the documents and records are forthwith transferred to the court nominated by the Chief Justice of the Bombay high court.

The state of Gujarat shall also ensure that the witnesses are produced before the concerned court whenever they are required to attend them so that they can depose

freely without any apprehension of threat or coercion from any person. In case any witness asks for protection, the state of Maharashtra shall also provide such protection as deemed necessary, in addition to the protection to be provided for by the state of Gujarat. All expenses necessary for the trial shall be initially borne by the state of Maharashtra, to be reimbursed by the state of Gujarat.

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

Sub-section (8) of Section 173 of the Code permits further investigation and even *de hors* any direction from the court as such, it is open to the police to conduct proper investigation, even after the court took cognisance of any offence on the strength of a police report earlier submitted.

Before we part with the case it would be appropriate to note some disturbing factors. The high court after hearing the appeal directed its dismissal on 26.12.2003 indicating in the order that the reasons were to be subsequently given, because the court was closing for winter holidays. This course was adopted "due to paucity of time". We see no perceivable reason for the hurry. The accused were not in custody. Even if they were in custody, the course adopted was not permissible. This court has in several cases deprecated the practice adopted by the high court in the present case.

We are satisfied that it is fit and proper case, in the background of the nature of additional evidence sought to be adduced and the perfunctory manner of trial conducted on the basis of tainted investigation, a re-trial is a must and essentially called for in order to save and preserve the justice delivery system unsullied and unscathed by vested interests.

About two decades back, this Court in *State of Punjab vs. Jagdev Singh Talwandi (AIR 1984 SC 444)* had *inter alia* observed as follows:

> "We would like to take this opportunity to point out that serious difficulties arise on account of the practice increasingly adopted by the high courts of pronouncing the final order without a reasoned judgement. It is desirable that the final order which the high court intends to pass should not be announced until a reasoned judgement is ready for pronouncement. Suppose, for example, that a final order without a reasoned judgement is announced by the high court that a house shall be demolished, or that the custody of a child shall be handed over to one parent as against the other, or that a person accused of a serious charge is acquitted, or that a statute is unconstitutional or, as in the instant case, that a detenue be released from detention. If the object of passing such orders is to ensure speedy compliance with them, that object is more often defeated by the aggrieved party filing a special leave petition in this Court against the order passed by the high court. That places this Court in a predicament because, without the

benefit of the reasoning of the high court, it is difficult for this Court to allow the bare order to be implemented. The result inevitably is that the operation of the order passed by the high court has to be stayed, pending delivery of the reasoned judgement."

It may be thought that such orders are passed by this Court, and therefore, there is no reason why the high courts should not do the same. We would like to point out that the orders passed by this Court are final and no further appeal lies against them. The Supreme Court is the final court in the hierarchy of our courts. Orders passed by the high court are subject to the appellate jurisdiction of this Court under Article 136 of the Constitution and other provisions of the concerned statutes. We thought it necessary to make these observations so that a practice which is not a very desirable one and which achieves no useful purpose may not grow out of and beyond its present infancy.

What is still more baffling is that written arguments of the State were filed on 29.12.2003 and by the accused persons on 1.1.2004. A grievance is made that when the petitioner in Criminal Revision No. 583 of 2003 wanted to file notes of arguments they were not accepted making a departure from the cases of the State and the accused. If the written arguments were to be on record, it is not known as to why the high court dismissed the appeal. If it had already arrived at a particular view there was no question of filing written arguments.

The high court appears to have miserably failed to maintain the required judicial balance and sobriety in making unwarranted references to personalities and their legitimate moves before the competent courts – the highest court of the nation, despite knowing fully well that it could not deal with such aspects or matters.

Irresponsible allegations, suggestions and challenges may be made by parties, though not permissible or pursued defiantly during course of arguments at times with the blessings or veiled support of the presiding officers of court. But, such besmirching tacticss, meant as innuendos or serving as surrogacy ought not to be made or allowed to be made, to become part of solemn judgments, of at any rate by high courts, which are created as courts of record as well.

Decency, decorum and judicial discipline should never be made casualties by adopting such intemperate attitudes of judicial obstinacy. The high court also made some observations and remarks about persons/constitutional bodies like NHRC who were not before it.

We had an occasion to deal with this aspect to certain extent in the appeal relating to SLP (Crl.) Nos. 530–532/2004. The move adopted and manner of references made, in Para No. 3 of the judgement except the last limb (sub-para) is not in good taste or decorous. It may be noted that certain reference is made therein or grievances purportedly made before the high court about (the) role of NHRC.

When we asked Mr. Sushil Kumar who purportedly made the submissions before the high court during the course of hearing, he stated that he had not made any such submission as reflected in the judgement. This is certainly intriguing. Proceedings of

the court normally reflect the true state of affairs. Even if it is accepted that any such submission was made, it was not proper or necessary for the high court to refer to them in the judgement, to finally state that no serious note was taken of the submissions. Avoidance of such manoeuvres would have augured well with judicial discipline.

We order the expunging and deletion of the contents of Para 3 of the judgement except the last limb of the sub-para therein and it shall be always read to have not formed part of the judgement.

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

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

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

…..J.
(Doraiswamy Raju)

…..J.
(Arijit Pasayat)
New Delhi
April 12, 2004