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JUSTICE DELIVERED
Excerpts from the Judgement
in the Naroda Patiya Case

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Editors' Note

TO begin with, we offer our sincere apologies to readers of *Communalism Combat*. This special issue of the journal should have been with you a few months ago. Unfortunately, we were unable to bring it out for unavoidable reasons.

From the feedback we have received over the years, it is clear that our readers preserve their copies as valuable reference material. If they have come to expect in-depth reportage from the journal at one level, at another they look for reader-friendly, easily accessible, edited versions of court judgements, inquiry commission reports, etc. We hope our readers will find the edited excerpts of the landmark judgement in the Naroda Patiya case of particular interest.

Until now, in the context of communal carnages, a culture of impunity has been the prevailing story of India where victims and survivors of well-orchestrated pogroms against the country's religious minorities – Nellie 1983, Delhi 1984, Bhagalpur (Bihar) 1989, Mumbai 1992-93, Kandhamal (Orissa) 2008 – have been denied justice. When measured against the scale, ferocity and bestiality of the mass crimes in these cases, there has been no punishment worth the mention for the perpetrators and the masterminds or the policemen guilty of partisan conduct and gross dereliction of duty.

Against this backdrop, the delivery of justice, even if partial, to the victim survivors of the 2002 genocide in Gujarat comes as a hopeful sign, a signal to the practitioners of hate crimes that impunity can no longer be taken for granted. Credit for this must go to the extraordinary courage and steadfastness of survivor witnesses, to the legal rights group Citizens for Justice and Peace (CJP) and to the Supreme Court which since 2003 has closely monitored the judicial process in Gujarat. By transferring the Best Bakery carnage case out of Gujarat in 2004 and ordering its retrial in a Mumbai court, the highest court in the land had made its intentions amply clear. In a manner of speaking, the 2006 judgement of the Mumbai trial court fully vindicated the unprecedented verdict of the apex court. In 2003 a Vadodara trial court had acquitted all the accused and the Gujarat high court upheld the acquittals. But following the retrial in Mumbai, nine of the accused were given life imprisonment.

The verdict in the Best Bakery case marked a new milestone. Never before in the history of communal carnages in post-independence India had any of the guilty received a life sentence. Since then, as readers of *CC* are well aware, many more of the accused have been held guilty by trial courts in Gujarat and have received life sentences. The verdicts in the Sardarpura, Odh and Deepda Darwaza carnage cases, delivered between November 2011 and July 2012, resulted in 79 more life sentences. Then followed the judgement in the Naroda Patiya case in end August 2012 when 32 of the accused were sentenced to life imprisonment.

While the above-mentioned verdicts stand out, individually and collectively, so far as criminal jurisprudence in the context of communal violence is concerned, the Naroda Patiya judgement is especially significant for more than one reason. In the other Gujarat verdicts, those convicted were mere "foot soldiers". But included among those given life sentences in the Naroda Patiya case are Babu Bajrangi and Dr Maya Kodnani. Babu Bajrangi was a leader of the Bajrang Dal who enjoyed the patronage of top-level politicians in Gujarat. Dr Kodnani, a BJP MLA in 2002, was elevated by chief minister Narendra Modi to the rank of minister after the 2007 assembly elections in Gujarat. Judge Jyotsna Yagnik's verdict holds Dr Kodnani guilty of criminal conspiracy, names her as the "kingpin" behind the crimes committed in Naroda Patiya on February 28, 2002, describing the incident as a "cancer for our cherished constitutional value of secularism", and awards her a stringent 28-year jail term.

It may be recalled that Dr Kodnani is one of those named in the complaint of Ms Zakiya Jaffri wherein she has accused Modi and 61 others, including top BJP politicians, bureaucrats and police officers, of "criminal conspiracy to commit mass murder". Thus Judge Yagnik's ruling may well have implications for the case against Modi and others that is still before the courts.

Without doubt, the Naroda Patiya verdict was a proud moment for the judiciary and the country's democratic polity. We are happy to place edited excerpts of this landmark judgement before our readers.

We urge our readers to treat this issue as a special edition of *CC* covering the period August-November 2012. The coming issue will commemorate 20 years of the anti-Muslim pogrom in Bombay (now Mumbai).

– EDITORS

BACKGROUND

JUDGEMENT
(Edited Excerpts)

BEFORE THE SPECIAL COURT DESIGNATED FOR CONDUCTING THE SPEEDY TRIAL OF RIOT CASES

SITUATED AT OLD HIGH COURT BUILDING NAVRANGPURA, AHMEDABAD

[SESSIONS CASE NO. 235 OF 2009 CONNECTED WITH SESSIONS CASE NOS. 236 OF 2009, 241 OF 2009, 242 OF 2009, 243 OF 2009, 245 OF 2009, 246 OF 2009 AND 270 OF 2009]

Complainant: The State of Gujarat

Versus

62 Accused

CORAM: HH DR SMT JYOTSNA YAGNIK

Dated: 29.08.2012

JUDGEMENT: NARODA PATIYA CASE

COMMON JUDGEMENT

A. Brief Facts and History about the case

The group of eight sessions cases popularly known as the 'Naroda Patiya case' came about after the occurrence of the killing of *kar sevaks* at Godhra in the Sabarmati Express on 27.02.2002 while the train coming from Ayodhya halted at Godhra.

1) As is known, the Godhra train carnage triggered widespread, large-scale communal riots in Gujarat but the stampede at Naroda Patiya took the highest death toll, which was of about 96 human lives, including many missing persons. In addition to many other offences against the human body, property, relating to religion, etc in which 96 persons were done to death and 125 were injured, property worth crores of rupees was also damaged, destroyed and ransacked at Naroda Patiya.

2) All these victims are of the Muslim community, who mainly hailed from Gulbarga-Karnataka, Maharashtra and some of them from Rajasthan and Uttar Pradesh. Most of them are very poor, struggling for bread for their families, and are labourers who were not even able to speak the regional language and did not understand the Gujarati language thoroughly.

3) The complaints related to the Naroda Patiya massacre started being filed at Naroda police station from the night of 28.02.2002 itself. About 26 different complaints came to be filed, in addition to the complaint vide ICR No. 100/02 which was filed by the police subinspector [PSI], then Shri Solanki (he has now changed his surname to Delvadiya) of Naroda police station. Different complaints came to be filed, which were then merged into some of these complaints. Vide Exhibit-2004 dated 29.04.2002, ICR No. 238/02 and vide Exh-2128 dated 01.05.2002, the remaining 25 complaints were ordered to be merged, as the police commissioner of the city of Ahmedabad had passed necessary orders to merge all these 26 main complaints wherein about 120 complaints had been merged, which all merged into ICR No. 100/02.

Thus, in all, about 120 complaints were merged into these 26 complaints which were again merged into ICR No. 100/02. All these complaints, viz 120 complaints, have been treated as part of the complaint filed at Naroda police station, ICR No. 100/02.

3-A) The gist of different complaints and different testimonies about different occurrences that took place throughout the day of 28.02.2002 is as under:

The occurrence took place on 28.02.2002 near Noorani Masjid and at the Muslim chawls opposite Noorani Masjid, the entrance to which faces the long ST [State Transport] workshop wall. The call for a bandh was given by the Vishwa Hindu Parishad [VHP] and the riotous mobs comprised of volunteers of the VHP, Rashtriya Swayamsevak Sangh [RSS], Bajrang Dal, led by leaders of the Bharatiya Janata Party [BJP], etc.

Somewhere between about 9:30 a.m. and 11:00 a.m. and thereafter riotous mobs of thousands of Hindus with deadly weapons came from all sides, making an uproar; clamour was all around. Severe disturbances started from 10:00 a.m. onwards when the Hindu mobs unduly entered Muslim chawls and barged into the Muslim houses; the infuriated mobs started a massive onslaught by burning dwelling houses and created violent disorder all around. The entire day was a day of horrendous carnage, stone-pelting on Muslims was common, stone-pelting on Noorani Masjid was done, there were gas cylinder blasts at the Masjid; everyone in the mob had some or other deadly weapon, including *guptis* [swordsticks], tridents, scythes, spears, swords, etc. Kerosene, petrol and even burning rags were thrown; they set on fire Muslim houses in the Muslim chawls, killed and burnt Muslims; slogan shouting was also all around, they were mainly shouting "Slaughter, Cut", "Not a single Miya should be able to survive", "*Jai Shri Ram*", etc.

They were shattering the property of Muslims into pieces; they were ransacking the property of Muslims; they were outraging the modesty of Muslim women; they were torching even women, children and cripples, burning them alive. The men of the mob wore khaki half-pants and saffron headbands. The police were not active in protecting the Muslims.

Different chawls in the area are mainly known as Hussain Nagar or Hussain Nagar-ni-Chawl. All the chawls situated at the beginning of the road opposite Noorani Masjid and thereafter are popularly known as Hussain Nagar and after those chawls comes Jawan Nagar. Adjoining Jawan Nagar is Gangotri Society beside which is Gopinath Park; Gokul Society was under construction then. The *khaada* (pit) of Jawan Nagar was near Jawan Nagar; Jawan Nagar had no direct access from the highway because of a wall that lay between Jawan Nagar *khaada* and Jawan Nagar.

Damage and destruction was also done to the houses of Muslims and to Noorani Masjid by bursting gas cylinders and by throwing inflammable substances. The police resorted to lathi charge and firing wherein many Muslims were killed. Private firing by the accused is also alleged. The State Reserve Police [SRP] quarters stood adjoining to Jawan Nagar but the Muslims were not allowed inside. Hence many were beaten while attempting to enter the SRP quarters. However, some Muslims did secure shelter at the SRP quarters, which might have happened in the morning and may thereafter have been prohibited.

The violent mobs were marching inside the Muslim chawls. They were burning Muslims alive and torching Muslim dwelling houses; unforgettable damage was caused to the Muslims. The atmosphere was surcharged with fear, anxiety and tension; aware of the tribulations on the frontal side, the Muslims could not go towards Noorani Masjid, since the police were firing and bursting tear-gas shells on that side.

Even violent mobs, with deadly weapons in the hands of each member, were there. The police were doing a lathi charge and asking Muslims to go back inside their houses which had become very insecure, unsafe and sure-to-die sites hence the Muslims were not inclined to go inside.

Having no option, the Muslims then went to the rear of the Muslim chawls, towards the Hindu societies. Some of them went to the Jawan Nagar pit, some of them went first to Hussain Nagar and then to Jawan Nagar. Then, upon increase of tension and further marching and attacks by the mobs, they moved further and further back and some took refuge on the terraces of closed bungalows in a Hindu society i.e. Gangotri Society.

In a nutshell, every Muslim was running here and there in search of shelter for that entire day and ultimately, at night, they were taken to relief camps under police protection, where they had to stay for months together. Most of them could not return to their houses at Naroda Patiya after that but have rather shifted to houses given by the Islamic Relief Committee.

4) The National Human Rights Commission had filed a writ petition before the Supreme Court of India against the state of Gujarat and others, which came to be decided on 01.05.2009 by the Supreme Court (coram: Dr Justice Arijit Pasayat, Mr Justice P. Sathasivam and Mr Justice Aftab Alam).

The Special Investigation Team (SIT) came to be constituted under directions given by the apex court, for speedy trial of riot cases, including the case on hand.

5) By virtue of the notification dated 01.04.2008 of the government of Gujarat, which is on record vide Exh-2332, the SIT came to be constituted.

6) The investigation, which began under police inspector [PI] Shri KK Mysorewala of Naroda police station, was passed on to assistant commissioner of police [ACP] Shri PN Barot and then passed on to the Crime Branch, DCB police station, Ahmedabad, and was handed over to the SIT on 10.04.2008.

As has been mentioned at para 8 hereinbelow, different first information reports [FIRs] came to be filed. As the charge sheets were filed, the criminal cases were lodged in the court of the learned metropolitan magistrate, court No. 11, which were then committed to the sessions court...

7) All the eight sessions cases were tried by this court. Vide the order passed below application Exh-22, all the eight sessions cases were consolidated to frame a joint charge and to have a joint trial of all the cases. All the evidence has been recorded in common for all the eight cases, forming part of the record of sessions case No. 235/2009, it being the main case. By virtue of the said order, all the said eight sessions cases have been tried jointly as one case and all the accused have therefore been shown as continuous accused without changing their numbers upon change of the sessions cases.

B. List of Complaints

8) The following complaints had been registered, all of which have been merged into ICR No. 100/02:

Sr. No.	ICR No.	Exhibit of Summary Papers of Complaints	Exhibit of FIR
1	111/02	1776/1	293
2	115/02 **		294
3	117/02	1776/2	295
4	127/02	1776/3	296
5	129/02 **	In the deposition, the complaint is at Exh-291	297
6	130/02	1776/4 (along with eight statements)	298
7	153/02 **	In the deposition, the complaint is at Exh-323	299
8	161/02	1776/5 (along with three statements)	300
9	162/02	1776/6	301
10	163/02	1776/7	302
11	164/02	1776/8	303
12	176/02	1776/9 (49 other complaints. One complaint, of Bilkis Banu, has not been accumulated in the FIR)	304
60	177/02	1776/10 (including 28 other complaints)	2363
88	179/02	1776/11	305
89	180/02	1776/12	306
90	181/02	1776/13	307
91	182/02	1776/14	308
92	183/02	1776/15	309
93	184/02	1776/16	310
94	185/02	1776/17	311
95	187/02	1776/18 (including eight other complaints)	312
104	188/02	1776/19 (including 12 other complaints)	313
117	204/02	1776/20	314
118	208/02	1776/21	315
119	210/02	1776/22	316
120	238/02	1776/23	317
	267/02	1776/24 (not part of ICR No. 100/02)	318

*** In all three cases, as has been declared in the pursis, Exh-1776 by PW-263, the production witness, the summary papers, including the complaint and accompanying materials, have not been found in the court of the learned metropolitan magistrate, court No. 11.*

All the above 120 complaints have then merged into ICR No. 100/02 of Naroda police station.

C. Translated Version of ICR No. 100/02

9) The translated version of ICR No. 100/02 which is on record in the regional language at Exh-1773, filed by prosecution witness PW-262, Mr VK Solanki, is as below:

"*Date: 28.02.2002*

"I, VK Solanki, PSI, Naroda police station, Ahmedabad city, do complain in person that:

"Recently, when the *kar sevaks*, who had gone with respect to the issue relating to the construction of the Ram temple at Ayodhya, UP, were returning by train, which had started from Godhra railway station, it was stopped by a mob of the Muslim community which brought down the driver and then assaulted the *kar sevaks*, and other passengers who were sitting in the railway compartments, with deadly weapons and breaking the compartments, set fire to the compartments. Due to this, some women, men and children had died, pursuant to which the VHP had given a call for "Gujarat Bandh" today.

"Today, on 28.02.2002, at 7:00 a.m., police points were fixed in the police station area. You and the second PI, Shri VS Gohil, and myself, in our respective vehicles, had gone for patrolling in the police station area. Along with me were ASI [*assistant* subinspector] Dashrathsinh Udesinh, police constable [PC] Ashoksinh Lakshmansinh, PC Bharatsinh and PC Deepakkumar Govindram, etc in the requisite vehicle. During the "bandh" the situation was found to be tense in the city area. Therefore myself, you, the second PI and other requisitioned vehicles had continued patrolling.

"Between 11:00 and 11:30 a.m. mobs of people had started turning up at several places in the police station area, which were attempted to be dispersed during the course of patrolling. But in a little while, violent incidents of setting ablaze the shops, dwelling houses, carts, etc had started. At that time police persons posted at the point of ST Patiya, opposite Noorani Masjid in the police station area, namely ASI Ramabhai Parshottambhai, ASI VT Ahari, PC Pradeepsinh Ratansinh, PC Chandrawadan Ramjibhai and Kirankumar Parshottambhai, as well as the police personnel posted at the point of ST workshop, namely ASI Ajitsinh Jaswantsinh, PC Vinubhai Harjivandas and PC Jitendradan, were present at the respective points. A mob of around 15,000 to 17,000 people had gathered at the entrance of Hussain's Chali, near the ST workshop, opposite Noorani Masjid, ST Patiya.

"At that time you, *deputy* commissioner of police [DCP], Zone IV, and the ACP, G Division, had also arrived and about 22 tear-gas shells were deployed by Chhababhai of your vehicle but the mob had become uncontrollable and the members of the mob were shouting "Attack – Kill". At that time mobs of people from Krishna Nagar Crossroads, Saijpur Fadeli Tower, Kuber Nagar, Bungalow area and Chhara Nagar had come. The leaders of such mobs were active members of the VHP and BJP, namely Kishan Korani, PJ Rajput, Haresh Rohera, Babu Bajrangi and Raju Chaumal, who were shouting "Attack – Kill" and instigating members of the mobs. It was found that it was impossible to control the mobs hence the mobs were warned to disperse and if they did not disperse, firing would be done.

"In spite of such repeated warnings, the members of the mobs, becoming uncontrollable, started to break shops and houses of members of the Muslim community residing near Noorani Masjid and its vicinity. Thereupon, I had fired five rounds from my service revolver and two rounds from a Musket-410 at the instructions of the DCP and you had also fired eight rounds one after the other and other police personnel and officers had also fired bullets and shells. But there was no effect on the members of the mobs and, becoming more violent, the members of the mobs divided themselves into small groups and started breaking Noorani Masjid and set it on fire. They also broke shops and houses of Muslim people situated in the nearby area and looted goods lying in the shops and committed acts of arson. On the other hand, mobs of Muslim people and mobs of Hindu people confronted each other at Hussain's Chawl, near the ST workshop, and started fighting each other with iron pipes and sticks and it has come to my knowledge that due to the acts of arson, in all, 58 persons, including men, women and children, were killed.

"At the time of the said riots, as per the information gathered by me, some members of the mobs had reached the Thakkar Nagar area and, joining other persons who had gathered there, the members of the mobs had broken Bhagyoday Hotel situated near Thakkar Nagar Crossroads and the shops of Muslim people situated in the surrounding area and committed acts of arson. It also came to my knowledge that the shops of Muslims situated in and around the Saijpur Tower area were broken and they were also set on fire.

"Therefore I am filing this complaint against the active members of the VHP and BJP, namely Kishan Korani, PJ Rajput, Haresh Rohera, Babu Bajrangi and Raju Chaumal, who were leading the mobs of about 15,000 to 17,000 persons and shouting "Attack – Kill" and for instigating members of the mobs today, on 28.02.2002, during the course of a "Gujarat Bandh" in connection with the recent incident of carnage at the Godhra station and in respect of breaking shops of the Muslim community situated in areas under the Naroda police station i.e. ST Patiya, Noorani Masjid and its surrounding Muslim residential areas, Hussain's Chawl situated opposite Noorani Masjid and near the ST workshop and the Saijpur Tower area and for breaking Bhagyoday Hotel situated near Thakkar Nagar Crossroads and other shops situated in its vicinity and looting the said shops and for scuffling with others and thereby causing the death of, in all, 58 persons, including men, women and children, with a request to investigate the same. My witnesses are police persons who accompanied me at the relevant time, persons posted at the points and the victim residents and owners of houses and shops, etc."…

D. About the Charge

10) As stated earlier, a joint charge was framed against all the 62 accused being tried (during the trial A-35 had died hence abated qua him) along with the deceased accused, the absconding accused and the unidentified accused, vide Exh-65.

According to the charge, the date of this offence was 28.02.2002, the time of the offence was 8:00 a.m. to 10:00 p.m. on the said date and since the call for a bandh had been given by the Vishwa Hindu Parishad to express rage against the Godhra carnage, to take revenge on the Muslim community, to strike terror and fear amongst the Muslims and with the intention to ransack, destroy and damage the properties of the Muslims and to kill the Muslims, the occurrences took place. All the acts and omissions were charged as offences committed under Sections 143, 144, 145, 147, 148, 153, 153A, 153A(2), 186, 188, 201, 295, 295A, 298, 302, 307, 315, 323, 324, 325, 326, 332, 395, 396, 397, 398, 427, 435, 436, 440, etc read along with Section 120B and/or Section 34 and/or Section 149 of the Indian Penal Code [IPC].

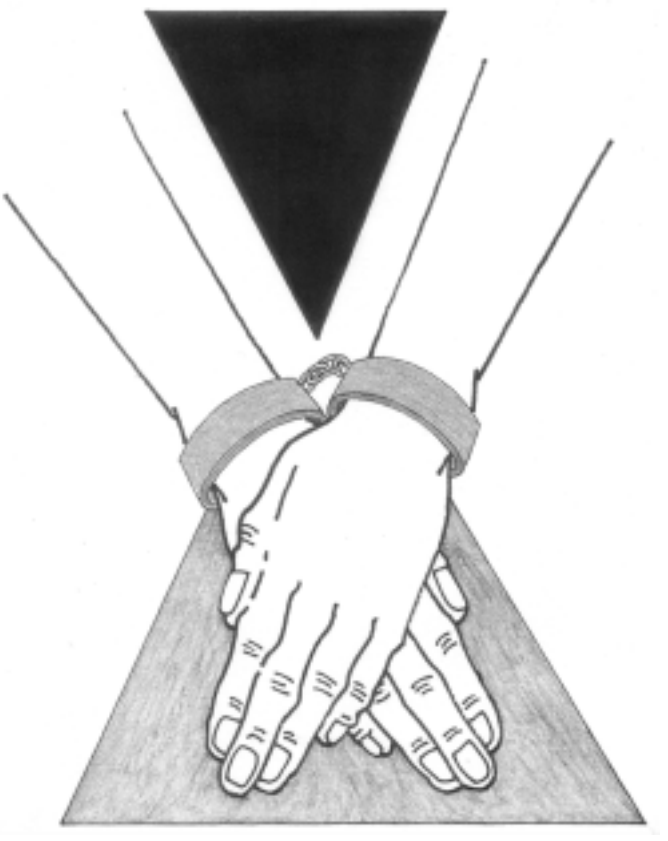
The charge has also been framed under Section [u/s] 354 read with [r/w] Sections

376 and 376(2)(g) r/w Section 34 of the IPC and Section 135(1) of the Bombay Police Act.

The plea of each of the accused was recorded. All of them have pleaded not guilty and have claimed their innocence and prayed for trial.

11) The accused who sought free legal services were so provided by the order of the court and thus learned advocates Mr GS Solanki and Mr HS Ravat were appointed to render free legal services to the needy accused.

12) During the trial accused No. 35 had died and therefore the case against the said accused was ordered to be abated...



LIST OF ACCUSED

Sessions Case No. 235 of 2009

A-1: Naresh Agarsinh Chhara, also known as brother of Guddu Chhara @ Nariyo *(Arrested on 08.03.2002 and released on bail on 20.12.2002.)*

A-2: Morlibhai Naranbhai Sindhi @ Murli *(Arrested on 08.03.2002 and released on bail on 12.09.2002.)*

A-3: Umeshbhai Surabhai Bharwad *(Arrested on 08.03.2002 and released on bail on 26.12.2002.)*

A-4: Ganpat Chhanaji Didawala (Chhara) *(Arrested on 14.04.2002 and released on bail on 30.10.2002.)*

A-5: Vikrambhai Maneklal Rathod (Chhara) @ Tiniyo, son-in-law of deceased Dalpat *(Arrested on 14.04.2002 and released on bail on 08.10.2002.)*

A-6: Rajesh @ Panglo, son of Kantilal Parmar (Chhara) *(Arrested on 14.04.2002 and released on bail on 03.10.2002.)*

A-7: Champak Himmatlal Rathod (Chhara) *(Arrested on 14.04.2002 and released on bail on 08.10.2002.)*

A-8: Ravindra @ Batakiyo Kantilal Parmar *(Arrested on 14.04.2002 and released on bail on 03.10.2002. At present in jail from 20.09.2009.)*

A-9: Amrat @ Kalu Babubhai Rathod (Chhara) *(Arrested on 14.04.2002 and released on bail on 11.10.2002.)*

A-10: Haresh @ Hariyo, son of Jivanlal @ Agarsing Rathod (Chhara), also known as brother of Guddu *(Arrested on 14.04.2002 and released on bail on 19.10.2002.)*

A-11: Kaptansing Javansing Parmar (Chhara) *(Arrested on 14.04.2002 and released on bail on 11.10.2002. At present in jail from 01.06.2011.)*

A-12: Fulsing Chandansing Jadeja (Chhara) *(Arrested on 14.04.2002 and released on bail on 08.10.2002.)*

A-13: Deepak Kantilal Rathod (Chhara) *(Arrested on 14.04.2002 and released on bail on 11.10.2002.)*

A-14: Mahesh Veniram Rathod (Chhara) *(Arrested on 14.04.2002 and released on bail on 03.10.2002.)*

A-15: Yogesh @ Munno, son of Narayanrav Tikaje (Marathi) *(Arrested on 14.04.2002 and released on bail on 11.10.2002. At present in jail from 17.08.2009.)*

A-16: Dhanraj Vaghumal Sindhi *(Arrested on 14.04.2002 and released on bail on 27.12.2002.)*

A-17: Nandlal @ Jeki, son of Vishnubhai Chhara *(Arrested on 14.04.2002 and released on bail on 05.12.2002.)*

Note: Criminal case No. 982/2002 was filed; the accused named above were charge-sheeted on 03.06.2002. Since the offences were triable by the sessions court, the case was committed to the sessions court on 29.07.2009 by the learned metropolitan magistrate, court No. 11.

Sessions Case No. 236 of 2009

(After the SIT was appointed by the Supreme Court of India)

A-18: Babubhai @ Babu Bajrangi, son of Rajabhai Patel *(Arrested on 28.05.2002 and released on bail on 19.10.2002.)*

A-19: Padmendrasinh Jaswantsinh Rajput *(Arrested on 28.05.2002 and released on bail on 19.10.2002.)*

A-20: Kishan Khubchand Korani *(Arrested on 28.05.2002 and released on bail on 21.12.2002.)*

A-21: Prakash Sureshbhai Rathod (Chhara) *(Arrested on 28.05.2002 and released on bail on 11.10.2002.)*

A-22: Suresh @ Richard @ Suresh Langdo, son of Kantibhai Didawala (Chhara) *(Arrested on 29.05.2002 and released on bail on 23.10.2002.)*

A-23: Ashok Silvant Parmar (Chhara) *(Arrested on 04.06.2002 and released on bail on 03.10.2002.)*

A-24: Rajkumar @ Raju, son of Gopiram Chaumal *(Arrested on 07.06.2002 and released on bail on 19.10.2002.)*

A-25: Premchand @ Tiwari Conductor, son of Yagnanarayan Tiwari *(Arrested on 19.06.2002 and released on bail on 08.05.2003.)*

A-26: Suresh @ Sehjad Dalubhai Netlekar (Marathi Chharo) *(Arrested on 22.06.2002 and released on bail on 14.10.2002.)*

A-27: Navab @ Kalu Bhaiyo Harisinh Rathod *(Arrested on 22.06.2002 and released on bail on 04.07.2003.)*

A-28: Manubhai Keshabhai Maruda *(Arrested on 26.06.2002 and released on bail on 11.10.2002.)*

A-29: Prabhashankar @ Prabha Pandit Shivshankar Mishra *(Arrested on 28.06.2002 and released on bail on 11.10.2002.)*

A-30: Shashikant @ Tiniyo Marathi, son of Yuvraj Patil *(Arrested on 28.06.2002 and released on bail on 04.07.2003. At present, in jail from 19.08.2005.)*

Note: Criminal case No. 1662/02 was filed; the accused named above were charge-sheeted on 22.08.2002. Since the offences were triable by the sessions court, the case was committed to the sessions court on 29.07.2009 by the learned metropolitan magistrate, court No. 11.

Sessions Case No. 241 of 2009

A-31: Ankur @ Chintu, son of Ashokbhai Parmar *(Arrested on 07.01.2009 and released on bail on 20.04.2009.)*

A-32: Shivdayal @ Raj Hakamsingh Rathod *(Arrested on 04.02.2009 and released on bail on 19.03.2009.)*

Note: Criminal case No. 87/09 was filed; the accused named above were charge-sheeted on 02.04.2009. Since the offences were triable by the sessions court, the case was committed to the sessions court on 30.07.2009 by the learned metropolitan magistrate, court No. 11.

Sessions Case No. 242 of 2009

A-33: Babubhai @ Babu Vanzara, son of Jethabhai Salat (Marvadi) *(Arrested on 19.11.2007 and at present in jail.)*

Note: Criminal case No. 71/08 was filed; the accused named above was charge-sheeted on 15.02.2008. Since the offences were triable by the sessions court, the case was committed to the sessions court on 30.07.2009 by the learned metropolitan magistrate, court No. 11.

Sessions Case No. 243 of 2009

A-34: Laxmanbhai @ Lakho, son of Budhaji Thakor *(Arrested on 16.03.2009 and released on bail on 22.06.2009.)*

A-35: Vijay @ Munno Shetty, son of Kesharising Didawala (Chhara) *(Arrested on 19.03.2009 and released on bail on 25.06.2009 but he expired during the trial on 27.10.2010. The death certificate of this accused is produced vide Exh-1297. Abated vide order below Exh-1296 dated 03.12.2010.)*

A-36: Janaksinh Dharamsinh Nehra @ Janak Marathi *(Arrested on 27.03.2009 and at present in jail.)*

A-37: Dr Mayaben Surendrabhai Kodnani *(Arrested on 04.04.2009 and released on bail on 19.05.2009.)*

Note: Criminal case No. 123/09 was filed; the accused named above were charge-sheeted on 01.05.2009. Since the offences were triable by the sessions court, the case was committed to the sessions court on 30.07.2009 by the learned metropolitan magistrate, court No. 11.

Sessions Case No. 245 of 2009

A-38: Ashok Hundaldas Sindhi *(Arrested on 26.09.2002 and released on bail on 19.10.2002.)*

A-39: Harshad @ Mungda Jilagovind Chhara Parmar *(Arrested on 19.06.2003 and released on bail on 10.07.2003.)*

A-40: Mukesh @ Vakil Ratilal Rathod, son of Jai Bhavani *(Arrested on 07.07.2003 and released on anticipatory bail on the same day.)*

A-41: Manojbhai @ Manoj Sindhi, son of Renumal Kukrani, known as Manoj Videowala and Manoj Tyrewala *(Arrested on 20.08.2004 and released on bail on 24.04.2006.)*

A-42: Hiraji @ Hiro Marvadi @ Sonaji, son of Danaji Meghval (Marvadi) *(Arrested on 27.08.2004 and released on bail on 29.03.2006.)*

A-43: Haresh Parshuram Rohera *(Arrested on 20.08.2004 and released on bail on 10.05.2005.)*

A-44: Bipinbhai @ Bipin Autowala, son of Umedrai Panchal *(Arrested on 26.09.2004 and released on bail on 02.12.2005.)*

Note: Criminal case No. 1924/02 was filed; the accused named above were charge-sheeted on 10.11.2004. Since the offences were triable by the sessions court, the case was committed to the sessions court on 30.07.2009 by the learned metropolitan magistrate, court No. 11.

Sessions Case No. 246 of 2009

A-45: Ashokbhai Uttamchand Korani (Sindhi), known as Ashok Paan-na-Galla-walo and Bholenath Paan-na-Galla-walo Ashok Sindhi *(Arrested on 16.09.2008 and released on bail on 09.01.2009.)*

A-46: Vijaykumar Takhubhai Parmar *(Arrested on 16.09.2008 and released on bail on 05.01.2009.)*

A-47: Ramesh Keshavlal Didawala (Chhara) *(Arrested on 16.09.2008 and released on bail on 05.01.2009.)*

A-48: Kishanbhai Shankarbhai Mahadik, known as Kishan Manek and Kishan Dada Marathi *(Arrested on 16.09.2008 and released on bail on 28.01.2009.)*

A-49: Ranchhodbhai Manilal Parmar *(Arrested on 04.11.2008 and at present in jail.)*

A-50: Badal Ambalal Parmar (Chhara) *(Arrested on 04.11.2008 and released on bail on 10.02.2009.)*

A-51: Navin Chhaganbhai Bhogekar (Chhara) *(Arrested on 04.11.2008 and released on bail on 28.01.2009.)*

A-52: Sachin Nagindas Modi *(Arrested on 04.11.2008 and released on bail in this case on 20.02.2009.)*

A-53: Vilas @ Viliyo Prakashbhai Sonar *(Arrested on 10.11.2008 and released on bail on 31.12.2008.)*

A-54: Nilam Manohar Chaubal (Marathi) *(Arrested on 11.11.2008 and released on bail on 30.12.2008.)*

A-55: Dinesh @ Tiniyo Govindbhai Barge (Marathi), known as son of SRPwala Govind *(Arrested on 12.11.2008 and released on bail on 19.02.2009. At present in jail from 02.02.2010.)*

A-56: Geetaben, daughter of Ratilal @ Jai Bhavani Rathod, known as younger daughter of Jai Bhavani *(Arrested on 12.11.2008 and released on bail on 29.12.2008.)*

A-57: Pankajkumar Mohanlal Shah *(Arrested on 17.11.2008 and at present in jail.)*

A-58: Santoshkumar Kodumal Mulchandani, known as Santosh Dudhwala *(Arrested on 17.11.2008 and released on bail on 29.12.2008.)*

A-59: Subhashchandra @ Darji, son of Jagganath Darji, known as Maharashtrian Darji *(Arrested on 24.11.2008 and at present in jail.)*

Note: Criminal case No. 295/08 was filed; the accused named above were charge-sheeted on 12.12.2008. Since the offences were triable by the sessions court, the case was committed to the sessions court on 31.07.2009 by the learned metropolitan magistrate, court No. 11.

Sessions Case No. 270 of 2009

A-60: Pintu Dalpatbhai Jadeja (Chhara) *(Arrested on 17.07.2009 and at present in jail.)*

A-61: Ramilaben, daughter of Ratilal @ Jai Bhavani Somabhai Rathod, known as elder daughter of Jai Bhavani *(Arrested on 18.07.2009 and released on bail on 26.08.2009.)*

A-62: Kirpalsing Jangbahadursing Chhabda, known as PA [*personal* assistant] of Mayaben Kodnani *(Arrested on 19.07.2009 and till today in jail.)*

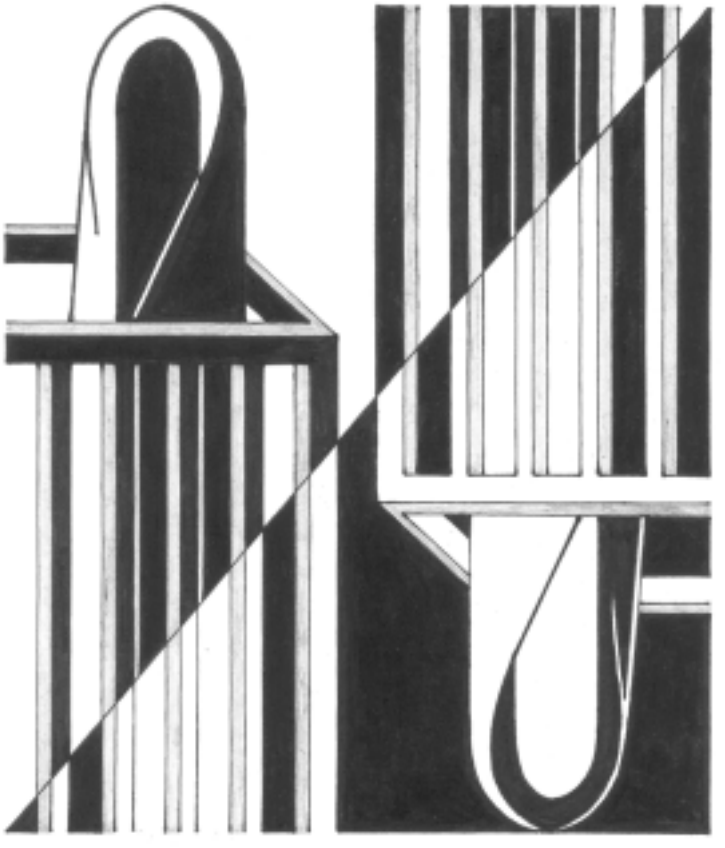
Note: Criminal case No. 239/09 was filed; the accused named above were charge-sheeted on 13.08.2009. Since the offences were triable by the sessions court, the case was committed to the sessions court on 25.08.2009 by the learned metropolitan magistrate, court No. 11.

The names of the deceased accused are as under:

1) Gulab Kalubhai Vanzara
2) Deepak Laljibhai Koli
3) Ramesh @ Subhash Ramkrushna Tukaram Arwade (Marathi)
4) Maheshbhai Bhikhabhai Solanki
5) Dalpat Abhesinh Jadeja (Chhara)
6) Jaswant @ Lalo Keshavlal Rathod (Chhara)
7) Raju Ratilal Rajput (Chhara)
8) Rajendra Kesharsinh Bhat (Chhara)
9) Ratilal @ Jai Bhavani Somabhai Rathod
10) Mukesh @ Guddu Chhara Jivanlal Baniya (Chhara)

The names of the absconding accused are as under:

1) Vinod Vasantrai Marathi
2) Mohansingh Brijlal Nepali
3) Tejasbhai @ Tejpal Ratilal Pathak



QUALITY OF WITNESS TESTIMONY

59. Language of Deposition

a) Almost all prosecution witnesses who belonged to the group of victims, injured PWs or relatives of deceased victims are illiterate and/or only know how to sign and some know formal reading. Most of them do thumb impressions. In all, about 126 such PWs out of the total victim PWs spoke in Hindi during their testimonies. Only about 44 such PWs spoke in the Gujarati language.

b) The injured victims or the relatives of the deceased victims were mostly doing miscellaneous labour work and were daily wage earners. Some of them were doing business on a very small scale and some of them were hawkers. Those who were housewives were very poor in verbal expression; some of them were shy, some of them came to the court in purdah, they were apparently very hesitant.

60. Victims in the Trial

a) Many women were also self-employed, doing labour work in factories or at their own houses. Except for one of the victims, who worked for the Ahmedabad Municipal Transport Service, none was employed in the government or semi-government sector. One, who was a traffic controller in the ST Corporation, knew Gujarati quite well.

b) It is obvious that a mother, while deposing, would remember her child dying in front of her eyes. All the loving gestures of the child would crash into her consciousness. Such testimony is bound to be a truthful account by the eyewitness.

c) The appreciations suggested by the defence, of the testimonies of the PWs wherein ultimately the PW has been labelled a liar and not a genuine witness or labelled a tutored witness, are all opined by this court to be false and full of misperception. Acceptance of the same would be a mockery of justice which would result in proving that the trial was a travesty of justice.

d) Noting the estranged relationship between the two communities, the occurrence of burning the *kar sevaks* alive would prompt the aggressors not to leave any loose ends in doing away with the Muslims. Since the aggressors were the majority community, it can safely be inferred that the minority community was the victim of the crime.

e) The running away of helpless Muslims and their assembling, to save themselves from assault, at a U-shaped place below a water tank scored a point in favour of the aggressors, as they got more Muslims in one place.

f) The hyper-technical approach, as is suggested by the defence, of treating as liars all those PWs who did not implicate the accused in 2002, would defeat the ends of justice and would have disastrous effects. This court is aware that the previous investigation was not up to the mark and was rather not reliable.

g) Poor economic conditions, disturbed emotions and lack of knowledge of the Gujarati language must be put together to appreciate the evidence of the victims in a just, fair and equitable manner.

h) In the humble opinion of this court, the submissions of the defence that the killing of *kar sevaks* in the Sabarmati Express on 27.02.2002 is a strong mitigating circumstance is not worthy to be accepted, as the commission of a crime cannot be justification for doing another crime, as nobody can take the law into one's own hands. We live in a society where the rule of law very much survives. The accused should have waited for the law to take its own course and they ought not to have become judges for the cause of *kar sevaks*.

i) A man, like the accused in this case, who possesses or uses deadly weapons must know that a blow would be so imminently dangerous that it must in all probability cause death and the injury intended to be inflicted would be sufficient in the ordinary course of nature to cause death.

… … …

70. Credibility of PWs

As has emerged from the depositions, the situation during the riots on that day, if put in short, was: There was slogan shouting of "Kill the Miyas", "Not a single Muslim should survive", "Jai Shri Ram", "*Maaro* (Kill)", "*Kaapo* – Slaughter Miyas", "Burn Miyas, rob Miyas", etc all around. There were miscreants all around with deadly weapons, there was killing, slaughtering, and burning persons alive was ongoing. The frequency of the incidents and the speed of happenings must have been so high that before the victims had grasped the detail of one incident, another slaughter might have taken place; a victim takes time to accept the series of incidents by rioters which the victim had never ever imagined. This must all have frightened the PWs. Because of fear, concentration increased. Whatever one saw or whatever one noticed must have been recorded in one's mind but what was happening nearby may have gone unnoticed. In a nutshell, the situation was that of war where the attack was by the majority and the victims were poor persons of the minority community. A reply for every detail may not have been provided by a PW and still his description of the occurrence and identification of the accused are most credible.

It is difficult for eyewitnesses to put everything into words therefore the policy was adopted that the spirit of the version of the witness should also be seen and whatever a victim had voluntarily stated during cross-examination has all been written in his deposition.

71. PWs while Deposing

This court has observed that during their depositions many of the witnesses were finding it very difficult to control their tears. They were eager to show their burnt limbs, their injured limbs, and explain their losses to the court. Many of

the parent witnesses were unable to describe the death of their children in the riot; they became so emotional that they often needed to be consoled and offered a glass of water to complete their depositions. Their pains, agonies, anxiety, effects of shock and trauma, were very visible and noticeable. Even on the date of the deposition they were noted to have been very afraid. They were frequently assured of their security but when they had to identify the accused, it was noticed that many of the witnesses avoided identifying the accused who they knew very well. At least two to three PWs were so disturbed that their physical health was affected and an ambulance had to be called to take them to hospital.

72. Fear, Psychological Trauma and its Impact

a) The overall evidence gives the impression to this court that somehow the witnesses, at the stage of investigations other than the investigation by the SIT, have not felt assured of their safety and security. Having no trust in society and the system of administration of justice, they probably thought that their interest lay in avoiding confrontation. The silence, withdrawal or the attitude of these witnesses is a matter which may be of interest to psychologists and sociologists. However, the opinion of some psychologists about victims of such crimes has been reproduced which might reflect the state of mind of the victims. It is opined that if the victims were extremely frightened then that is also one more cause why the truth did not come out in the previous investigation, which is over and above the lack of desire of the previous investigators to allow the whole truth to surface.

b) It is well known that psychological trauma impairs the ability or willingness of crime victims to cooperate with the criminal justice system. Victims must be treated better by the criminal justice system. Crime-related fear makes the victim reluctant to report crimes to the police, or those who are so terrified are even afraid to testify effectively. Before recording their statements for investigation of the crimes, the crime-related mental health problems of the victims should have been dealt with by grief counselling. There have to be victim assistance personnel and professionally sound persons who can be useful in dealing with avoidance behaviour. This was never addressed by the previous investigators.

c) The victims of such terrorising crimes are normally shocked, surprised and terrified about what has happened to them. "Fight or flight" responses are common in dangerous situations for anyone.

d) Criminal victimisation also leads to many physical disorders coupled with mental traumas. At times the victims experience problems in their relationships with family and friends. Mental health counselling can only bring normalcy to crime victims. It is an admitted position that the mental health issues of the victims were not addressed at all.

e) The criminal justice system, in such situations, has to be more victim-friendly and should treat the victims as human beings and not as evidence for this side or that side. Victims of such crimes have difficulty in describing what happened to them. The re-experiencing of the ghastly crime, avoidance and hyper-arousal are seen as common features in victims of such crimes. Hence at times the sordid tales they tell lack chronological cohesion. The victims of such crimes usually feel very unsafe while persistent investigation, media attention and visits of different persons overshadow the necessary grieving process.

f) The victim faces fears of many kinds. Fear of violence, fear of perpetrators, fear of memories, etc are chief among them. A victim always finds it difficult to organise his thoughts, his memories, during the mourning period hence the statements recorded during that period are to be considered keeping this in mind. There have to be healing or rehabilitation programmes systematically arranged by professional persons for the victims to bring them back to normalcy.

This court is of the opinion that the psychological aspect, the result of such crimes which traumatise victims, is a very important factor. It is clear that none of the previous investigators have shown any concern for the victims of the crimes, which was necessary for effective investigation of the crimes to unearth the modus, the preparation, the conspiracy, the perpetrators, etc.

g) It can safely be inferred that the mourning period, for most of the victims, must have been over when the SIT took over the investigation about six years after the crimes. Therefore also the statements before the SIT only should be considered except for the part which does not inspire the confidence of the court.

h) There cannot be any universal rule that every victim would be influenced by fear; it all depends upon one's psychological and surrounding circumstances. Some may be afraid of one situation while another may not be.

i) The above discussion is mainly aimed to highlight the possibility that many prosecution witnesses who had not named the accused in the year 2002 had done so on account of fear and some of the PWs have even advanced this reason in their voluntary versions before the court. Be that as it may, the fact remains that the psychological and sociological impact of fear can be and may be one of the reasons for not reporting to the police the names of the accused in the case of many of the witnesses. Some such PWs have fairly accepted that in 2002 they had not stated the names of the accused, certain facts, etc.

j) It also cannot be put out of mind that numerous PWs have stated that even though they had so stated, the police had not written as was stated by them.

In the opinion of this court, this is also equally possible. The reason may be either but the record of the previous investigation is doubtful, is the common finding.

k) It was submitted that for the PWs, fear is a factor which would not allow a person to notice everything and one would only think to save oneself. The paragraphs mentioned below are self-explaining.

l) In the view of psychologists: "On the contrary, fear generally has a large emotional factor and as a result, the attention is sharpened, the mental faculties are concentrated and better memory on material points should result. Intense feeling of any kind is apt to key up the powers of the brain and sharpen perception. When we feel a thing strongly, we are sure to retain the recollection of it. It is more firmly impressed upon us than the humdrum affairs of our ordinary life" (*Psychology and the Law* by Dwight G. McCarty, 1960, p. 198).

m) GF Arnold, in his book titled *Psychology of Legal Evidence*, has considered the question of the effect of fear on memory: "There is a mistaken impression that fear prevents attention to what is going on and therefore hinders memory. It is argued that the narrative or an identification is not reliable because the witness was frightened at the time and the witness could not have noticed or recollected what was seen. It is well therefore to state that usually a person under the influence of fear observes better and remembers clearly."

n) "'Fear,' says Darwin, 'is often preceded by astonishment and is so far akin to it that both lead to the sense of sight and hearing being instantly aroused. It lends us to attend minutely to everything around us because we are then specially interested in them, as they are likely to intimately concern us'" (Quoted from Wigmore's *The Principles of Judicial Proof*, Boston, Little, Brown & Co, 1913).

o) The above abstracts guide that just because the PWs were frightened, it would not be proper to disbelieve them on the ground that because of fear, they cannot remember anything and all that they deposed is imaginary. It is different that at times they would keep information on the crime close to their chest and would not trust anyone to share it with, which is due to fear…

(The occurrence witnesses in the Naroda Patiya case were many critical eyewitnesses. It is impossible to reproduce here the large sections of the judgement evaluating their testimonies. This can be read at: www.cjponline.org.)

PREVIOUS INVESTIGATION GUJARAT POLICE

a) Introduction

a-1) The police record of the statements recorded during the previous investigation under Section 161 of the Code of Criminal Procedure [CrPC] was submitted to be unreliable. As a matter of fact, the learned advocates for the accused have also advanced arguments contending that the previous investigation was manufactured and concocted. The learned special public prosecutor [PP] has also begun with the remarks that since the previous investigation was not reliable and proper, there was a need to constitute the SIT.

Throughout the trial the examination-in-chief was based on the statement before the SIT, if it was recorded for that PW.

a-2) As emphatically put forth by both sides, the entire police record of statements is suspect and unreliable in this case.

a-3) The effect of the omissions has already been discussed at length and considering the condition of the victims, much importance to the non-mentioning of names in the police statements prior to the SIT cannot be given.

a-4) Whether anybody from the mob was known to the witnesses was a matter which could have been revealed by the witnesses through specific questioning, on their attaining normalcy, in that stress-free stage, and on regaining faith in the system. This care was never taken by the previous investigators.

a-5) No investigating officer [IO] or executive magistrate seems to have ever coolly and calmly elicited the details from the victims who were badly injured or were under tremendous fear, which was needed at that time but, as it appears, was not done in this case.

a-6) The first IO faces numerous allegations mainly for his ill-treating Muslims; there is much uproar against him among Muslims of Patiya.

a-7) The principle of communication is: an empathetic listener alone is able to go into the world of the sufferer but, as has emerged on record, insensitive and untrained police officers could not do this; hence the victims lost courage and confidence.

a-8) The ideal IO hears a statement, understands the same and then, in conscience, puts it in context. He should also make a restatement of the text and explain the same. As has emerged on record, Shri KK Mysorewala has done nothing of the sort.

a-9) As has been held in the citation produced by the learned special PP at Sr. Nos. 35 and 37, it is clear that an irregularity or defect, however serious it may be, has not to be taken as a ground to acquit the accused. It would not be proper to acquit an accused person solely on account of the defects, as to do so would be tantamount to playing into the hands of the investigating officer if the investigation was designedly defective.

a-10) It has also been held that merely because the complaint was lodged less than promptly, it does not raise the inference that the complaint was false.

b) On 27.02.2002

b-1) The guidance and oral instructions given by higher officers for taking preventive steps on 27.02.2002 had not been given due attention by Shri KK Mysorewala. Not a single such step was taken.

b-2) Two incidents of burning Muslim shops on 27.02.2002 should have been taken as signals of the series of horrifying and terrifying incidents to occur but nothing was noted by Shri KK Mysorewala; not even was a police point arranged near the wall of Jawan Nagar where the Muslim chawls known as Jawan Nagar begin.

b-3) On 27.02.2002, since the two shops of Muslims were burnt, complaints on record at Exh-2084 and 2085 of ICR Nos. 96/02 and 97/02 were registered but no proper and detailed investigation was done and no one was arrested. This job could also have been assigned to some subordinate by Shri KK Mysorewala but he remained inactive, as emerges on record.

b-4) After having learnt that 12 of the victim train passengers were from the Nava Naroda area, no proper bandobast was made or informers were not used to find out about the ill designs, if any, for 28.02.2002.

b-5) Vide the defence citation at Sr. No. 55 it has been submitted that a deficient investigation itself gives clear benefit of the doubt to the accused but on perusal of the citation, it becomes clear that it has been held therein that an inept or deficient investigation could never be sufficient to reject the evidence of witnesses. Their credibility has to be tested on other circumstances like the chances of their being present at the place of occurrence, the credibility of their claims of having seen the occurrence and the intrinsic value of their evidence when they claim to be eyewitnesses to the occurrence.

b-6) It hardly needs to be mentioned that in any case the court has a duty to differentiate falsehood from truth and to search out the truth. The deficiency in investigation can in no manner entitle the defence to claim the benefit of the doubt.

At this juncture it is fitting to mention that citation No. 15 of the prosecution is on the principle that a faulty investigation can never be cause to disbelieve the prosecution story. This court is of the opinion that if an investigation is defective or faulty, the accused cannot be held to be entitled to secure the benefit of the doubt unless the defective investigation is shown to have prejudiced the accused.

c) First IO: Shri KK Mysorewala (28.02.2002 to 08.03.2002)

c-1) As discussed above, the first IO, Shri KK Mysorewala [PW-274], did not take even elementary and routine steps and has avoided doing investigations altogether. This court believes that in all such cases of neglect, or maybe inefficiency, one cannot be labelled to have malice or criminality. In these kind of cases, effective and efficient investigation

helps search the truth. Up to 01.03.2002, most of the vital investigation should have been completed by the first IO but if the record is seen, the entire investigation was conducted in a sluggish manner by Shri KK Mysorewala.

c-2) Mr KK Mysorewala had seen the incidents on 27.02.2002 but even after that, he let the grass grow under his feet.

c-3) As it seems, the first investigating agency wasted lots of time, right from 28.02.2002 to 08.03.2002, even wasted available resources and did not secure scientific evidences; the investigation was carried out for the sake of carrying it out, PW-274 was never involved in the investigation.

Shri KK Mysorewala deposes on having done lots of police firing on the day, at the site. This becomes extremely doubtful when different PWs have deposed that while at midnight they were taken to relief camps, there were violent mobs on the road, creating hurdles for the vehicle carrying victims. At that time there were four to five policemen in the vehicle and still, either by bursting one tear-gas shell or by firing in the air, those four to five policemen were able to meet entire violent mobs which were stopping the vehicles carrying the victims (illustration, para 133, PW-73).

If this was the effect of a single firing, what would have been the effect of a series of firings, as per the claim of PW-274? This also goes with the fact that not a single evidence has been produced by the first IO to show the genuineness of the amount of firing claimed to have been done by him. The attempt is not to opine that there may not have been police firing at all but that it must not be as per the tall claim of PW-274.

c-4) During questions by the court PW-274 simply shrugged his shoulders and blamed the insufficiency of manpower.

c-5) Shri KK Mysorewala was fully aware that bigwigs were also present in the mob but he has not paid any heed to this fact while investigating the crime.

c-6) While people were flocking into the streets, leaving their households, Shri KK Mysorewala had reported to the control room that "everything is okay (khairiyat hai –there is peace and happiness in the Patiya area)"; it was like Nero playing the fiddle when Rome was burning.

c-7) Near the Jawan Nagar wall, which was the entry point to the Muslim area, no force was deployed by Shri KK Mysorewala to prevent any untoward incident. The wall of Jawan Nagar was demolished by the mob on that day due to his lapses.

c-8) It seems that the entire situation on 28.02.2002 was underestimated and the information available was not received by the IO, revealing the existence of a conspiracy. He handled the entire situation without exhibiting any sincerity, at least up to sunset.

c-9) The firing as stated by IO Shri KK Mysorewala, if it had taken place in the amount mentioned by Shri Mysorewala then the incidents alleged would never have even occurred, even bursting of tear-gas shells would have had effect as a result of which the gravity of the incidents could have been reduced by a notable extent, but nothing like that happened, which shows that the situation was handled improperly. It is doubtful as far as the number of firings and tear-gas shells is concerned.

c-9.1) It is an admitted position that many of the victims died in police firing. This is not natural death. PW-274 ought to have inquired into these deaths in police firing. The relevant documents could have proved that the deaths occurred in police firing, by firearms of the police, but this has not been done as required under Section 174 of the CrPC. This lacuna strengthens the possibility of private firing, which also goes with the admission in the [*Tehelka*] sting operation, of A-18 having collected 23 firearms for the riots. This collection was done on the intervening night of 27.02.2002 and 28.02.2002.

c-10) The decision to impose curfew, as is depicted in the entire facts and circumstances, was in fact taken at 10:30 a.m. but the effect of it, as it seems from the record, began from 12:20 p.m.; this is also another clue which links the insincere approach of the police in the incidents on the fateful day.

c-11) It is an admitted position that no one was arrested from the site; had even a single policeman been alert and active, he could have at least arrested one person from the mob and if all those who were at the *bandobast* points had at least arrested one rioter then so many miscreants of the violent mobs could have been arrested from the site itself.

The first IO did not have proper estimates and assessment of the reactions which were quite likely.

c-12) There is nothing on record to show what steps were taken on the messages received from the control room.

c-13) The investigation by Mr Mysorewala lacks care, analysis, neutrality and microscopic collection of all relevant information.

To exhibit the kind of careless investigation carried out, *panchnama* mark-134/65 should be seen, wherein the address of *panch* No. 2 has been kept void. In the same way, the amount of damages has also not been assessed but has been kept void and the most painful part of the entire *panchnama* [written and attested record] is that it is signed by an ASI, Naroda police station, whose signature, ultimately during the trial, nobody could identify. There are many such statements, *panchnamas*, etc, below which the designation, written as ASI, Naroda police station, is signed in a manner that ultimately that person could not be found out. All such carelessness resulted in loss of faith in the police among the Muslim community and it is because of such reasons that a perception was developed that the police were trying to favour the other side.

c-14) Up to 08.03.2002, no substantial steps were taken to arrest the accused named in the FIR.

c-15) A large number of miscreants from both sides could have been rounded up; the indomitable mob was out to destroy but the police were silent spectators which had given an impression that the police were with the Hindus.

c-16) The *panchnamas* drawn by Mr Surela obviously under instruction of the first IO were recorded without the presence of a Forensic Science Laboratory [FSL] officer; had that care been taken, the opinion of the FSL could have been obtained.

c-17) It seems very clear that the police had not resisted, opposed or hindered the violent mobs and that way, indirectly, the men of the mob were facilitated because, in the humble understanding of this court, the entry point to the Muslim chawls near the gate of the ST workshop is such where if the police had made a chain then the mob could not have entered.

To that extent, the heart-burning of the victims because the police had ignored the activities of the mobs seems to be not wrong. This finding is also backed by the most glaring and undisputed fact that all the victims went to the rear of their Muslim chawls to save their lives on that day and nobody came towards Noorani Masjid on the frontal side. The chawls are situated in the direction from west to east, almost in a straight line. Now the victims were compelled to run towards the east. No one could come out to the west. At the west end is the highway. Here the police and even violent Hindu mobs were present. At the east end, two Hindu societies are situated. The Muslim chawls lie in between the national highway and the Hindu societies. As comes on the record, on 28.02.2002 all requests made by Muslims to the police for their protection failed hence their losing trust in the police; the Muslims, being helpless, ran away, leaving their chawls on account of the assault, to the east. From the east came violent Hindu mobs hence the Muslims, being in a sandwich position, died on account of the fatal assault by Hindu mobs.

The police had rather witnessed inflammatory speeches by the leaders and had witnessed the rioters running rampage.

c-18) No cartridges have been found from the site, which poses a question about the claim of firing during the deposition of the first IO.

c-19) The inept and inefficient handling by the first IO resulted in total lawlessness prevailing on that day which resulted in mass murders which brought shame to the entire nation and shame to the secular feature of the Constitution of India.

The mobs were riotous mobs and it is quite probable that in view of the communal disturbances which had taken place, the PWs, being of the minority, might have been reluctant to then name the accused. For this position, the first IO is responsible.

c-20) At the initial stage of investigation the opinion of the FSL should have been obtained about the probability of the occurrence below the water tank, at the U-shaped corner between Gopinath and Gangotri societies.

c-21) On 28.02.2002 itself, and from 28.02.2002 to 08.03.2002, nothing had been done for the recovery of the weapons used by the accused who were miscreants of the mob.

c-22) Though the accused named in the FIR were not absconding, nothing had been done by the first IO to arrest those accused.

c-23) Phone call records of the fire brigade could have been obtained and the statements of personnel of the fire brigade could have been recorded at the initial stage which is always a crucial stage in the investigation of such mass crimes.

c-24) Had the accused been arrested at the site, they could have been arrested with the weapons or the kerosene tins in their hands. Had the police been active and sincere on the day at the site of the offence then the occurrence might not have taken place at all.

c-25) Shri KK Mysorewala states that he had persuaded the Muslims to go inside their houses and had tried to disperse mobs of both communities but then he is unable to mention the name of any one person who was persuaded by him. This makes the statement doubtful.

c-26) According to Mr Mysorewala and other police PWs, the mob was of 10,000 to 15,000 persons but it is astonishing that not even 10 out of the 10,000 were arrested. Had even a single person been arrested, a weapon would have come on the record. If every policeman had arrested or caught hold of at least one person then the number of accused arrested would have equalled the number of policemen present there.

Some of the police were armed; it seems that they have not done anything at the site. If they had genuinely done any exercises, the right signals would have been sent to the miscreants.

c-27) The question remains as to why the stone-pelters were not arrested then and there?

The police could have caught the members of the mob on whom they wielded batons/sticks or, say, did a lathi charge.

The normal mentality of a mob is to run away if firing is done hence the fact of firing by the police is doubtful. It is more so when no cartridge has been found from anywhere.

One policeman with a revolver is sufficient to spread terror among many persons.

The police could have cordoned off some of the members of the mob.

c-28) Mr KK Mysorewala said that he ran after the driver of a tanker and ultimately caught him – the said Mr KK Mysorewala did not catch anyone from the mobs; this poses a question about his sincerity in maintaining law and order there.

c-29) The police photographer and videographer could have been immediately called by Shri Mysorewala or in fact should have been ordered to be present in advance.

c-30) The *panchnama* of the site of the offence was drawn after many hours. This delay destroyed many evidences.

c-31) If the arrests or rounding up had been done there, the *panchnama*, or memo, of the physical state of the accused could have come on the record. Mr KK Mysorewala should have done a combing operation in the area on the previous night as a precaution, to find out suspects on the previous night of the occurrence itself.

c-32) The statements of all the injured should have been taken in hospital but only a few were taken there.

c-33) More help from the SRP could have been taken; statements of the SRP personnel on duty could have been taken.

c-34) As per the police, patrolling duty was assigned, but during patrolling no one had been arrested which shows that the surveillance and vigilance of the police were extremely poor.

c-35) Test identification parades of the accused could have been held.

c-36) Attempts to find the teeth and other remains of the burnt bodies of the deceased persons from the ashes could have been made which might have been helpful for DNA tests.

c-37) No effective preventive measures were taken by Shri KK Mysorewala. At the site of the offence, none of the accused had been arrested or cordoned off; no attempts at recovery of any weapons had been made; no effective *panchnama* of the site of the offence had been prepared; nothing had been recovered from the site of the offence. An FSL officer had not been called to the site of the offence in spite of the fact that several persons were done away with by severe burns in the offences and the properties of the Muslims had been totally destroyed and damaged. No recovery of the *muddamal* [case property] from the arrested accused had been attempted and even remand was not sought for the accused arrested on 08.03.2002. No investigation had been carried out to find out the source and containers for petrol, diesel, kerosene, etc. Statements of the staff at nearby petrol pumps, taking stock registers, etc, could have been helpful. The mob had committed theft of gas cylinders from Uday Gas Agency but there was no investigation into the complaint by Uday Gas which could have been linked with the present complaint. Had it been investigated, the complaint of the theft of gas cylinders would have been placed along with the material collected by the investigating agency.

No attempt was made to find out from the doctors treating victims of firing about the bullets, whether any were found in the bodies or not, and no care had been taken to send the same to the FSL. Had this been done, the allegations about private firing could have been ruled out if all firing stood proved as police firing.

c-38) At the right time, which was certainly before 08.03.2002, no attempt had been made to arrange for test identification parades.

c-39) No attempt had been made to call the fire brigade when there was so much fire all around… If all these faults, carelessness, inefficiency, ineptness, are collectively seen then the record of the first investigating officer is not found to be dependable, fair and absolutely reliable.

c-40) Mr KK Mysorewala had the opportunity of getting eyewitness and first-hand accounts of the occurrence from the victims but no such effort was made by Mr Mysorewala nor is there any explanation for his failure.

c-41) Instead of taking preventive actions when the tension was rising on the morning of 28.02.2002, things were allowed to develop till the unfortunate occurrence took place. The first investigation was full of lapses, lacking quickness, but then it was not to prejudice the accused hence the accused cannot claim any benefit from it. This court finds that it was a defective investigation but it was in no way against the accused.

c-42) The PWs have seriously complained about the fact that their statements were not recorded, their complaints were not recorded at all or the contents were edited to not reflect certain names of miscreants in the complaints, etc. These grievances clarify that the record qua the complaints, etc is not reliable. It is obvious that mischief would have been done in recording the complaints and not only in drawing inquest *panchnamas* or *panchnamas* of the site of the offence, etc.

c-43) Mr KK Mysorewala had done his duty properly only when many Muslims were found dead at the water tank, when he noticed that several Muslims had been burnt at the site and when he took all of them for treatment at the Civil Hospital. There is no hesitation to record that had he not taken timely action, the death toll among Muslims could have been higher. In fact, his investigation is a mockery of the word "investigation" but taking a balanced view, though prayed for by the victims, he should not be impleaded as accused in the case.

d) Second IO: Shri PN Barot (08.03.2002 to 30.04.2002)

d-1) Many of the gaping holes left by the first investigating officer could have been filled in if the second investigating officer had taken the entire task seriously, keeping the Constitution of India in front of his eyes (he was quite a senior police officer then).

d-2) When the investigation was with the second IO as a matter of fact, the victims had not been searched out and those victims whose statements were recorded, were not recorded after they came out of the grip of terror, for which taking them to a psychologist and a safe environment was a must.

d-3) Phone call records of the fire brigade could have been obtained and the statements of personnel of the fire brigade could have been recorded even at this stage…

d-4) The statements of all the injured should have been taken in hospital but only a few were taken over there.

d-5) Probing the criminal antecedents of the accused, background of the accused, recording statements of family members of the accused, seizure of the houses of the accused, etc could have helped the investigation but had not been done.

d-6) Investigation as to which inflammable substance was thrown had not been done. It should have been investigated and the crime scene could have been reconstructed and information about the kind of inflammable substance could have been obtained.

d-7) All the complaints under investigation were tagged or made part of ICR No. 100/02 wherein all the complainants are Muslims.

d-8) It is difficult to make out why Mr PN Barot, the second IO, recorded many statements of Hindus. The conclusion is: he was too careless to even know that the complainants and victims were Muslims and not Hindus. It seems that he diverted his attention from the pivotal point of the investigation which should have been about the loss of lives of Muslims, demolition, destruction and damage to the properties of Muslims and collecting more evidence about the proposed accused. For reasons best known to him, he did not show any anxiety to record the statements of Muslims at the earliest. Rather, he recorded statements of Hindus and wasted much of his precious time. Thus his investigation was not in the right direction. He ought to have made all necessary attempts to give psychological counselling to the Muslims to remove their fear psyche but he did not even record their dying declarations in time. This investigating officer had also not recovered any weapons used in the crime.

d-9) Even the statements of the witnesses who had lost their family members in this ghastly crime were not verified by him.

d-10) There was no need for him to draw a *panchnama* of the site of the offence but when he has chosen to do so, it should not have been done without the FSL. He ought to have called the FSL to the site.

d-11) This investigating officer had also not made any attempts to arrest the five accused named in the FIR, not held any test identification parades, not recorded the statements of the injured, and totally ignored and neglected the printed applications given by the victims residing at relief camps even though many revealed serious cognisable offences of murder, rape, etc.

d-12) Nothing in his testimony shows that he had ever visited the relief camps where victims were residing. He had not provided proper guidance to his assignee officer for effective investigation. He depended on his assignee officer and did not do any vital part of the investigation with any application of mind.

Hence even this investigating officer is not found to be dependable and the record of his investigation also comes under the shadow of doubt.

d-13) The VCD prepared by Shri PN Barot (IO-2) is the best part of his investigation but it has no titles, no signboards, it is without clarity about the places shot. Even during the investigation by this IO, even though it was possible to collect scientific evidence, the FSL was not called for. No attempt was made to correct the blunders committed in the investigation led by Shri KK Mysorewala (IO-1). The detail on the previous investigation has been narrated above. It does not inspire confidence. It apparently shows inept investigation.

d-14) This court is therefore of the opinion that as a matter of fact there is nothing on the record which is totally dependable and reliable to get a complete outline of the site of the offences at that point of time. The witnesses had no reason to lie about the topography. But all of them were not able to describe it satisfactorily. It is not necessary to reconstruct the entire topography of the Muslim chawls. Oral evidence of the injured witnesses, victims and their relatives is obviously the best evidence. Secondly, during the site visit certain factors have been noticed by this court… which too have been kept in mind.

d-15) He himself has hardly done any active and result-oriented investigation. It seems that both these investigating officers had not realised the gravity of the situation and in fact did not take any steps to collect evidence of the occurrence which was in clear violation of the constitutional and human rights of the victims and which was apparently the result of premeditated plans by the accused.

Both these investigating officers were either incompetent or had no will to take any necessary steps to inspire confidence in the minds of Muslims.

e) Third IO and all IOs from the Crime Branch

1) Shri SS Chudasama (from 01.05.2002 to 19.11.2002 with in between the charge being given to PI Shri Agrawat)
2) Shri HP Agrawat, PI (19.11.2002 to 05.04.2003)
3) Shri GS Singhal, ACP (06.04.2003 to 14.12.2006)
4) Shri HR Muliyana, ACP (15.12.2006 to 21.11.2007)
5) Shri VK Ambaliyar, ACP (21.11.2007 to 10.04.2008)

e-1) The third IO was Shri SS Chudasama of the Crime Branch who took charge from 01.05.2002.

The investigation by both the first two investigating officers was very inept, inefficient, and for this reason and the reason that Shri SS Chudasama had to complete much of the investigation work within 34 days, as only 34 days were left to file a charge sheet when he was handed over the investigation, he too prepared a large team of several assignee officers, including PIs and PSIs.

All these assignee officers went to the relief camp and without doing any investigation of the crime, simply made

an announcement and recorded the statements of such persons whosoever came in response to the said announcement. Hence the entire investigation by the Crime Branch was more or less a slipshod investigation.

e-2) The names of the accused revealed in the statement of PW-149 were not taken forward and in fact no investigation seems to have been done on that. In the same way, the statements of other witnesses revealed the names of certain accused but the said statements had not been further investigated. No proper investigation had been done on the mobile of A-38, nor had any recovery or discovery been effected.

e-3) In the charge sheet filed by this witness, those who should have been shown as absconding were not shown to be so. This witness has also recorded numerous statements through his 18 assignee officers. The entire task of investigation was done so mechanically that blunders were committed in recording the statements.

e-4) After taking charge of the investigation, the charge sheet was filed within 34 days by this investigating officer.

e-5) Out of 621 statements filed and out of 390 *panchnamas* drawn within these 34 days, about 580 statements and 379 *panchnamas* were practically completed by assignee officers. No doubt they were his assignee officers but looking to the time constraint, it is a matter of doubt whether he had applied his mind to the task. Moreover, the purpose of assigning the investigation to an officer of the rank of ACP has been lost, as even the second investigating officer had only depended on his assignee officer and did nothing. These figures are only for the statements and *panchnamas* which came on the record but there may be many more.

e-6) Some of the statements have even been recorded in the presence of police officials whose signatures nobody was able to identify. At times even a constable has signed hence the statement appears to have been recorded before a constable. Thus though on paper the investigation was assigned to an ACP, considering the gravity of the allegations, it in fact has gone into the hands of a constable.

Hence it cannot be accepted that the investigation was proper, dependable, and was done with all sincerity and sensitivity, which ought to have been attached to such an investigation.

e-7) In most of the cases, the IO has not met the victims. He has done the job of collecting statements and *panchnamas*. Absence of malice, or mala fides, against the victims is not the only criterion; the investigator should be fair, unbiased, sensitive, serious, quick, effective and able to logically connect the accused with the crime. Many of these qualities were sadly lacking in all the three investigating officers. But it is more highlighted in IO-3, during whose tenure the majority of the investigation was carried out. Thereafter, two other IOs who also belonged to the Crime Branch were in charge of the investigation but no progress was made…

e-8) It is true that the situation of curfew and the communal riots continued for about 45 days and during this time the police commissioner had assigned additional responsibilities to all the three above-referred investigating officers. Even the latter IOs had additional responsibilities. They might have all been busy with law and order problems but the common factor was that the investigations by all those who had investigated before the constitution of the SIT were seriously lacking sensitivity, seriousness and sincerity, which were very much required for the investigation of such ghastly crimes. The insensitivity was of such a high degree that it gave the Muslims the impression that the investigation was directed against Muslims and the Muslims were deeply concerned that the further investigation to be carried out by the SIT under orders from the apex court should not be handed over to two among those investigating officers.

e-9) The picture was so gloomy and sad that the complaints of the Muslims were not taken when the Muslims gave the names of certain accused as perpetrators of crimes. Muslims were even indirectly threatened not to file complaints against certain accused. It seems that the entire negligence, light attitude, carelessness in the investigation, insensitive attitude towards victims and their agonies, etc, was all surely aimed to see to it that at the end of the entire investigation, if not all statements then at least those of the majority of the witnesses would say that "they do not know any member of the mob". This cannot be accepted by any prudent person, as it is impossible that the accused, though they belonged to the same locality, were not identified by the victims of the crime. Be that as it may, the fact remains that the investigation done before the SIT was constituted does not inspire the confidence of the court as far as fairness, faithfulness of the record, etc, is concerned. This could be in an anxiety to see to it that certain bigwigs should not be involved in the crime.

e-10) A few illustrations are given to show the quality of investigation carried out by the previous investigating agency:

a) PW-236 has deposed, and this court has reason to believe it to be true, that on 12.03.2002 he went to Naroda police station to register his complaint but since he had given the name of A-37, the police refused to note down his complaint and he was told that "You do not know Mayaben." "You better get the *panchnama* of your house and do not indulge in such affairs otherwise you will face difficulties." Thereafter, this witness was left with no choice but ultimately he made a second effort on 09.05.2002 when in fact the *panchnama* of his house was drawn. At that time also he went to Naroda police station but his complaint was not taken down…

b) At the Naroda police station, as stated by the PW, the witness was given the reply that: "the complaint would be recorded at the Crime Branch". The witness stated his griev-

ances, including the names of the miscreants and their participation, at the Crime Branch but only a selected part was written down. This court has no reason to disbelieve this. It is for the reason that A-37 stood too tall in public life and in political life, in comparison with these very small labour workers who had to struggle to make a living.

c) PW-104 was admittedly a rickshaw-driver in the year 2002 but his occupation was written as tailoring work. This shows how carelessly and how without any involvement the statements were written only to raise the number of statements.

d) The son of PW-151, Shoaib, admittedly was 20 days old in the year 2002 and obviously no statement could have been recorded of this infant child of 20 days. But still, in the material collected by the investigating agency, there is even a statement of this 20-day-old child, showing his age to be 20 years. This illustration shows that the statements were also written in a self-styled manner.

Many PWs like PW-144, etc have stated that what was stated by the witness was not written by the police and that the police avoided writing down many facts.

e) Numerous statements appear, on the face of them, to be only statements of damages. Hence it is clear that the entire focus of some of the assignee officers was only on recording the statements of damages, for which no fault can be found with the witnesses. Using these statements, the witnesses were put in an embarrassing position by the cross-examiner, as if the witnesses had spoken lies.

Some of the PWs have clarified that when they were trying to give details about the crime or violence, they were advised by the police to interest themselves only in getting compensation for loss or recovery of loss, nothing beyond that.

f) In the statement of PW-176, the date of 11.02.2002 has been corrected with white ink and overwritten to read as 11.06.2002 or 11.07.2002, as can be seen.

The attempt is only to focus on the fact that some parts of the statements were reduced into writing by the police and some parts of the statements were ignored though stated by the witnesses and in most of the cases, creation of the record was given more importance than discovery, search or establishing the truth, which should be the real aim of any investigation of crime.

g) Though according to the prosecution case, the previous investigation was done by either the investigating officer himself or by his assignee officers, during the trial it has been noticed that the statements were at times signed by a constable, ASI, writer, and some even had signatures of unknown persons. If this is not a mockery of the words "investigation of crime" then what else can it be named?

h) PW-136 is Mr Mansuri. It cannot be believed that even though one is Mr Mansuri, one would have stated one's surname as Pathan to the police while the police were recording a statement.

This witness, in para 21 of his testimony, clarifies that he had not stated his surname as Pathan but since the person whose statement was recorded prior to his statement was a Mr Pathan, the police had mechanically written his surname also as Pathan. The witness added that at that time the police were in a great hurry and they wanted to complete all the work of writing with great speed.

This illustration exhibits how, at times mechanically and without any application of mind and only to increase the bundles of statements, the police were doing their so-called investigation. This illustration further exhibits that in many cases, the police did not spend even a single minute on hearing the name, surname, address, of the witness. Hence it is out of the question that the police would have invested any time in eliciting any information about the crime or discovering the truth, etc.

i) Moreover, this witness, during the course of cross-examination, has given many voluntary statements stating that the police did not hear out the witnesses and wrote the statements according to will and whim.

This court is inclined to believe the version of the witnesses to be true, for the reason that in the case of almost every witness, the police have repeated the same tune whereby many witnesses appear to state that "they do not know anyone in the mob; the mob was of about 15,000 to 20,000 persons". Certain monotonous sentences in the statements prompt that these are not statements recorded genuinely as were spoken by the witnesses or in the words of the witnesses.

Some of the witnesses have stated that the police only asked for names and addresses and wrote the remaining material themselves. In the facts and circumstances of the case and in view of the number of statements written in 34 days by the Crime Branch before filing of the charge sheet, this part of the version of the witnesses seems to be full of truth.

j) This court does not propose that in all the statements, it must have so happened but at least in some of the statements, the police seem to have adopted this shortcut.

k) In the statement dated 09.05.2002 of PW-143, the date of occurrence has been shown to be 28.05.2002. This could be a slip of the pen but then the fact remains that if the statement had been read over to the PW, he would certainly have stated that the date of the incident was 28.02.2002 and not 28.05.2002.

l) Many witnesses like PW-162 have stated that the police were not interested in noting down the details that the Muslim victims were giving them about the crimes. The police were not inclined to take on record certain names. The court is not sitting in an ivory tower and it is fully aware and conscious of the kind of devices and tactics that are employed in hiding the names of the real culprits, and more particularly when that real culprit is a VIP, on the books.

m) PW-167 has stated in his testimony that he had resided at Street No. 1, Hussain Nagar, for about 25 years. If para 29 is seen, it becomes very clear that the slipshod manner adopted by the previous investigators put the witnesses in an embarrassing position through no fault of theirs. It seems that the previous investigators had not bothered to note that Jawahar Nagar and Jawan Nagar are one and the same; and Saijpur Patiya was written in place of Naroda Patiya, as these were all alternative words used by the previous investigators without even hearing the addresses that the witnesses gave them for their houses. It seems that as a shortcut, the entire area was referred to more as Jawan Nagar or Jawahar Nagar or Jawan Nagar-na-Chhapra (roof) without taking pains to show that there are different Muslim chawls and in those chawls, Jawan Nagar and Hussain Nagar are situated and both of them are different. It may be that all such hush-ups were done by the previous investigators, as at that time they faced an unprecedented burden of work and they may not have had any intention of doing so. This is merely to place on record what embarrassment the witness had to undergo when this was misused in open court. The cross-examiner wanted to project the witness as a liar, projecting that he even lied about his address.

n) PW-171 was fair enough to state before the SIT that though in his statement on 12.05.2002 he had not given the names of two more accused, he was surprised as to how the two names, over and above the name of A-22, had been inserted in his statement. The witness has fairly stated before the SIT that he had not seen the two accused named in the statement dated 12.05.2002 who are over and above Suresh Langda (A-22) and Guddu Chhara [d.].

o) The surname of PW-183 is admittedly Shaikh but, as is clear at para 20, in spite of this fact, the surname of the witness was written in the statement dated 13.05.2002 as Saiyad, which the witness had learnt of when a summons was served by this court to the witness to depose. This illustration also highlights the lack of due care and the probability of the Crime Branch having adopted unhealthy shortcuts to make a show that the investigation was done in the speediest manner. It is true that there may have been a slip of the pen as well but had the statement been read over to the witness, he could at least have corrected the slip. Hence it shows that the statements were never read over to the witnesses and their names were also not written properly and with due care.

p) PW-186 admittedly had been residing in Pandit-ni-Chali for the last 33 years. But still however, in her statement dated 12.05.2002, her address is shown as Kashiram-Mama-ni-Chali, Saijpur Patiya. No witness would ever give a wrong address. Hence it is clear that the address of somebody else was written by the police in this statement.

Another interesting aspect is related to one more common aspect in the statement of every witness but somehow it has been brought on record in this testimony. In para 20, the witness has denied that she had stated before the police that "the reason for the incident was that on 27.02.2002, in the Sabarmati Express train at Godhra railway station… were burnt alive". Hearing and seeing the witness, this court is convinced that the witness might not have said what was written in the name of the witness. This is focusing on the fact that most of the statements of the previous investigation or most of the facts in the previous statements are written by procuring some information and then writing other information by imagination. The address of the witness is written wrongly by the previous investigators, which again confirms that this is not a completely reliable record and it is better not to take aid from the previous investigation to understand the prosecution case.

q) PW-188 is an important witness who is an exception among the kind of witnesses this case has. This man is one of the rarest, who is educated and is working in a government organisation, viz ST Corporation, whose communication skills, exposure and ability to present and to muster courage would always be better than the usual kind of victims in this case.

Vide mark-C/1, at the instance of the defence, the printed complaint-application which seems to have been filed by this witness on 05.03.2002, has been brought on record as has been noted below para 111 of the testimony of PW-188. It is clear that this witness had clearly involved Jai Bhavani [d.], Suresh (A-22), Pappu (not being tried), Bipin (A-44), Manoj (A-41), in the crime. It is very surprising that this complaint had not been given a crime register number by the first investigator, Mr Mysorewala, the second investigator, Mr Barot, and even this, the third investigator, Crime Branch. It is more surprising that the loss-damage analysis form produced by the prosecution is also incomplete. His statement was certainly recorded, which has to be positively noted, but the complaint, which is the reaction, the first in point of time, ought to have been properly preserved and projected on record as a vital piece of evidence, which has not been done.

e-11) PW-156 had mentioned his complaint in his statement dated 08.05.2002 but the complaint is not on record. It is an irony that neither is the complaint of this witness who had lost numerous family members even traceable nor were any attempts made to record his complaint.

e-12) It is very clear that until the date of occurrence, no house numbers were given in the Muslim chawls but for reasons best known to the police, as for giving numbers to the houses of PWs, the police did so. In two different *panchnamas*, two different house numbers are mentioned, as some of the PWs had two houses in the area. This confused the victims, without their fault, which was obviously used in cross-examination.

e-13) If the case of PW-227 is seen then though he had stated that he had seven family members, in the statement, it is shown as five family members. The addresses and even

surnames have been written wrong. It can safely be inferred that no witness would give the wrong name, wrong address, wrong surname and wrong number of a family member. Hence this shows that the police were extremely negligent and when they did not take care while noting down the non-incriminating facts, it cannot be expected from the said police that they would have written down all incriminating facts correctly and as dictated by the witnesses.

e-14) The previous investigation agency had never taken any injury seriously or else, even at the point of time when the Crime Branch was recording the statements of different PWs at the camp, they could still have obtained certificates or recorded the statements of the treating doctors at the relief camps.

e-15) This court has reason to believe that in the previous statements, the names of certain accused were not given, according to the statement of the previous investigator made before the court and the SIT. Hence these are not lapses by the PWs. The statement showing a 20-day-old boy to be of 20 years is not to be held as indicative of the fact that the witnesses were lying. On the contrary, it indicates that the record kept by the police while recording the statements was not correct, dependable, and that the entire work was taken very lightly.

The mission seemed to be to make a show of collecting more statements or making more statements after noting names and addresses only and in some cases like this, not even waiting to know the age, of 20 days or 20 years, and preparing a self-styled statement of the infant aged 20 days, showing him to be of 20 years.

e-16) How can it be believed that in all other cases also, the statements reflect a genuine account of what the witnesses spoke, as even many of the PWs have disowned much of their so-called statements. Hence the only just and proper remedy for the situation is to hold the record of the statements of the previous investigation, even of IO-2, to be not reliable.

e-17) In some of the statements, it seems that the description given by the PW was heard hurriedly and half-heartedly and reduced into writing at leisure by the police. It can safely be inferred that the police might not have even invested time and waited for the PW to narrate his entire tale. Therefore the say of some of the PWs, that they had shown and stated the involvement of many accused but the police had only written the names of some of them, is absolutely probable and credible.

e-18) While opining, as above, on the record of all the previous investigators, this court cannot forget to mention the situation prevalent then; a number of cases of serious offences were registered on the books and serious incidents were happening every minute, a serious law and order threat was faced by the police. It was practically impossible for the police to elicit all detailed information from the victims at that time. It is obvious that in such a situation, whatever the strength of the police force, it is found insufficient with regard to the workload. Hence it is improper and unjust to impute to the police any malice or mala fides or any bias against Muslims.

e-19) In this country, it is a matter of common experience that at times the police note what the police think it proper to note to establish the prosecution case and the police do not always record every such thing which comes up in the narration of a particular incident. Hence the PWs who state that even though they have stated something before the police, the police did not record it sound very credible.

e-20) It needs to be recorded here that it really appears to be extremely clear that the Crime Branch had indeed not recorded the statements of any of the PWs in the manner stated by the PWs. In the facts and circumstances of the case, it is extremely clear that the statements of different PWs are not an accurate record of what the witnesses had stated before the police.

e-21) It is not proper for the court to mechanically accept what the police officer recording the statement states, by disbelieving what the person concerned suggests in that regard.

e-22) Investigation as to which inflammable substance was thrown had not been done. Had it been investigated and the crime scene been reconstructed, information about the kind of inflammable substance could have been obtained.

f) General Observations about the Previous Investigation

f-1) Given the clear, unambiguous and consistent versions of the witnesses against the previous investigation, the substantive evidence before the court cannot be disbelieved on the ground of so-called omissions or contradictions with the previous statements and if the same is doubted only on that ground, it would be an unjust approach.

f-2) It is a case of communal violence and false implication could be the motive is what the submission of the defence is; in the facts and circumstances of the case, this court is to separate truth from falsehood, which would serve the purpose. Hence accepting it would create supremacy of the police record over the evidence before the court and specific facts against general philosophy; therefore it is held that in this case, the causes of justice and equity demand that one believe the versions of PWs before the court, keeping in mind that the record of further investigation by the SIT is to an extent reliable for all purposes, including omissions and contradictions.

f-3) It was a panic situation for all, including the police. The police force is not trained to meet such a situation; the police force also had its own issues, including facing a shortage of manpower, overpressure of work all the while, which at times transforms human beings with vibrant hearts into machines, like the pressure faced by the third investigating officer to file a charge sheet within a

stipulated time of only 34 days, when a major investigation was to be completed, which is one such illustration.

f-4) Even after pondering over all the problems faced by the police, the special facts do not fade, that the sincerity, sensitivity and, more importantly, the desire to do a proper investigation was missing in the previous investigators and the attempt not to include the names of certain accused in the crime was constant and common to all the previous investigators, including all the IOs from the Crime Branch.

f-5) This weakness or overshadowing cannot be labelled as participation of the police in the criminal conspiracy hatched by the accused. Every weakness is not criminality. The victims have tendered an application to implead the police as accused, which is not found worthy to be entertained.

f-6) It cannot be put out of mind that it is undisputed that the first investigating officer had taken the injured to hospital on the night of 28.02.2002 and that he reached the horrifying scene at the water tank first of all and had saved many Muslim lives.

f-7) The third investigating officer has dealt with the record of C-Summaries, all of which have been produced vide Exh-1776/1 to 1776/24, wherefrom many supporting materials have been quoted in this judgement.

The first charge sheet was filed on time by IO-3; it is during the tenure of this IO that help to Muslims was given by issuing necessary yadis [memos] for post-mortem reports of their deceased relatives, etc.

f-8) Everything that is not reliable is not necessarily done with criminality within.

f-9) The judicial mind is aware that the possibility of the victims being tongue- tied from fear cannot be ruled out. However in that case also, the police record is not genuine and is not free from fearful statements and hence is not true and therefore also not dependable.

f-10) Giving undue importance to the statements of the previous investigation would be as if the pre-trial statements were decisive and conclusive rather than the evidence before the court and that too when the accuracy of the pre-trial statements or the pre-trial record is clearly and certainly doubtful.

f-11) The effect of omission to name a culprit before the police would vary from case to case and for appreciating the real significance thereof, the entire evidence in the case and all the relevant circumstances should be taken into consideration. In this case, while doing the said exercise, it is clear that the previous investigation is not dependable.

f-12) Mr MT Rana [former ACP, G Division] gives a plausible explanation for the insufficiency in the investigation and has rather established that the police could have done many more things but had not done so.

f-13) The investigation carried out by all agencies other than the SIT was most unsatisfactory and lacked all sincerity and sensitivity. Hence it is more advisable not to depend on it to decide the credibility of the PWs.

f-14) Upon appreciating various factors, this court is of the firm opinion that the authenticity and accuracy of the police record of the statements under Section 161 of the CrPC in this case, as far as the previous investigation is concerned, is not at all reliable.

f-15) This court is conscious of the situation then and is not imputing malice to the irresponsible conduct of the previous investigators for the reasons that:

1) A number of cases of serious offences were registered on the day and serious law and order problems were faced by the police.

2) It might not have been possible for the police to make detailed inquiries of the witnesses and try to elicit detailed information from them about the crimes.

3) The mental and physical condition of the injured witnesses at the time makes it impossible to expect that they would have given minute details of the occurrence, of their suffering, agonies and even about all the perpetrators of the crimes.

4) A proper probe may not have been possible, nor may it have been possible to maintain an accurate record of what the witnesses said.

5) Both the learned special PP as well as the learned advocates for the defence have submitted that the previous investigation was not proper and reliable and still the learned advocates for the defence argued on omissions and contradictions relying upon this.

6) The oral evidence of the witnesses establishes that the statements were not read over to the concerned witnesses. As revealed by the PWs, it seems that one of the reasons could be that the then investigating agency had not written the statements of the witnesses as were given.

7) The language of expression of the witnesses was admittedly not Gujarati hence the failure to read over the statements is also one of the reasons for which an honest and sincere record was not made. In reality, it seems that no statement was properly recorded.

8) The victims, as can be seen from the record, were in a state of shock, a terrorised condition, frightened, and had almost accepted that there was no safety or security for them and no one who would stand by them hence their tongues were bound to be tied.

f-16) Moreover, if the police record becomes suspicious or unreliable then in that case, it loses much of its value and the court, in judging the case of a particular accused, has to weigh the evidence given against him in court, keeping in view the fact that the earlier statements of the witnesses, as recorded by the police, is a tainted record and has no great value as it otherwise would have, in weighing the material on record against each individual accused.

f-17) No importance can be given to the so-called contradictions and omissions when the authenticity or the reliability of the police record is itself in doubt.

In the case of *Dana Yadav*, the Supreme Court had occasion to discuss: "there cannot be an inflexible rule that if a witness did not name an accused before the police, his evidence identifying the accused for the first time in court cannot be relied upon."

f-18) Failure to give particulars or names in such kind of cases is not material from which adverse inference can be drawn.

f-19) The investigation suffered from lack of thoroughness, and quickness. As a result, statements of the witnesses were recorded in a most haphazard manner, like in the case of the team of IO-3 which had recorded numerous statements within 34 days.

f-20) The contradictions in the statements of the concerned eyewitnesses recorded by the previous investigating agency as compared with the statements recorded by the SIT should not be allowed to affect the credibility of those witnesses because it is clear that all the previous investigating officers did not faithfully record the statements of those witnesses.

f-21) Many matters of importance and significance to the case were omitted. There are many weaknesses in the previous investigation, all of which suggest that one hold that this is not a reliable investigation.

f-22) One cannot reject reliable testimony before the court with reference to that very record which this court has condemned as unreliable.

f-23) The contention that the previous investigation, of 2002 and of the Crime Branch, was not efficiently done and was defective and half-hearted has found favour with this court but the defective investigation has not affected the accused in any manner, which is an important criterion to decide its effect on the accused, and more particularly to grant the benefit of the doubt to the accused from that.

f-24) No doubt it was an elephantine task to investigate these kind of crimes but then it cannot be believed that senior investigating officers with experience do not know what the priorities should be in such kind of investigations. It seems that they must have been overshadowed by some element. Investigation should be free, fair and autonomous but here it seems to have been overpowered by someone.

f-25) The investigation done previously by investigating officers other than those of the SIT has mainly been questioned during cross-examination. This court has already held that the investigation is not reliable and since the investigation is not reliable and the record kept by the police is not reliable, the same has already been looked at with doubt but then their bona fides cannot be said to have been challenged by any point raised in cross-examination. What has only been proved is that the record kept by the police by recording statements of witnesses is faulty. In the light of this discussion, the judgement cited at Sr. No. 78 by the defence has no application to the facts of the present case where statements are doubtful but other formalities like drawing *panchnamas*, writing yadis, etc are not doubtful hence it cannot be said that the bona fides of the IOs in every aspect is doubtful.

f-26) The judgement in the matter of *State of UP vs Ram Sajivan* (AIR 2010 SC 1738) has some similarity of facts. The cited case arose from the conflict between upper castes and lower castes, wherein the fear psyche and its impact has been discussed, which is also applicable to the facts of the case on hand. Head Note-A thereof is relevant, which reads as under:

"(A) Penal Code (45 of 1860), S. 300 – Evidence Act (1 of 1872), S. 3 – Murder –Evidence – Witness – Unnatural conduct – Multiple murder case – Witness one amongst persons who were abducted, taken to river, killed and thrown in river one by one – Witness, though seriously assaulted, reaching riverbank alive – Failure of witness to give names of accused in fear psyche – Not unnatural – Cannot be ground to disbelieve testimony" (para 31).

At para 32, what is written is also applicable to the case on hand: "In a genocide and massacre which was witnessed by him, wherein all his seven close relatives, including his wife, were killed one after the other in his presence and were thrown in the river Ganga, his escaping death was a miracle. Hiding and saving his life from a mighty cruel upper-caste group was a normal human instinct. Any reasonable or prudent person would have behaved in the same manner… Perhaps at the intervention of someone, the police seriously investigated the matter and he was brought to his village, Lohari, under police protection. The delay in giving his statement is fully explained and in the facts and circumstances of the case, delay was quite natural. In a case of this nature, the witnesses turning hostile is not unusual, particularly in a scenario where upper-caste people have created such a great fear psyche. The instinct of survival is paramount and the witnesses cannot be faulted for not supporting the prosecution version."

f-27) At the end of the trial, the learned special PP, Mr AP Desai, has emphasised that the entire trial, according to the prosecution, is based on the investigation done by the SIT. At this stage it also needs to be noted that the previous investigation was done by several different investigating officers of three different units. The peculiarity of all the three units, which were changed one after the other, is that at no point of time was the investigation done by an individual but the entire unit had investigated.

f-28) When the first IO, Mr Mysorewala, was the investigating officer, most of the police station officials were made part of the investigation. Hence consistency of aim was not maintained; each unit was trying to make more bundles of paper without the aim of establishing the truth. The com-

mon factors of all the three officers/units were: all the three failed to provide proper and effective leadership; all the three did not have an aim of investigation except exhibiting bundles of documents and exhibiting a show of investigation rather than going into the depth of the case; all the three lacked sensitivity to the victims, which was the prime need looking to the facts and circumstances of the case; all the three never thought of the fact that the victims and their relatives must be in the tremendous grip of terrifying and horrifying visions of the crimes they had witnessed and which were committed on that day and it was impossible to make them free to speak the truth unless they were psychologically counselled, and more particularly counselled by experts, to cope with the fear psyche in their minds.

f-29) In view of the above situation, all the previous investigating units were not able to secure true, complete, detailed and searching accounts of the commission of crimes on that day but then the notable point was that none of these investigating units was noticed to have any concern for it.

It is stated here three units whereof the first unit is Naroda police station which investigated up to 08.03.2002. Shri PN Barot and his assignee officers who investigated up to 30.04.2002 were the second unit and then the third (Crime Branch) unit wherein initially Shri SS Chudasama investigated along with his big team of assignee officers, which is inclusive of Shri Agrawat who was many a time in-charge investigating officer, and thereafter, Shri Singhal, Shri Muliyana, Shri Ambaliyar, etc, who all belonged to the Crime Branch. So before the SIT took over, the investigation was handed over from Naroda police station to Shri PN Barot and from Shri PN Barot to the Crime Branch and then the charge was taken over by the SIT.

f-30) It seems from the oral evidences that the ground, or maidan, of Jawan Nagar, including the pit therein, was a very big area which was not on a level with the road but only a part of it was lower and as the defence has suggested, even if one runs from one end to another, it takes 12 to 15 minutes (PW-52, para 77). It is therefore clear that in such a large area, big mobs can easily be accommodated. This maidan is just adjoining to the Muslim locality.

f-31) Moreover, the material collected by the investigation does not appear to be a complete and faithful record of the case and it is, to the extent where the police deliberately skipped writing the names of some of the miscreants and avoided writing the statements as were spoken by the witnesses.

f-32) In the opinion of this court, viewing the totality of facts and circumstances of the case, it becomes amply clear that the previous investigation was improper, lacked sensitivity, and the grievances made by different prosecution witnesses, that the previous IOs and their assignee officers had not fairly recorded all those contentions and all those names of the accused or miscreants given by the respective prosecution witnesses, are worthy to be believed. The reason is obviously that the previous investigating agency was anxious to see to it that certain names and their participation should not come on the books, even indirectly.

f-33) This court is convinced that the statements of the witnesses were filtered while recording the same to keep out of the record the names of certain miscreants whom the prosecution witnesses were naming again and again. When the prosecution witnesses had given the names of certain persons, they were discouraged and even if they had insisted then a filtered statement seems to have been recorded or else it would not have happened that after the SIT initiated further investigation, certain accused who were not earlier arraigned have then been arraigned.

f-34) It seems just and proper, in consideration of the entirety of the case on record, to opine that even if it is accepted that in fact the PWs had not given the names of the accused in the year 2002 in their statements before IOs-1-3 then also, considering the fear and its impact, the panic conditions, and keeping in mind that the victims must have been in a totally numb condition, the record is in any case not a true and faithful record.

f-35) In a nutshell, the previous investigation or, say, the investigation until the SIT took over, is not dependable, not reliable, did not reflect a faithful record, was prepared in panic conditions and under the impact of fear in the minds and hearts of the victims, etc. Hence it cannot be used to decide the credibility of the PWs. In the same way, it cannot be used to decide omissions and contradictions, to the extent where the PW does not accept or admit it to be his statement. As far as the previous investigation is concerned, the oral evidence of the PWs before the court shall be given maximum weightage, as it is safe to act upon the same in the facts and circumstances of the case.

f-36) After detailed discussion, as above, on the subject of the previous investigation, it has been discussed and decided as to what would be the impact of this previous investigation on the appreciation of evidence and which part of the previous investigation can be relied upon and which part cannot be relied upon.

g) Appreciation of the Previous Investigation in General

1) The investigation of any crime has several common facets like recording the statements of witnesses, collection of evidence, including documents, certain ministerial acts like drawing *panchnamas*, collecting scientific evidences, etc. Normally, all the above is aimed to unearth the truth and to investigate the crime. It rarely happens that the investigating agency does not do it as a package.

2) Concentrating on the previous investigation in this case, the following different compartments need discussion to finally conclude the outcome of it:

a) Recording the statements of the witnesses/victims of the crime.

b) Recording the statements of the eyewitnesses, police officials and officers.

c) Doing ministerial acts like issuing yadis to seek permission to draw inquest *panchnamas*, drawing the inquest *panchnamas*, drawing the *panchnamas* for identification of the dead bodies, preparation of necessary yadis to hold test identification parades, collection of injury certificates, post-mortem notes, post-arrest procedures, drawing *panchnamas* of the sites of the offences, drawing *panchnamas* of damages suffered by the minority victims at their dwelling houses, at their shops, and shooting to prepare VCDs of the sites of the offences, etc.

3) *Background:*

a) It is almost undisputed that, including the police witnesses, all the eyewitnesses have stated, as their first reaction on 28.02.2002 itself (as is contended in the complaint at Exh-1773 dated 28.02.2002 by PSI Shri Solanki), that communal riots took place at Naroda; the Hindu leaders of the riots were members of the BJP, VHP, RSS, Bajrang Dal, etc. It is a matter of fact that when the riots took place, the BJP was the ruling party in the state of Gujarat.

b) A-37 [Maya Kodnani] was the current MLA then, who was the returned candidate from the Naroda constituency. Some of the Muslim eyewitnesses who are victims and complainants have testified to the presence of A-37, her active leadership, ingredients for having conspired for the success and execution of rioting on that day and provoking the Hindus to make the riots most successful by violence against Muslims and by attacking the Muslim religious place, viz Noorani Masjid, etc.

c) No reasonable man can believe that when such wide-scale rioting was ongoing in the constituency and when a larger conspiracy was hatched to do away with Muslims, designed with a view to settle the score for torching the kar sevaks alive in the Godhra carnage, and when inhuman and ghastly offences were committed which raised the death toll among Muslims by up to 96 Muslims in a day, the MLA of that constituency would remain aloof and away from the entire occurrence though she was admittedly in the city. It is not probable that when the time span of the occurrence was 9:30 a.m. to at least 8:00 p.m. and even according to the police complainant, it was from 11:00 a.m. to 8:00 p.m., the MLA would not come to the constituency at all. The common experience of life says that whenever such occurrences take place, political leaders do take their stand.

c-1) In the instant case, A-37, being the MLA of the area, would either support the Hindus, in which case the Hindus, viz the miscreants, would be tremendously boosted, which would add to their confidence and courage in doing away with Muslims and ruining their property.

c-2) If, as according to the defence, she has not played the role of provoking Hindus then there is nothing on record to believe that she has played the role of pacifying agent. She has not done anything to stop the massacre, she has not even instructed police officers to stop lawlessness at the site.

This para needs to be understood in the backdrop of the fact that while for A-37, the cross-examination of PW-104 was conducted, it was suggested that A-37 was present at the site and in fact she had recommended to the police to see to it that no inconvenience was caused at Hussain Nagar, Jawan Nagar, etc, as it was her constituency (paras 129 and 130 of the deposition of PW-104). This role of being a neutral person or making attempts to pacify the situation was not further pursued during cross-examination of other witnesses but then the fact of such acceptance cannot be ignored altogether.

c-3) It is also not her case that she was neutral. If the fire call occurrence register brought on record by the chief fire officer is perused, it is clear that at about 2:15 p.m. she did telephone the fire brigade for sending firefighters to Sahyog Petrol Pump where an occurrence of fire took place. Secondly, she had her own hospital in Naroda where a visit by her would have been quite natural. Considering the above, it cannot be believed that she would not have come to her hospital at all and that she had telephoned the fire brigade for the petrol pump at Naroda without being at Naroda.

c-4) Considering the above discussion, in fact, the principle of probability would guide the court that the natural conduct of A-37 would always be to be at the site which, according to the prosecution witnesses, she was. In the light of the appreciation of evidence, in the considered opinion of this court and according to counselling on the natural course of events and the principle of probability, it can safely be held that the presence and participation of A-37 and her close aides in the riots on that day is the truth, which also stands corroborated by the sting operation wherein A-18, 21 and 22 have all stated that A-37 was present at the site and was boosting them all.

d) It is obvious that A-37 would not like to let her presence at the site be proved on the record of the case, as it can safely be inferred that she must be aware of the consequences of it. Like any other political leader, A-37 must also have her followers, her propagators, her canvassers and her aides; she would also take care to protect the skin of all those accused who must indeed have been present with her on the date of the occurrence.

e) This court is not sitting in an ivory tower and is conscious to the hard realities of the system. In the system, normally, if the police officer knows the desire of a political leader, the police would leave no stone unturned to give colour to such desire.

f) This court firmly believes that the surrounding circumstances lead to only one inference: that in this case, to respect and to give colour to the desire of A-37, the police took all care to see to it that in all the statements of the

eyewitnesses recorded, there had to be a common recitation to the effect that "I am injured, my family members died or were injured, my house and property were all ruined and looted by the mob of miscreants but I do not know any one of them." This was the safest way out, making a show of investigation and still not booking certain VIPs as per design.

g) It is this inference which guides that the involvement shown of certain accused, unless supported by the victims, should not be taken on face value. Once the court smells something fishy in the affair of recording the statements of witnesses, the said statements should be appreciated keeping in mind this background.

h) It is a matter of common experience that when such a heinous crime takes place, which takes the lives of several and that too in a communal riot, the police have to register a case, the police have to make a show of some investigation and the police would also do certain ministerial acts as have been mentioned at para 2(c) above. In all such ministerial acts, favour or bias would play no role. The role begins when incriminating material against individuals pours in. As far as the ministerial acts are concerned, being a routine part of investigation, no scheming would normally be done in that. It is for this reason that it is reflected on the record through different PWs as to how the statements were designed by the police to not bring on the books several accused.

i) It is in this background that it needs to be noted that numerous witnesses have voiced their very serious grievances about polluting of their statements, tampering with their revelations, to shape and mould their statements as was desired by the police. Noting the difference between the status of A-37 and her group and the helpless poor victims of this crime, this court is convinced that these grievances have the ring of truth. It is for this reason that this court is not ready to take any contradictions or omissions from the statements before the previous investigators.

j) Whatever has been testified by the victims of the crime before the court shall only be tested through the statements of the victims before the SIT because while the SIT was investigating, no such hostile atmosphere was prevailing against the victims of the crime, passage of time was another solace and the order of the Supreme Court of India to further investigate the crime was the ultimate strength.

k) The foregoing discussion shows that the presumption of Section 114(e) of the Indian Evidence Act stands rebutted by credible and positive evidence. This court is inclined to believe the statements before the SIT and the testimony of witnesses before the court and is not ready to look into the alleged and self-styled statements recorded by the previous investigators, the aim of which was to conceal the presence of A-37 and her aides and to exhibit the presence of the accused whom the police wanted to project.

l) As is narrated, with regard to the official acts performed by the police as mentioned at para 2(c) hereinabove, no grievances have been voiced. There is no substantial challenge offered even by the defence, which would create a reasonable doubt about the said part of the official acts of the previous investigators and which can be termed to be a rebuttal to the presumption under Section 114(e) of the Indian Evidence Act. This court is however not taking this part of the investigation, viz the ministerial acts, as truthful except when the concerned PW owns it. The point being articulated is: neither the PWs nor the defence have rebutted the presumption of propriety of this part of the official acts performed by the previous investigators, which also proves that the victims have not complained falsely and have only complained when they are genuinely aggrieved.

m) One more facet of the investigation (applicable to the first IO only) is that the police witnesses have also deposed as eyewitnesses present at the site of the offence. Such police witnesses range from armed constable to DCP. It is obvious that all of them would have to support the stand they had taken right from the beginning. As is clear, the stand they had taken was to conceal the presence of A-37 and other bigwigs and to project the presence of certain other accused. The police officials' depositions have two sides; one is the fact situation, the violence, the activities of the mob, etc in general at the site, and the second side is the presence and participation of specific accused. The first side was unanimously testified by all police officials. The second side was projected in a manner which creates lots of reasonable doubt about the presence and participation of the named accused. As discussed earlier, the entire aim of the police was different than unearthing the truth and investigating the crime. It is not safe and prudent to believe the presence and participation of any accused if it is placed on record by the police witnesses alone. In other words, when the accused is involved in the offence only by the police, in the facts and circumstances of this case, it is most imprudent to act upon the said version. In such circumstances, the interest of justice demands that one grant the benefit of the doubt to the accused for whom there is no victim witness to testify to his presence and participation.

4) One more situation needs to be dealt with here, wherein the alleged statements of certain witnesses were recorded by the previous investigators in the year 2002 but for one or other reason, the SIT had not recorded any statements of the said witnesses. It may be because the said witnesses had not given any statement to the SIT. In the opinion of this court, in every case where a witness has not given an application to the SIT, it cannot be believed that he had no grievances about the statements recorded in the year 2002. The finding of this court even deals with the cases of such witnesses, when the court has concluded that as far as recording the statements of witnesses is concerned, the previous investigation is not reliable. It is therefore thought

proper that in such rare situations, the statements of the year 2002 shall not be considered for the purpose of contradiction or omission and that the conclusion that the previous investigation is unreliable is equally applicable to such cases.

5) This court is convinced that the previous investigation is indeed not at all reliable as far as recording the statements of witnesses, projecting the presence or absence of the accused at the site and involvement of the accused by police witnesses alone is concerned. It is not proved to be a genuine and truthful version recorded by the police beyond all reasonable doubt. The presumption of propriety has been rebutted qua the compartments mentioned at para 2(a) and 2(b) hereinabove.

6) The ministerial official acts done by the police during the investigation do enjoy the presumption of propriety except when effectively rebutted. This has a reference to the compartment on official acts mentioned at para 2(c) hereinabove.

h) Final Finding on Previous Investigation

a) The statements of witnesses recorded by the previous investigators are held to be unreliable as the presumption of propriety of this part of the official acts of the previous investigators is held to have been rebutted.

b) In case the accused is involved in the crime solely on the testimony of the police eyewitnesses then such an accused shall be granted the benefit of the doubt.

c) All the official acts mentioned at para 2(c) hereinabove enjoy the presumption of propriety until rebutted…

CRIMINAL CONSPIRACY

…Having perused the oral and documentary evidence on record and upon considering the circumstantial evidence on record and the settled position of law, the following points have been considered by this court…:

Legal Aspects of Conspiracy

1) Section 120A of the Indian Penal Code defines criminal conspiracy, which spells that: when the accused agree to do, or cause to be done, an act and when such an act is either illegal or is done by illegal means and when at least one of the accused does any overt act in pursuance of the agreement arrived at, the accused is said to have committed the offence of hatching a criminal conspiracy.

Commission of criminal conspiracy requires that there has to be a common design and the common intention of all the accused to work in furtherance of the common design. Each conspirator plays a separate role in one integrated and united effort to achieve the common purpose. In such a case, each of the accused is hatching a conspiracy.

2) There has to be an association of two or more persons to hatch a criminal conspiracy. The offence of criminal conspiracy consists of an agreement between two or more persons to commit an offence. There has to be unanimity of purpose and for the objects to be achieved. In a way, it is a mental process among the accused.

Section 43 of the IPC defines the word 'illegal', which is applicable to everything which is an offence or is prohibited by law.

3) Hatching of a criminal conspiracy being a mental process among the accused, generally, direct evidence to link the accused with the conspiracy would not be available.

As required under Section 10 of the Indian Evidence Act, where there is reasonable ground to believe that two or more persons have conspired together to commit an offence, anything said or done by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.

The conduct of the accused prior to the offence and their conduct after the conspiracy is hatched are important factors.

4) The criminal conspiracy remains in existence till the acts or omissions and/or the offences continue to be committed.

It is a matter of common experience that in a conspiracy, the accused are alert, conscious, and would take all necessary care to see to it that the conspiracy should not be proved; hence direct evidence is seldom available to prove criminal conspiracy.

5) Whenever a conspirator commits any offence or act or omission prohibited by law, all the conspirators become liable for the act or omission, which is their joint liability, and it is for this reason that the offence committed by one of the accused can be used as evidence against a co-conspirator.

6) For any of the charged offences, if there is no express provision for abetment of that particular offence, the provisions for abetment in Chapter V of the IPC would be applicable. Section 109 provides for abetment of any offence when the act abetted is committed in consequence of the abetment. If the act is committed in consequence of instigation or in pursuance of a conspiracy, it is abetment. Thus if a co-conspirator accused does any act in pursuance of a conspiracy or instigation, it would be termed to have been done on account of the abetment by the conspirator who is proved to have abetted or instigated.

7) All the conspirators are liable for illegal acts or omissions by any co-conspirator under the principle of joint liability when the offences are committed because of a collective decision.

The court can always infer about the intentions and objects of the accused where the acts of the co-conspirator before the conspiracy and after the conspiracy assist the court to so conclude.

The presence of the co-conspirator is not a material and necessary ingredient to invoke the principle of joint liability.

Extrajudicial Confession and its Effects

In the facts of the case, to decide whether there was a conspiracy or not, it is essential to discuss confessions and their impact…

8) In the matter of *Mohd Khalid vs State of West Bengal* (2002 Law Suit SC 826), the apex court through a full bench has… explained what a criminal conspiracy is, what are its characteristics and what law has developed on the subject:

"17. It would be appropriate to deal with the question of conspiracy. Section 120B of the IPC is the provision which provides for punishment for criminal conspiracy. Definition of 'criminal conspiracy' given in Section 120A reads as follows: '120A– When two or more persons agree to do, or cause to be done,– (1) an illegal act, or (2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy; Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.'

"The elements of a criminal conspiracy have been stated to be: (a) an object to be accomplished, (b) a plan or scheme embodying means to accomplish that object, (c) an agreement or understanding between two or more of the accused persons whereby they become definitely committed to cooperate for the accomplishment of the object by the means embodied in the agreement, or by any effectual means, (d) in the jurisdiction where the statute required an overt act.

The essence of a criminal conspiracy is the unlawful combination and ordinarily the offence is complete when the combination is framed. From this, it necessarily follows that unless the statute so requires, no overt act need be done in furtherance of the conspiracy, and that the object of the combination need not be accomplished, in order to constitute an indictable offence.

"Law making conspiracy a crime is designed to curb immoderate power to do mischief which is gained by a combination of the means. The encouragement and support which co-conspirators give to one another rendering enterprises possible which, if left to individual effort, would have been impossible, furnish the ground for visiting conspirators and abettors with condign punishment. The conspiracy is held to be continued and renewed as to all its members wherever and whenever any member of the conspiracy acts in furtherance of the common design. For an offence punishable under Section 120B, prosecution need not necessarily prove that the perpetrators expressly agree to do or cause to be done an illegal act; the agreement may be proved by necessary implication. Offence of criminal conspiracy has its foundation in an agreement to commit an offence. A conspiracy consists not merely in the intention of two or more but in the agreement of two or more to do an unlawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry into effect, the very plot is an act in itself, and an act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced, if lawful, punishable if for a criminal object or for use of criminal means.

"18. No doubt in the case of conspiracy, there cannot be any direct evidence. The ingredients of the offence are that there should be an agreement between persons who are alleged to conspire and the said agreements should be for doing an illegal act or for doing by illegal means an act which itself may not be illegal. Therefore the essence of criminal conspiracy is an agreement to do an illegal act and such an agreement can be proved either by direct evidence or by circumstantial evidence or by both, and it is a matter of common experience that direct evidence to prove conspiracy is rarely available. Therefore the circumstances proved before, during and after the occurrence have to be considered to decide about the complicity of the accused.

"19. In *Halsbury's Laws of England* (vide 4th ed., Vol. 11, p. 44, p. 58), the English law as to conspiracy has been stated thus: 'Conspiracy consists in the agreement of two or more persons to do an unlawful act, or to do a lawful act by unlawful means. It is an indictable offence of common law, the punishment for which is imprisonment or fine or both in the discretion of the court. The essence of the offence of conspiracy is the fact of combination by agreement. The agreement may be express or implied, or in part express and in part implied. The conspiracy arises and the offence is committed as soon as the agreement is made; and the offence continues to be committed so long as the combination persists, that is, until the conspiratorial agreement is terminated by completion of its performance or by abandonment or frustration or however it may be. The *actus reus* in a conspiracy is the agreement to execute the illegal conduct, not the execution of it. It is not enough that two or more persons pursued the same unlawful object at the same time or in the same place; it is necessary to show a meeting of minds, a consensus to effect an unlawful purpose. It is not however necessary that each conspirator should have been in communication with every other.'

"20. There is no difference between the mode of proof of the offence of conspiracy and that of any other offence; it can be established by direct or circumstantial evidence.

"21. Privacy and secrecy are more characteristics of a conspiracy, than a loud discussion in an elevated place open to public view. Direct evidence in proof of a conspiracy is seldom available, offence of conspiracy can be proved by either direct or circumstantial evidence. It is not always possible to give affirmative evidence about the date of the formation of the criminal conspiracy, about the persons who took part in the formation of the conspiracy, about the object which the objectors set before themselves as the object of conspiracy and about the manner in which the object of conspiracy is to be carried out, all this is necessarily a matter of inference.

"22. The provisions of Sections 120A and 120B, IPC, have brought the law of conspiracy in India in line with the English law by making the overt act unessential when the conspiracy is to commit any punishable offence. The English law on this matter is well settled. *Russell on Crime* (12th ed., Vol. I, p. 202) may be usefully noted: 'The gist of the offence of conspiracy then lies not in doing the act, or effecting the purpose for which the conspiracy is formed, nor in attempting to do them, nor in inciting others to do them, but in the forming of the scheme or agreement between the parties, agreement is essential. Mere knowledge, or even discussion, of the plan is not, per se, enough.'

"Glanville Williams in *Criminal Law* (second ed., p. 382) states: 'The question arose in an Iowa case but it was discussed in terms of conspiracy rather than of accessoryship. D, who had a grievance against P, told E that if he would whip P, someone would pay his fine. E replied that he did not want anyone to pay his fine, that he had a grievance of his own against P and that he would whip him at the first opportunity. E whipped P. D was acquitted of conspiracy because there was no agreement for 'concert of action', no agreement to 'cooperate'."

"Coleridge, J. while summing up the case to the jury in *Regina vs Murphy* states: 'I am bound to tell you that although the common design is the root of the charge, it is not necessary to prove that these two parties came together and actually agreed in terms to have this common design and to pursue it by common means and so to carry it into

execution. This is not necessary because in many cases of the most clearly established conspiracies, there are no means of proving any such thing and neither law nor common sense requires that it should be proved. If you find that these two persons pursued by their acts the same object, often by the same means, one performing one part of an act, so as to complete it, with a view to the attainment of the object which they were pursuing, you will be at liberty to draw the conclusion that they have been engaged in a conspiracy to effect that object. The question you have to ask yourselves is, had they this common design, and did they pursue it by these common means, the design being unlawful.'

"23. As noted above, the essential ingredient of the offence of criminal conspiracy is the agreement to commit an offence. In a case where the agreement is for accomplishment of an act which by itself constitutes an offence, then in that event, no overt act is necessary to be proved by the prosecution because in such a situation, criminal conspiracy is established by proving such an agreement. Where the conspiracy alleged is with regard to commission of a serious crime of the nature as contemplated in Section 120B read with the proviso to Subsection (2) of Section 120A, then in that event, mere proof of an agreement between the accused for commission of such a crime alone is enough to bring about a conviction under Section 120B and the proof of any overt act by the accused or by any one of them would not be necessary. The provisions, in such a situation, do not require that each and every person who is a party to the conspiracy must do some overt act towards the fulfilment of the object of conspiracy, the essential ingredient being an agreement between the conspirators to commit the crime and if these requirements and ingredients are established, the act would fall within the trappings of the provisions contained in Section 120B.

"24. Conspiracies are not hatched in the open, by their nature, they are secretly planned, they can be proved even by circumstantial evidence, the lack of direct evidence relating to conspiracy has no consequence (See *EK Chandrasenan vs State of Kerala*.)

"25. In *Kehar Singh & Ors vs The State (Delhi Administration)*, this court observed: 'Generally, a conspiracy is hatched in secrecy and it may be difficult to adduce direct evidence of the same. The prosecution will often rely on evidence of acts of various parties to infer that they were done in reference to their common intention. The prosecution will also more often rely upon circumstantial evidence. The conspiracy can be undoubtedly proved by such evidence, direct or circumstantial. But the court must inquire whether the two persons are independently pursuing the same end or they have come together to the pursuit of the unlawful object. The former does not render them conspirators but the latter does. It is however essential that the offence of conspiracy required some kind of physical manifestation of agreement. The express agreement however need not be proved. Nor actual meeting of the two persons is necessary. Nor is it necessary to prove the actual words of communication. The evidence as to transmission of thoughts sharing the unlawful design may be sufficient. Conspiracy can be proved by circumstances and other materials. (See *State of Bihar vs Paramhans* [1986 Pat LJR 688].) To establish a charge of conspiracy, knowledge about indulgence in either an illegal act or a legal act by illegal means is necessary. In some cases, intent of unlawful use being made of the goods or services in question may be inferred from the knowledge itself. This apart, the prosecution has not to establish that a particular unlawful use was intended so long as the goods or services in question could not be put to any lawful use. Finally, when the ultimate offence consists of a chain of actions, it would not be necessary for the prosecution to establish, to bring home the charge of conspiracy, that each of the conspirators had knowledge of what the collaborator would do, so long as it is known that the collaborator would put the goods or services to an unlawful use. (See *State of Maharashtra vs Som Nath Thapa* [JT 1996 (4) SC 615].)

"26. We may usefully refer to *Ajay Agarwal vs Union of India & Ors*. It was held: '…It is not necessary that each conspirator must know all the details of the scheme nor be a participant at every stage. It is necessary that they should agree for design or object of the conspiracy. Conspiracy is conceived as having three elements: (1) agreement; (2) between two or more persons by whom the agreement is effected; and (3) a criminal object which may be either the ultimate aim of the agreement, or may constitute the means, or one of the means by which that aim is to be accomplished. It is immaterial whether this is found in the ultimate objects. The common law definition of 'criminal conspiracy' was stated first by Lord Denman in the *Jones* case, that an indictment for conspiracy must 'charge a conspiracy to do an unlawful act by unlawful means' and was elaborated by Willies, J. on behalf of the judges while referring the question to the House of Lords in *Mulcahy vs Reg* and the House of Lords in a unanimous decision reiterated in *Quinn vs Leathem*: 'A conspiracy consists not merely in the intention of two or more but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced, if lawful, punishable if for a criminal object or for the use of criminal means.'

"This court, in *EG Barsay vs State of Bombay*, held: 'The gist of the offence is an agreement to break the law. The parties to such an agreement will be guilty of criminal conspiracy though the illegal act agreed to be done has not been done. So too, it is an ingredient of the offence that all the parties should agree to do a single illegal act. It may comprise the commission of a number of acts. Under Sec-

tion 43 of the Indian Penal Code, an act would be illegal if it is an offence or if it is prohibited by law.'

"In *Yash Pal Mittal vs State of Punjab*, the rule was laid as follows: 'The very agreement, concert or league is the ingredient of the offence. It is not necessary that all the conspirators must know each and every detail of the conspiracy as long as they are co-participators in the main object of the conspiracy. There may be so many devices and techniques adopted to achieve the common goal of the conspiracy and there may be division of performances in the chain of actions with one object to achieve the real end of which every collaborator must be aware and in which each one of them must be interested. There must be unity of object or purpose but there may be plurality of means sometimes even unknown to one another, amongst the conspirators. In achieving the goal, several offences may be committed by some of the conspirators even unknown to the others. The only relevant factor is that all means adopted and illegal acts done must be and be purported to be in furtherance of the object of the conspiracy even though there may sometimes be misfire or overshooting by some of the conspirators.'

"In *Mohammad Usman Mohammad Hussain Maniyar & Ors vs State of Maharashtra* (1981 2 SCC 443), it was held that for an offence under Section 120B, IPC, the prosecution need not necessarily prove that the perpetrators expressly agreed to do or caused to be done the illegal act, the agreement may be proved by necessary implication.

"27. Where trustworthy evidence establishing all links of circumstantial evidence is available, the confession of a co-accused as to conspiracy, even without corroborative evidence, can be taken into consideration. (See *Baburao Bajirao Patil vs State of Maharashtra*.) It can in some cases be inferred from the acts and conduct of parties. (See *Shivanarayan Laxminarayan Joshi & Ors vs State of Maharashtra & Ors*.)"

… … …

Points of Determination Raised

I-A. Point of Determination No. 1

Q: Whether the prosecution proves beyond reasonable doubt that on the date, time and place of the offence, and in the facts and circumstances of this case, any criminal conspiracy has been hatched by the accused (Part 1) and whether any offences were committed in consequence of abetment and/or instigation and/or in pursuance of the conspiracy hatched by the accused or not? (Part 2) If yes, when the conspiracy was hatched, the offences mentioned in this point for determination were committed by which of the accused? (Part 3)

(*With reference to Section 120B of the IPC and for the offences committed r/w it*.)

I-B. Discussion on Point of Determination No. 1

a) …It has been proved on record by the oral evidence of numerous victim witnesses and by occurrence witnesses that the proved charged offences were committed throughout the day and the initiation of commission of offences was somewhere from about 9:30 a.m. to 10:00 a.m. on 28.02.2002. The offences continued up to at least 8:00 p.m. It is a proved fact that accused Nos. 1, 2, 5, 10, 18, 20, 21, 22, 25, 26, 27, 33, 34, 38, 39, 40, 41, 42, ,44, 45, 46, 47, 52, 55, 58, 62 (26 live), deceased Guddu, Jai Bhavani, Dalpat, Jaswant, Ramesh and A-35 had all assembled under the active leadership of A-37 (27 live accused and six deceased, who were 33 in number) near the Muslim chawls, viz the ST workshop, and the religious place of Muslims, viz Noorani Masjid, on the morning of 28.02.2002. The riotous activities were mainly done at Muslim chawls opposite Noorani, behind Noorani and at Noorani Masjid. This proves the date, time and site of the offences…

b) The classification of morning occurrences, noon occurrences and evening occurrences from the proved fact has been done for an easy and just conclusion. With the said analysis, the judicial soul is satisfied that all the proved charged offences against the human body (except rape and gang rape), offences against the public tranquillity, offences against property, etc, were committed in the morning, in the noon and in the evening with the same modus operandi, using the same means, with the same criminal force and to bring about similar results. Except for the offences of rape and gang rape of Muslim women, committed only in the evening, and offences relating to religion, etc, committed only in the morning, all other proved offences were committed in all the three occurrences.

c) About 81 victim witnesses and about 52 occurrence witnesses thus, in all, about 133 different witnesses had witnessed the morning occurrences from different points. The morning occurrences consisted of slogans being shouted by the majority which were provoking, disturbing the harmony between the two communities, as they were against the minority. The accused uttered slogans of "Kill – Cut", "Burn the Miyas", "Not a single Miya should now live", "Rob the Miyas", "Go to Pakistan", etc.

d) Several murders like the murder of Hassan Ali Mirza i.e. brother of PW-135 caused at Hussain Nagar, burning alive the mother of PW-259, stone-pelting, throwing burning rags, were committed by the miscreants of the Hindu mobs in the morning at the site of Noorani Masjid, outside the masjid, near the ST workshop and at the Muslim chawls. The occurrences of police firing took place in the morning, the proved facts reveal, the occurrences of private firing, torching shops, carts, cabins and dwelling houses of Muslims around Noorani and at Muslim chawls, attacks, including burning Noorani Masjid by throwing two carts of kerosene, dashing a tanker of diesel against Noorani, bursting gas cylinders inside Noorani, breaking minarets of Noorani,

etc, were all morning occurrences. For these occurrences, the unlawful assembly of the morning is to be punished.

e) The presence of the accused with weapons, severe damage, ransacking, arson, robbing, burning, etc, of households and other materials like TVs, embroidery machines, sewing machines, clothes, cupboards, vehicles, furniture, tape recorders, fridges, washing machines, vessels, gas stoves, gas cylinders, mattresses, bedrolls, grocery, ornaments, cash, etc, prove offences against property throughout the day in all the occurrences. About 68 PWs and about 25 occurrence witnesses, in all about 93 PWs have testified on damages. *Panchnamas* of damages, and other documents, are on record. For these offences, every member of the unlawful assembly is responsible whether s/he was present and had participated in the morning, noon and/or evening, as these offences took place in all the three occurrences hence none of the members of the unlawful assembly is such who did not remain present and did not participate in the offences committed by the assembly.

f) …It stands revealed … that on that day about 222 different properties, including 134 dwelling houses, shops, etc and 88 different properties, had been burnt, destroyed, damaged and/or ransacked at the site. These 222 properties were only of the Muslim chawls situated opposite Noorani over and above many vehicles, household properties, dwelling houses, which were burnt to ashes. These figures show that huge amounts of damages had been sustained by the victims in all the three occurrences. This establishes that offences against property had been committed throughout the day hence that part of the charge stands proved against all the members of the unlawful assembly, as none of the members of the unlawful assembly, whether of the morning, noon or evening occurrence, is such who did not participate in any one of the occurrences, causing mischief, damage, etc.

g) Moreover, the injuries sustained by members of the minority community in the morning ranged from simple hurt to grievous hurt which can be held to be attempt to commit murder. The deaths that occurred in the morning, through injury by blunt weapons, like that of one deceased, Mr Mohammad Shafiq, who was thereafter killed by bullet injury; and by burning dwelling houses wherein victims like Sakina Babubhai, Razzak, etc were grievously hurt while inside the burning houses and who ultimately succumbed to their injuries, are clearly cases of attempt to murder as provided u/s 307 of the IPC.

g-1) In the noon the murders of Moiyuddin, the son of Mullaji, Aiyub, the lame wife of PW-74, the parents of PW-65, etc, had been committed. The Jawan Nagar wall was broken, numerous persons were attempted to be murdered, grievous hurt, simple injuries, were also caused to the victims there and damage to the dwelling houses of Muslims was also caused.

g-2) In the evening the murders of Kauserbanu, Sharif, Siddique, Nasim and of 13 Muslims as witnessed by PW-158, the six murders proved by PW-198, the murder of family members of PW-156, torching houses of Muslims, attempts to murder all those who were admitted to hospital, clearly stand proved. The offences u/s 302, 307, 323 to 326, etc were committed even in the evening occurrences as they were committed in the morning and the noon.

h) Putting all of the above and what has been discussed in the previous parts of this judgement together, then it is proved beyond all reasonable doubt that the accused who were identified by different victim witnesses had assembled near Noorani Masjid and near the Muslim chawls at about 9:00 a.m. to 9:30 or 10:00 a.m. on 28.02.2002; they possessed deadly weapons, were shouting provoking slogans, etc, which all continued for the whole day.

i) The common time at which all the accused had assembled proves that an agreement had already been arrived at among the accused before meeting there. Had there not been agreement, all the accused would not have assembled at the place at a fixed time within the range of an hour or so. This conduct is a strong circumstance suggesting the existence of a conspiracy among the accused – agreement to do illegal acts.

j) As has been testified by many of the eyewitnesses, the accused were armed with deadly weapons, inclusive of inflammable substances, stones, swords, tridents, iron pipes, firearms, containers of inflammable substances, burning rags, spears, sticks, hockey sticks, etc. This preparation by the accused clearly links them, with preconcert or premeditation having been successfully attained among the accused, as, had there not been agreement, premeditation or preconcert before they met at the site, the accused ought not to have come to the site in the possession of deadly weapons and shouting provoking slogans against the minority.

k) The possession of deadly weapons is suggestive of preparation by the accused which is even an overt act. This would not have been possible without their arriving at an agreement among themselves to commit illegal acts. It is a matter of common experience that without any cause, nobody comes out of the house with deadly weapons in hand, knowing that it is prohibited, and still the accused came to the site with deadly weapons, which speaks of their oneness, their commitment and their dedication to the common intentions and objects they shared.

The similar acts of all the accused, of coming to the same site, to the same place, with similar inciting slogans, with deadly weapons, and then committing similar offences as designed, very clearly and undoubtedly establish the commonality of their perceived intentions and this confirms the agreement beyond any doubt.

l) The above discussion shows that different charged offences which have been proved to have been committed in the morning occurrences were committed with common intentions, objects, and were based on the agreement the

accused had arrived at. The presence of all these mentioned accused clearly proves their oneness.

m) The presence and participation of A-21 has also been inferred by this court, which is found to be quite trustworthy, based upon the proved, voluntary, free and lawfully acceptable extrajudicial confession of A-21. As has been discussed in the section on the sting operation, one revelation by A-21 is to the effect that though many gas cylinders were burst, the mosque was not much shaken. The fact has been undoubtedly proved that the attack or assault on Noorani took place only once on 28.02.2002 and that was in the morning, after A-37 came to the site. The revelations and expressions of A-21 in the sting show that he does not give a hearsay account but he speaks from his personal knowledge, which shows that he was himself present at the site of Noorani and nearby in the morning. It is therefore clear that A-21 was present at the site right from the morning itself. A-21 is inferred to be one of the conspirators, based upon relevant substantial oral evidence like that of PW-322 and circumstantial evidence. Aid, then, is called upon from the sting operation. Moreover, his confession is that he "cut off the hands and legs" of victims who were escaping from the Muslim chawls. A-21 confessed that he was outside the Muslim chawls and had cut off the legs and hands of Muslims. This goes with his agreement to do illegal acts with the remaining co-conspirators who were inside the Muslim chawls. This combination of commission of offences, viz overt acts inside the Muslim chawls and outside the Muslim chawls, leads to only one inescapable conclusion: that A-21 was one of the conspirators and was working as per a common design in pursuance of the preconcerted conspiracy hatched with his co-accused. Even his knowledge about the plight of the victims inside the Muslim chawls without going inside the chawls and his counter-role outside the chawls undoubtedly prove that a criminal conspiracy had been hatched where A-21 was also a conspirator. His presence at the site stands proved by his extrajudicial confession where he confesses his overt acts. There is no reason to doubt the extrajudicial confession when he himself is the maker of it.

m-1) The offences of attacking the Muslim chawls took place throughout the day in all the three occurrences and when A-21 is inferred to be one of the conspirators, his abetment, instigation and overt acts in pursuance of the conspiracy stand proved. It is needless to express that the prosecution could not examine any eyewitnesses qua the role of A-21 but that does not diminish the importance of PWs like PW-322 or the FSL scientist or the official of All India Radio and even the extrajudicial confession of A-21 himself. It is scientifically proved to have been recorded in his voice without any tampering. The reliance on the extrajudicial confession qua the accused himself, and not qua the co-accused he involves, are on a different footing. No doubt is created about the truthfulness, genuineness and voluntariness of the said confession. It can safely be acted upon when not a single defence was raised or put up against the sting which was almost unchallenged as far as A-21 is concerned.

m-2) An extrajudicial confession in this case possesses a high probative value, as it emanates from a person who has committed a crime, and that, as discussed in the section on the sting operation, is free from every doubt. PW-322, before whom confessions were given by A-18, A-21 and A-22, is an independent and disinterested witness who bore no enmity against any of the accused. This extrajudicial confession, in the case of all the three accused, is relevant and admissible in law under Section 24 of the Indian Evidence Act. Law does not require that the evidence of an extrajudicial confession should in all cases be corroborated. In the instant case, PW-322 is not a person in governmental authority or in any manner an authority. There is no ambiguity in the version given… The extrajudicial confessions of all the three accused do not lack plausibility and they inspire the confidence of the court. This court is therefore of the opinion that though an extrajudicial confession is in the very nature of things a weak piece of evidence, in the instant case, in the very peculiar facts and circumstances, these extrajudicial confessions need absolutely no corroboration as far as A-18, A-21 and A-22 being makers of the confessional statements is concerned. It stands proved by the substantial evidence of PW-322, the CDs, VCDs and the oral evidence of the FSL scientist, etc. Hence this extrajudicial confession, considering the foregoing discussion on its own merits, is found very dependable, reliable, having contents full of probability and it is found absolutely safe to convict the accused on the basis of this extrajudicial confession.

m-3) Hence he is liable for all the offences committed during the entire day, to be read with Section 120B. His overt acts clearly prove that having hatched the conspiracy, he then became a member of an unlawful assembly right in the morning itself when attacks on Noorani and the Muslim chawls were started, knowing it to be unlawful to execute the conspiracy. The presence of A-21 in the morning occurrence stands proved. He shared at that time the common objects of the unlawful assembly. The attacks and assaults were ongoing in the Muslim chawls right from 10:00 a.m. to about 6:00 p.m. His knowledge of the attack on Noorani proves his presence in the morning and his participation in the attack at the Muslim chawls proves his presence in the noon and evening. His revelation shows his admiration for the patronage of A-18 and acceptance of the heroism of A-22. All his acts need to be accordingly read and held as those of a principal offender; he is liable for the offences committed, to be read with Section 120B of the IPC. He shall also be held liable for the offences committed while he was present and when he has participated as a member of the unlawful assembly, to be read with Section 149.

n) The presence of A-37 has now been proved a fact. A-37 was admittedly the MLA from the Naroda constituency

then; complaint Exh-1773 contends about the provocation by BJP leaders, etc. A-37 was an MLA of the BJP then, the presence of the MP of the area or of some minister of the government was nil. In these circumstances, it is crystal clear that the only leading personality of the BJP present was A-37. It has come on record as a fact accepted by the defence that A-2, A-20, A-38 and A-41 (who are all Sindhis) were canvassers, propagators and election workers for A-37. It is also now a fact accepted by the defence that the office of A-44 was very much situated on the site and was used as an election office for BJP candidates. In addition to A-37, A-44, A-2, A-20, A-38, A-41 and A-18, etc have been identified as workers and leaders of the BJP, RSS, Bajrang Dal, VHP, etc. A-18 has been proved to be a very active worker of the VHP then. It is an admitted position that it is the VHP which gave the call for a 'Gujarat Bandh' for 28.02.2002 to oppose the Godhra train carnage which took place on 27.02.2002.

o) In his extrajudicial confession, A-18 has confessed to having decided, during his visit to Godhra and after having seen the corpses at Godhra, that he would show results on the next date, viz 28.02.2002, at Naroda Patiya by raising the death toll by about four times in comparison to the Godhra carnage. He confessed to having collected 23 firearms for the offences to be committed on 28.02.2002, as preparation, and having prepared a team of about 29-30 persons, both done during the intervening night of 27.02.2002 and 28.02.2002. As is clear on the record, about 33 accused, including the deceased accused, were assembled at the site on the morning of 28.02.2002 when A-37 came. The confession of A-18 in the sting operation tallies with the number of miscreants, conspirators, assembled at the site, their possession and use of weapons, firearms, and the offences committed during the entire day to raise the death toll of Muslims to many times more than the death toll of Hindus in Godhra, all of which support the conclusion of the hatching of a criminal conspiracy among the accused. The occurrences spread over the entire day were totally linked with the criminal conspiracy hatched amongst the 33 accused.

p) It is well known that a conspiracy is hatched in secrecy and direct evidence is seldom available. It is quite natural that direct evidence of the agreement to do illegal acts would not be available. In the facts of the case, it is inferred from the proved facts and circumstances as permissible in law.

q) It is true that the prosecution has not proved the connection of mobile phone calls in the conspiracy hatched but that does not mean that it proves that the accused conspirators had no inter se communication with one another. It is an admitted position that they were all workers of the BJP, VHP, RSS, etc. Their affiliation, intimacy and relationship with one another are inferred, as their organisational belonging is common. It has also been proved on record that all of them had common intentions and objects which stands proved from their working pattern, their time of assembling, their choice of the site of offence to be Noorani and the Muslim chawls, their modus, their weapons and their overall conduct. This court therefore inferred that through any means of communication, including their phones, no matter what the phone number, the accused had contacted each other at any time after the visit of A-18 to the site of the Godhra carnage on 27.02.2002 and at any time before the morning meeting of the accused at the site on 28.02.2002.

r) This court firmly believes that the large-scale commission of offences by the accused on that day, the exhibition and use of weapons, preparations made by all of them, the conduct of the accused before the occurrence, during the occurrence and after the occurrence, are all speaking evidences of a criminal conspiracy having been hatched amongst all of them.

s) It is proved beyond all reasonable doubt that A-37, A-18, A-44, A-41, A-2, A-20, Guddu, his brothers A-1, A-10, Bhavani, were leaders and A-22, A-26, etc were present at the site with preparation and on account of the conspiracy hatched. In fact, they were well-known leaders of the area, as proved beyond reasonable doubt, when about 24 reliable PWs saw A-22, about 12 reliable PWs saw A-26, about 11 reliable PWs saw A-37, about 15 reliable PWs saw A-41, about 23 reliable PWs saw A-44, about 26 reliable PWs saw Guddu, about 17 reliable PWs saw Bhavani and even A-1, A-10, A-18 and A-20 were seen by numerous witnesses.

This presence of all the accused, as discussed, shows the agreement to do illegal acts amongst the accused, which is strengthened by the proved fact that they assembled at the site at the same time in the same spirit only because of the conspiracy hatched. This was the first overt act the conspirators did, as proof of their preconcerted agreement or premeditation.

t) Oral, documentary and circumstantial evidences available on record prove the existence of a criminal conspiracy amongst the accused beyond all reasonable doubts, under the active leadership of A-37, who was obviously the kingpin, and where the main actors were A-18, A-41, A-2, A-20, A-44, etc. It was carried out with the full-fledged involvement of all those accused whose presence and participation in the morning occurrences stood proved beyond all reasonable doubts, like A-22, A-26, Bhavani, Guddu, etc.

u) The previous conduct of all the accused in having possessed deadly weapons, their provocation and incitement while approaching the site, their inciting slogan shouting, their conduct in reaching the site between 9:00 a.m. to 9:30 or 10:00 a.m., their selection of sites of a religious place for Muslims and chawls dominated by Muslim inhabitants, are all their proved overt acts. The overt acts of A-37 were to come to the site on time, to provoke and instigate

the co-conspirators by lecture and by presence to form an unlawful assembly and to instigate mobs to beat and kill Muslims, to attack Noorani and to demolish dwelling houses of Muslims and settle an account with Muslims, as proved by at least more than 10 to 11 eyewitnesses. This gets strength from the circumstance of her having given a false explanation [in her further statement]. A-37 is proved to have made rounds at the site during the entire day to back up the co-conspirators by ensuring her backing to continue the riot, etc.

Obviously, these are acts besides the agreement, done in pursuance of the agreement amongst the accused, all of which have been proved by the oral evidence of the PWs and clearly supported by the sting operation, viz confessions of the co-conspirators.

v) Moreover, the conduct of committing and participating in different offences against Muslims while being at the site, which were offences against the public tranquillity, the human body, property, relating to religion, etc, are proved facts committed by the co-conspirators. These proved facts, inclusive of oral, documentary and circumstantial evidence, built up an unbreakable chain, tightened by the extrajudicial confessions and identification of the accused by different eyewitnesses, proving the presence and involvement of the accused. This proves the hatching of a criminal conspiracy by the accused beyond all reasonable doubts.

w) It is worthy to be noted that the conduct of the accused before coming to the site, while coming to the site, after coming to the site, clearly reveals their preconcerted agreement, their premeditation to commit illegal acts. The way in which different offences under the IPC had been committed on that day, the way in which the law was broken, the way in which the Muslims were done to death wantonly, the way in which different proved charged offences were committed at the site, proves beyond all reasonable doubts that the agreement arrived at amongst the accused was of nothing but to do illegal acts. In pursuance of the said agreement, all the accused in fact did overt acts.

x) It is obvious that for the commission of such offences, direct evidence is seldom available. However, the trustworthy chain of circumstances, oral evidences, the documents, and even the corroboration from the confessions of co-accused A-18, A-21 and A-22, bring home the charge of a conspiracy having been hatched by the accused and the co-accused, as all the necessary ingredients of Sections 120A and 120B of the IPC stand proved beyond all reasonable doubt in the acts and omissions committed by the accused present at the site in the morning.

It is needless to add that the offences for which the criminal conspiracy was hatched were not punishable for a term of two years hence no formality of sanction is needed.

It is notable that the offences committed were such for which no express provision is made for the conspiracy to commit such offences.

y) In these circumstances, Section 120B of the IPC requires that the offenders shall be punished in the same manner as if they have abetted the offences committed.

In the light of Section 109 of the IPC, as discussed hereinabove, the presence of abettor accused is not necessary hence whether the presence of all the above-referred accused, including A-37, has been proved at the site or not is indeed not material, since the hatching of a criminal conspiracy among the accused and their overt acts stand proved, including commission of the proved charged offences in pursuance of the conspiracy.

It is therefore held that all the conspirators accused, referred to hereinbelow, shall be held liable for having instigated and abetted the other accused and one another to commit the charged offences. A-37 and other leaders have actively stimulated the co-conspirators to commit the charged offences.

All the accused can be inferred to have known the probable consequences of their abetment and their acting in pursuance of the conspiracy.

z) Many of the conspirators have also committed the offences abetted by remaining present at the site and by actively involving themselves in executing the conspiracy hatched and thus have also committed the offences abetted; hence all such conspirators shall be liable for commission of offences u/s 120B and the same punishment which may be inflicted on the principal offenders for committing other offences shall also be imposed on the accused, to be read with Section 149 of the IPC and also read with Section 120B.

In the sting operation, A-18, A-21 and A-22 confessed a common point: that A-37 was present at the site, she backed up, encouraged, the accused, provided them with mental strength to continue the violence, provoked and instigated the co-accused. She praised their commission of offences when the co-conspirators and the co-accused were committing the offences, A-37 came many times, met the co-accused, she made rounds at the site in her car, etc. She also said: "Continue, I am at your back and shall remain at your back." In her speech, she instigated them to kill Muslims, to destroy the masjid, etc… All this is nothing but instigation and acting in pursuance of the conspiracy by A-37 hence it is held that she has abetted the offences committed and has acted in pursuance of the conspiracy. She is therefore needed to be held guilty as an abettor.

aa) As has been discussed, when instigation is provided by any of the co-conspirators and when the offences were committed in pursuance of the conspiracy, it is said to have been abetted by the accused. It is now a proved fact that A-37 came to the site, she had instigated and provoked the miscreants of the Hindu mobs there… The entire scenario was a result of instigation, provocation, abetment, by A-37, A-18, etc of the mob, and the preparation by the accused, the arrival of the accused at the site and their commission of offences were all in pursuance of the conspiracy arrived at amongst the accused.

No doubt is left in concluding that A-37 instigated and abetted the formation of an unlawful assembly and the commission of all the proved charged crimes, which were all done in pursuance of the conspiracy hatched.

ab) The place, time, conduct of the accused, all very clearly prove the fact that all the proved charged offences were undoubtedly committed in pursuance of the conspiracy hatched amongst the accused. The abetment by A-37 and other accused of the commission of the offences stands proved beyond all reasonable doubts, as it is proved that A-37 and other leaders had instigated the mob of miscreants at the site. It is also proved that the offences abetted were committed in consequence of the abetment, by instigation and by acting in pursuance of the conspiracy hatched. The presence of the abettors is hence not necessary to be proved. The meeting of the accused, with preparation, incitement and commitment at the site, was on account of the agreement to do illegal acts already arrived at amongst the accused at any time prior to their gathering at Noorani Masjid on 28.02.2002 and at any time after the occurrence of the Godhra carnage on 27.02.2002.

From all the above discussion, it is held to have been proved beyond all reasonable doubt that all these who had assembled in the morning on the date, at the time and site of the occurrence, are all conspirators in the criminal conspiracy, who had agreed to do illegal acts like to strike terror amongst Muslims, to kill many times more Muslims than the Hindus who were killed at Godhra, to disturb the public tranquillity, to damage, ruin and destroy the property of Muslims, to do away with and to injure Muslims, offences relating to religion, etc. As proved from oral, documentary and circumstantial evidence, the conspirators were A-1, 2, 5, 10, 18, 20, 21, 22, 25, 26, 27, 33, 34, 37, 38, 39, 40, 41, 42, 44, 45, 46, 47, 52, 55, 58, 62 and deceased A-35, Guddu, Bhavani, Dalpat, Jaswant and Ramesh (27 live accused and six deceased accused who had all hatched the criminal conspiracy).

The requisites of an agreement for doing illegal acts and/or breaking the law among the mentioned accused, the commission of offences abetted, punishable under the IPC, and with reference to the agreement, having done overt acts, etc, stand proved beyond reasonable doubt.

At the cost of repetition, let it be noted that A-37 and A-18 are principal conspirators whereas many other leading conspirators were there. A-18 is a principal conspirator as well as an executor of the conspiracy.

In the light of the foregoing discussion, Point of Determination No. 1 needs to be replied in the affirmative, which has been accordingly replied, holding that the prosecution proves beyond all reasonable doubt that:

I-C. Point No. 1

Part 1: In the facts and circumstances, on 28.02.2002 when the accused met at the Muslim chawls, opposite Noorani Masjid, at Noorani and at the ST workshop, the conspiracy was already hatched by the 27 accused. *In the affirmative*.

Part 2: An offence u/s 120B of the IPC has been committed hence all other offences, if proved to have been abetted, instigated, or to have been committed in pursuance of the conspiracy by the accused, the 27 accused shall be punishable for commission of those offences for the respective offences r/w Section 120B of the IPC.

The conspiracy was hatched at any time after the Godhra occurrence on 27.02.2002 and before 9:30 a.m. on 28.02.2002 when the conspirators met at the site.

Part 3:

a) *Guilty:* The criminal conspiracy was hatched by A-1, 2, 5, 10, 18, 20, 21, 22, 25, 26, 27, 33, 34, 37, 38, 39, 40, 41, 42, 44, 45, 46, 47, 52, 55, 58, 62 and deceased A-35, Guddu, Bhavani, Dalpat, Jaswant and Ramesh (27 live accused and six deceased accused have hatched the criminal conspiracy). These live accused are held guilty and shall be punished u/s 120B of the IPC and also shall be punished for the proved offences r/w Section 120B of the IPC.

b) *Guilty:* These 27 accused shall also be liable to be punished for all the offences committed during the entire day, whether committed in the presence of the accused or not, r/w Section 120B of the IPC.

c) *Benefit:* All the other accused charged shall be entitled to the benefit of the doubt qua the charge of conspiracy, viz A-3, A-4, A-6, A-7, A-8, A-9, A-11, A-12, A-13, A-14, A-15, A-16, A-17, A-19, A-23, A-24, A-28, A-29, A-30, A-31, A-32, A-36, A-43, A-48, A-49, A-50, A-51, A-53, A-54, A-56, A-57, A-59, A-60, A-61 (34 live accused)…

STING OPERATION

In October 2007 when news broke about *Tehelka*'s sting 'Operation Kalank', the secretary of Citizens for Justice and Peace (CJP), Teesta Setalvad, moved the Gujarat high court seeking orders for authentication of the *Tehelka* tapes. When the high court declined, CJP moved the Supreme Court for similar orders, concerned that such valuable evidence must be protected. However, the Supreme Court also declined to pass orders in the matter. This was while a petition praying for the transfer of investigation in major carnage cases to the Central Bureau of Investigation (CBI), filed in May 2002, was lying before the Supreme Court.

Concerned that a delay would actually ensure that such valuable evidence could be lost, Setalvad moved the National Human Rights Commission. The NHRC, then headed by Shri Rajendra Babu, took note and on March 5, 2008 passed a full bench order and, invoking its powers under the Protection of Human Rights Act, handed over the *Tehelka* tapes to be authenticated by the CBI. (The NHRC's orders can be read at: http://www.cjponline.org/modiscorder/080305%20NHRCORDERSTehelka.pdf.) But for this timely action by the NHRC, the valuable corroborative evidence provided by Ashish Khetan of *Tehelka* would have disappeared.

If we had waited for the Supreme Court-appointed SIT to do its job, this valuable evidence would have been lost. In the case of the telephone call records on CDs provided by Gujarat police officer Rahul Sharma, for the SIT to fairly investigate the ownership of phones, etc, Judge Jyotsna Yagnik has had to ignore valuable evidence that may have been available because of the failure of the SIT to rigorously investigate ownership of phones and other technical details.

We reproduce below her findings on the *Tehelka* sting operation.

– Editors

In this case, 15 DVDs and five CDs have been produced on record, which were recorded by PW-322 while taking interviews of different persons, including three accused in this case, in the sting operation shot by him.

1) Appreciation of DVDs and CDs

Fifteen DVDs were shot, from which five CDs were prepared, selecting certain parts to be telecast on the Aaj Tak news channel under the name 'Operation Kalank'. The DVDs were shot in a sting operation by *Tehelka*.

A DVD or CD, to a certain extent, is on a par with a document but, for its capacity to store even visual images apart from sound, it can for certain purposes be treated as real evidence and can have more evidentiary value than a mere document. When treated as real evidence, it can be a strong piece of evidence, by viewing of which the court can form its own opinion on the facts in issue or on the relevant facts.

a) In the case, the CDs or DVDs have been properly and satisfactorily proved. PW-322, who had recorded the interviews and done the shooting in question, was examined as a prosecution witness.

b) The prosecuting agency had obtained a certificate from the FSL about its genuineness. The scientist from the FSL, Jaipur, PW-323, was examined for the purpose. No reasonable doubt is created about the genuineness of the CDs and the DVDs and hence the same have been proved to be beyond reasonable doubt and is admissible evidence.

c) There is no challenge to the evidence that what the CDs and DVDs contained is what was shot at the place of the interviews. It is only challenged with respect to the claim that the same was done under some inducement and in the alternative, accused No. 18, whose interview had been recorded, was merely reading a script given to him; and that too this defence was only raised vis-à-vis A-18, and the other two accused, viz A-21 and A-22, who are seen and heard being interviewed on the DVDs and CDs, were not defended on any grounds.

d) For A-21 and A-22, the evidence of the CDs and DVDs remained unchallenged and uncontroverted.

e) It may be observed here that though it is an admitted position that a certain part was taken by Aaj Tak on the CDs made from DVDs, merely that would not create any doubt about the admissibility and relevancy of the CDs or DVDs, as the evidence is what is seen and heard when it is played.

f) The DVDs of the interviews recorded by PW-322 were viewed by this court, as one of the CDs was certified to have become corrupted at this stage and in search of truth and to examine the genuineness of the defence raised, it was necessary to view the concerned DVDs to note the gestures of A-18. It was essential to ascertain whether A-18 was reading a script or was interviewed and was he under any inducement or not?

g) The judgement at Sr. No. 79, produced by the defence, is of the Punjab and Haryana high court. This judgement is relied upon to submit that the extrajudicial confession is a weak piece of evidence and should not be believed. In the facts of the case, page 6, which has been highlighted, reflects the facts of the cited case where the person whose extrajudicial confession was on record was under the influence of liquor and the same was an outcome of the con-

sumption of liquor; but in the case on hand, the defence has neither submitted nor is it the case of the defence that during the sting operation any of the accused was under the influence of liquor.

h) In the very same judgement, all the sentences which have been highlighted by the defence are indeed based on the facts of the case and there is discussion that the extrajudicial confession did not find corroboration in any other evidence. But in the instant case, corroboration is available from the oral evidence of PW-322 Mr Khetan, PW-323 and the evidences of other prosecution witnesses and even documentary evidence on record.

In another highlighted paragraph, the discussion of the extrajudicial confession is related to the facts of another case, which do not exist in the case on hand. Hence this judgement would not be applicable to the case on hand, the facts being different.

i) Section 17 of the Indian Evidence Act provides that an admission means a statement, which may be contained in electronic form, which suggests any inference as to any fact in issue or relevant fact.

j) Section 22A helps the PWs, as it is provided that: Oral admissions as to the contents of electronic records are relevant if the genuineness of the electronic record is proved. Here, by a certificate of the FSL, genuineness has been proved.

2) Relevant Citations

It is a propounded principle that if the extrajudicial confession passes the test of credibility, it can be a basis for conviction also. The judgements discussed hereinbelow highlight the principle.

i) *SK Yusuf vs State of West Bengal* (AIR 2011 Supreme Court 2283): It is held that to act upon an extrajudicial confession, it must be established to be true and made voluntarily and in a fit state of mind – The words of the witness to whom the extrajudicial confession was made must be clear, unambiguous and clearly convey that the accused is the perpetrator of the crime – The extrajudicial confession can be the basis for a conviction if it passes the test of credibility.

ii) *Kulvinder Singh vs State of Haryana* (AIR 2011 Supreme Court 1777): …The accused had gone to the ex-sarpanch of the village and disclosed that they had committed the murder of the deceased and he should take them to the police – The ex-sarpanch took them to the police who arrested them on the same date – It is not the defence's version that they had been arrested earlier – Neither accused have challenged the deposition of the ex-sarpanch, that he did not produce them before the police, nor was it their case that they had been arrested from somewhere else – The ex-sarpanch faced gruelling cross-examination but the defence could not elicit anything to discredit him – The deposition of the ex-sarpanch in respect of the extrajudicial confession made to him by the accused is a trustworthy piece of evidence (para 9).

iii) The learned special PP, through a citation at Sr. No. 22, has submitted that it was held by the Supreme Court that corroboration of each and every piece of information mentioned in an extrajudicial confession is not necessary. It can and will have corroboration in general. It was held to be sufficient corroboration.

iv) As has been held at Sr. No. 23 of the list of the learned PP, the extrajudicial confession was voluntary, not out of threat, inducement or promise in terms of the provisions of Section 24 of the Indian Evidence Act. The confession was corroborated by material on record and was held to be proper.

v) The judgement at Sr. No. 24 is to the effect that: "No doubt in law the confession of a co-accused cannot be treated as substantive evidence to convict, other than the maker of it, on the evidentiary value of it alone. But it has often been reiterated that if on the basis of the consideration of other evidence on record, the court is inclined to accept the other evidence but not prepared to act on such evidence alone, the confession of a co-accused can be pressed into service to fortify its belief to act on it also."

vi) At Sr. No. 29 in para 29, it has been observed that: "No doubt the extrajudicial confession is held to be a weak type of evidence. But even an extrajudicial confession can be made a basis to convict an accused without any corroboration. This proposition of law had been laid down in the case of *State of UP vs MK Anthony* (AIR 1985, Supreme Court 48 (1985) CriLJ 493) as follows:

"There is neither any rule of law nor of prudence that evidence furnished by extrajudicial confession cannot be relied upon unless corroborated by some other credible evidence. The courts have considered the evidence of extrajudicial confession a weak piece of evidence… If the evidence about extrajudicial confession comes from the mouth of witness/witnesses who appear to be unbiased, not even remotely inimical to the accused, and in respect of whom nothing is brought out which may tend to indicate that he may have a motive for attributing an untruthful statement to the accused; the words spoken by the witness are clear, unambiguous and unmistakably convey that the accused is the perpetrator of the crime and nothing is omitted by the witness which may militate against it, then, after subjecting the evidence of the witness to a rigorous test on the touchstone of credibility, if it passes the test, the extrajudicial confession can be accepted and can be the basis of a conviction. In such a situation, to go in search of corroboration itself tends to cast a shadow of doubt over the evidence. If the evidence of extrajudicial confession is reliable, trustworthy and beyond reproach, the same can be relied upon and a conviction can be founded thereon."

vii) As against the above submissions of the learned PP, the learned advocate for the defence has also produced a citation, at Sr. No. 62, to submit that the extrajudicial confession was not truthful and was part of a hallucination from which the prosecution and its witnesses were suffer-

ing. It needs a very special note that these are the facts of the case at Sr. No. 62 but then in the case on hand, no such case has been submitted, either by suggestions in cross-examination or by leading oral evidence or even by submitting any documentary evidence, that the witnesses or the accused were suffering from hallucination.

According to the meaning given in the Oxford Dictionary, hallucination means "delusion, illusion, figment of imagination, etc". In the cited judgement, hallucination was held to have been suffered by the prosecution witnesses. In the instant case, that is not the case. As far as the accused are concerned, as already discussed hereinabove, a defence has been raised qua the sting operation only for A-18 and that too the defence raised is that PW-322 induced A-18 and/or A-18 was given a script and was reading the script, both of which have been dealt with in detail below. Hence repetition has been avoided. Suffice it to say here that the ground of hallucination is not applicable either to the PW or to A-18, A-21 or A-22. Moreover, A-21 and A-22 have not raised any defence at all qua the sting operation either through cross-examination or while their further statements were recorded. In the light of the above discussed facts, the judgement cited by the defence at Sr. No. 62 has no application to the facts of the case.

viii) Another judgement has been cited by the defence, at Sr. No. 73, wherein the accused had made the statement when he was under the influence of liquor, etc; it was held in the facts of that case that such statements cannot be stated to be truthful and made while completely in his senses.

In the case on hand, the situation as discussed hereinabove in the cited judgement at Sr. No. 73 is not at all applicable and it is nobody's case that the accused were under the influence of liquor or were not completely in their senses when their extrajudicial confessions were being recorded. That being the situation, even this judgement does not come to the rescue of the accused.

In General: From Facts and Opinion

3) The sting operation carried out on A-18, A-21 and A-22 has revealed that the offences were continued for the entire day and what can be inferred from the conversations of the three accused is that along with the three accused there were A-2, A-20, A-37, A-41 and A-44 as well. Though for A-2, A-20, A-37, A-41 and A-44, these conversations cannot solely be the foundation by which to bring home their guilt, they can be used as corroboration, after marshalling all the evidence against the accused, if capable of providing corroboration of any kind of evidence against the accused. In this sting operation, it is stated that A-37 had visited the site of the offence in the morning as well as in the evening of the date.

3.1) A-18 and A-22 have revealed that they hated the Muslims very much and were very much interested in doing away with the Muslims. A-18 had collected about 23 firearms on the previous night in preparation for the massacre. They are absolutely unable to give any explanation as to why they came to a Muslim locality and remained there for the entire day of the occurrence.

3.2) This makes it abundantly clear that A-18 had made notable preparations for the massacre, to terrorise Muslims, to take revenge for the Godhra incident of the previous day, to do away with Muslims in more numbers than the death toll in Godhra. A-18 seemed to be very much committed and determined to carry out a horrifying massacre at Naroda Patiya.

4) The submission by A-18 is that what had been recorded on the DVDs and CDs by PW-322 was not genuinely recorded but is a created recording by PW-322, as A-18 was induced by him to read a script given by PW-322 and what is presented as recorded conversations was in fact created.

5) As mentioned above, this court has viewed the relevant part of the DVDs and CDs to test the defence raised. Almost all interviews with A-18 were recorded at his personal office where his men were around, it was his area and PW-322 had visited as a guest. During every episode of the interviews everything apparently seems to have been done voluntarily. The talks of A-18, with eye contact, would not have been possible if one was merely reading a script. A-18 talks about many things, including his social activities (according to him) of saving Hindu women from Muslim men, who were joined in wedlock. A-18 also talks about his firm convictions, and his severe dislike of and opposition to Muslims and Christians, quoting them as being his two enemies. During the interview A-18 was sitting on the main revolving chair in the room in a very relaxed posture, talking with vigour, and the entire talk seems very natural. A-18 also talks about numerous police cases having been filed against him and he draws a map of Naroda Patiya and explains to PW-322 as to how, on the date of the incident, Muslims were cordoned off, surrounded, and how race murders were committed. From his talk, it sounds as if violence was extremely common, a routine activity in his life. His association with the VHP and Bajrang Dal, according to him, was of 22 years. During the interview he attends to phone calls, he responds to a caller stating that a reporter from Delhi is sitting in front of him and even while saying this, nothing looks like he is reading any script. He does not even remotely appear to be talking under some inducement. He was absolutely free and talking voluntarily. There was no element of any compulsion in his talk. His conservation was very natural…

6) In the opinion of this court, an extrajudicial confession in this case possesses a high probative value, as it emanates from a person who has committed a crime, which is free from every doubt. PW-322, before whom confessions were given by A-18, A-21 and A-22, is an independent and disinterested witness who bore no enmity against any of

the accused. This extrajudicial confession, in the case of all the three accused, is relevant and admissible in law under Section 24 of the Indian Evidence Act. Law does not require that the evidence of an extrajudicial confession should in all cases be corroborated. In the instant case, PW-322 is not a person in governmental authority or in any manner an authority. There is no ambiguity in the version given. As emerges on record, more particularly from the oral evidence of PW-322, he had developed a cordial relationship with the accused. Not only that but he had also established a link with the accused; creating the basis of an institutional organisation, he had projected himself as a dedicated worker of a Hindu organisation. The Hindutva in the three accused had been linked by PW-322 with his identity which he had assumed for the purpose of recording the sting operation. It is this identity and cordial relationship that created a tremendously high level of faith and confidence in the minds of the accused, where they felt that PW-322 was their own person and their interest was the same. The extrajudicial confessions of all the three accused do not lack plausibility and they inspire the confidence of the court. This court is therefore of the opinion that though an extrajudicial confession is in the very nature of things a weak piece of evidence, in the instant case, in the very peculiar facts and circumstances, these extrajudicial confessions need absolutely no corroboration. They stand proved by the substantial evidence of PW-322, the CDs, VCDs and the oral evidence of the FSL scientist, etc. Hence these extrajudicial confessions, considering the foregoing discussion on its own merits, are found very dependable, reliable, having contents full of probability and it is found absolutely safe to convict the accused on the basis of these extrajudicial confessions.

7) Summary of CDs, DVDs and from the Deposition of PW-322

a) Exh-2259 is the excerpts of the CDs and DVDs sent to the FSL, Jaipur, for scientific examination. This has been prepared by the FSL, Jaipur.

b) PW-322 is the person who interviewed, and recorded the sting operation on, the three accused, viz A-18, A-21 and A-22. PW-322 has also reproduced the gist of the conversations he had with the three – A-18, A-21 and A-22 – in his testimony…

c) *Abstract of the Conversations of PW-322 with A-18, A-21, A-22, as testified by PW-322:*

c-1) Paras 30-46 of the testimony of PW-322 are from the interview with A-18 by PW-322.

c-2) Para 48 of the testimony of PW-322 is from the interview with A-21 by PW-322.

c-3) Paras 49-50 of the testimony of PW-322 are from the interview with A-22 by PW-322.

c-4) Paras 51 and 53 of the testimony of PW-322 are from the combined interview with A-21 and A-22 taken by PW-322.

c-5) Paras 54-57 of the testimony of PW-322 are from the interview with A-22 (mainly) and some part of the interview with A-21 taken by PW-322.

8) To satisfy the judicial conscience, this court also thought it fit to view the *muddamal* DVDs, as one of the CDs was certified to have become corrupted. This court has also viewed the relevant DVDs and CDs, and more particularly the parts concerning the three accused. It is observed by this court that PW-322 through his testimony before this court has provided certain glimpses of the entire conversations. While the DVDs were viewed, the following points have been found worth producing on record, which is the gist and substance of the conversations, in the words of the three accused, the summary of which is as under:

9) From the interview recorded by PW-322 with A-18 [Babu Bajrangi]

PW-322 has deposed that the interview with A-18 was recorded in the office of Babu Bajrangi, near Galaxy Cinema. The gist of the revelations by A-18 is as under:

- Once we were in the VHP, now in the Shiv Sena; we (Hindus) are not feeble-minded people (*kadhi, khichdiwale nahin hai*).
- The abdomen of the pregnant woman was slit with a sword; a large number of people were done away with at Naroda Patiya by him. They were charged with fanaticism. They had slaughtered the Muslims, they killed them. Ravana's Lanka was destroyed. Hinduism is within them.
- They were equipped with swords, bombs. Petrol bombs were flung.
- The moment I was noticed by the police, they immediately realised that now it would all be over (meaning thereby that the police were afraid of him). Had I not been in Naroda, nobody would have dared to come out.
- Twenty-three revolvers were collected at night (talking about the intervening night of 27.02.2002 and 28.02.2002). I shall not stop working for Hinduism until I die. I have personal notions about Hinduism. I have no fear even if I am hanged.
- The Chhara tribe has long indulged in stealing. They are powerful enough to overcome the Muslims. Now there won't be any Muslims in India. The moment I saw corpses lying in Godhra, that very night I decided and challenged that: "There would be four times more slaughter in Patiya than that of Godhra".
- I have two enemies, the Muslims and the Christians. I had been to Godhra. I have a pretty good rapport with the police.
- There were 80 to 90 dead bodies lying in Naroda Patiya, which were burnt to ashes with kerosene. They killed whoever came into their hands; they attacked from all sides.
- I am accused of murdering many people. The Chharas were with me. We went to Godhra where at night I had

challenged, saying: "They will face the consequences tomorrow". My name is enough to confound the Muslims.

- Mayaben (A-37) arrived at the Patiya at 4:00 p.m.
- If I am hanged, my last wish is to get two days' leave to blow up all Muslims with grenades. I have so much hatred for Muslims. I would incite rioters to start ravaging their (Muslims') buildings and properties.
- Bipin Panchal (A-44) and Manoj Videowala (A-41) were there. That day it was the Haldighati battle fought vigorously.
- We had besieged them. It was decided to slash them, whosoever comes out. I killed a lot of Muslims. The Chharas had slaughtered them.
- Mayaben kept wandering throughout the day in a car. I was a leader that day. We slaughtered Muslims; Patiya is half a kilometre away from my house. I and the local public were there to do the massacre at Patiya. Anyone who had gone to Godhra would have been provoked and determined to kill all Muslims then and there. We retaliated at Patiya. In Patiya, we secured the highest death toll. Naroda village is at a distance of only half a kilometre.
- I would go to Juhapura and slit 500 Muslims by the evening. I would resort to shelling if Hinduism so demands. They (Muslims) started dying after we reached there. One could not withstand the sight of the Godhra massacre and might feel the urge to retaliate. One would feel like taking revenge then and there.
- I had gathered a team of 29 to 30 volunteers at night itself (the intervening night of 27.02.2002 and 28.02.2002) and collected 23 revolvers. It was a befitting response.
- We and the Chharas executed the Patiya carnage. Not a single shop was spared in Naroda Patiya – everything was burnt to ashes. The Muslims were slaughtered. We used the gas cylinders lying in their houses.
- A pig was tied over the mosque. A tanker full of diesel was smashed into Noorani, the tanker was dashed against the mosque. We could dash into the mosque and all was set afire under our leadership.
- At night we got free petrol from the petrol pump. Then the massacre followed and everything was set ablaze. Any Muslim who dares to speak against me can no longer remain or reside in Patiya. The firearms were secretly placed elsewhere. I even did not use my licensed revolver.
- The Muslims were dazed by our valour. The men, women, even the children were slit and burnt to death. Some Muslims could escape by saying *Jai Shri Ram* and *Jai Mataji*. The carnage had occurred just behind the SRP. On return from the Patiya massacre, we felt very elevated, as if we were King Pratap. There were 50-60 policemen. We got cooperation from the police."

The above are abstracts of the interview with A-18… The record of C-Summaries brought from the court of the learned metropolitan magistrate has a complaint at Exh-1776/22 that is a strong supporting circumstance for accepting the truthfulness of the extrajudicial confession of slitting the stomach of a pregnant Muslim woman, which is noted to be truthful while appreciating the evidence. As such, the extrajudicial confession itself is sufficient and satisfactory evidence to convince this court that A-18 had slit the stomach of a pregnant woman. Nobody had heard or seen the Muslim woman mentioned in complaint Exh-1776/22, or heard that the Muslim woman had survived, till the date, which was more than seven years later. Hence there is no question of doubting the happening of the occurrence. It is therefore inferred by the court that the said pregnant Muslim woman died on that day of the riots.

In fact, in the case on hand, there is a charge of slitting the stomach of pregnant Kauserbanu, by A-18. It was forcefully submitted that the story of Kauserbanu was a development after the sting operation and was entirely fabricated. No such incident had happened. Exh-1776/22 is not a tried and proved fact but it indicates that such an occurrence was complained about right in 2002, even before the sting operation…

10) From the interview recorded by PW-322 with A-21 [Prakash Rathod]

- One word from Babu Bajrangi (A-18) and there would be crowds thronging. The entire Chhara Nagar would be out at his single call. Babu Bajrangi is the lion incarnate of the Hindus. Even today we would just blindly follow Babu Bajrangi.
- Burst many gas cylinders but the mosque was not much shaken. Firstly, they dashed into the Muslim chawl, a second time also, 12 Muslims were killed.
- Tiniyo Marathi (A-55) was there. Mayaben (A-37) was there where the occurrence took place. She said: "Kill, them. I am and will be with you always. You will always have my backing." Mayaben was there for 30-45 minutes. He had engaged in riotous activities. Used a baton, stick, sword and trident. Had weapons which they had used on that day of the riots.
- A-22 [Suresh Langdo] had all kinds of weapons except revolvers. Guddu Chhara was very bold, he also killed many Muslims. His awe was too much. Suresh (A-22), Guddu [d.], Naresh (A-1) were not tired. They did very well.
- I had cut off the hands and legs of many. I did not go inside (the Muslim chawl). All other Chharas went inside. I was outside and whoever came out, I beat that person and made him turn back into the chawl where other Chharas were there.
- Bipin Panchal (A-44) came along with his team of men to the Muslim chawl. They all went inside. Since Hindus were killed, they also needed to be taught a lesson. Suresh (A-22) has a strong enmity against the Muslims; he has kept a Muslim woman (as his mistress), in tussle with some Muslims. In fact, he was to marry the elder sister of

this woman but only a day before that marriage, he ran away with this woman. He ate, slept, did everything with the elder sister of this woman. After this, the Muslims did not do anything because Muslims are afraid of Suresh (A-22); even certain policemen are afraid of Suresh.

➢ Mayaben assured us: "I am with you." Babu Bajrangi is our god, we will obey his orders. Mayaben said: "I will always be with you and stand by you." Babu Bajrangi would secure the release of anyone from police custody with only one phone call. Babubhai (A-18) had arranged, from within jail, for Rs 1,000 to be paid to each of their families at their doorstep.

➢ The Vishwa Hindu Parishad was known by the name of Babu Bajrangi (A-18). Tiniyo Marathi (A-55) was also there, a Nepali and another Marathi were also there. Mayaben delivered a speech there (at Patiya).

11) From the interview recorded by PW-322 with A-22 [Suresh Langdo]

➢ Manoj (A-41), Mayaben (A-37), Kishan Korani (A-20), Bhavani [d.], Babu Bajrangi (A-18), were the main leaders who were present there. Kishan (A-20) and Manoj (A-41) are close aides of Mayaben (A-37). They are the left and right hands of Mayaben.

➢ Truckloads of weapons, pouches of water and snacks were brought in. Gas cylinders were used in the occurrence. We were helped (talks with reference to fiscal help) by Babu Bajrangi (A-18) only. Pipes, batons, were taken from our homes. I had participated in the riots. I had no repentance for whatever I had done.

➢ Had Chharas not been there, then these RSS, VHP and Shiv Sena people could not have done to death the Muslims on that day. Mayaben was there at the site on the date of the occurrence for the whole day up to 8:00 p.m., in her car, making rounds, and on every round, she was telling us: "You are doing proper deeds, go ahead."

➢ After the torching started, certain Muslims were killed and were thrown inside (the Muslim chawl). Some Muslims had hidden in a gutter. They closed the lid of the gutter and put heavy bricks on it. Dead bodies were found from there. The riot continued up to 8:30 p.m.; because of stone-pelting, giving knife-blows, giving pipe-blows, etc, we were tired. I was inside (the Muslim chawl).

➢ Mayaben was making rounds in her car for the whole day. Mayaben was telling us: "Continue doing all these deeds, I am at your back". She wore a white sari and put on a saffron belt. We were doing slogan shouting and had on saffron bands. We were throwing gas cylinders. I killed a sleeping pig with a spear-blow. We tied that pig on the mosque and unfurled the saffron flag. We broke minarets of the mosque. Some eight-10 boys did all this. We even dashed a tanker against the mosque by taking it in the reverse direction often. That tanker was a Muslim's. One of them brought it, taking it away from the Muslim. We could damage the mosque with this tanker. The tanker was full of kerosene or petrol. After sprinkling kerosene and petrol like the fire brigade sprinkles water, we burnt Muslim chawls. We broke the wall of the mosque by reversing the tanker often. Some were also killed there. The chawls were set ablaze using petrol.

➢ Rape was committed by two-four of them. About 2,000 Chharas went inside the Muslim chawl, some drunkards or hungry men might have committed rape. If fruits (meaning girls) were lying, the hungry would eat it. In any case, she (the Muslim girl) was to be burnt hence somebody might have eaten the fruit.

➢ Two to four rapes, or maybe more, might have been committed. Who would not eat fruit? In whatever number Muslims are killed, it is still too little. I would not leave them. I have too much rancour (malice) against them (Muslims). Even I raped a girl – the daughter of a scrap man (one who is in the business of scrap) – named Nasimo, she was fat. I raped her on a roof and then threw her from there. I smashed her, cut her into pieces like achar (pickle).

➢ He speaks in the interview to explain to PW-322 what kind of pain he gave parents: "If our child was thrown into the fire by him and if we see him thereafter, our hearts would burn." Hence after the occurrence, being secure, they (Muslims) said: "here is that Langda who had thrown my child into the fire."

➢ Muslims did tilaks of blood, said *Jai Shri Ram* and saved themselves on that day but some of them were known to him (A-22); I killed them. Mayaben told the police that "do not do anything today".

➢ According to PW-322, Sajan, the nephew of Ganpat (A-4), was sitting there with Suresh; he said that "had our tribe, Chharas, not been there to help, the success of this riot would not have been possible".

➢ No one has done as much as the Chharas have done. They (Muslims) had settled for 60 to 70 years – in Naroda Patiya. They were rescued by the SRP; in the 1969 riots.

Opinion

12) The above are abstracts of the interview with A-22. If the depositions of several eyewitnesses, like PW-158, are appreciated, if the deposition of a victim of gang rape, Zarinabanu (PW-205, and wife of PW-158), is perused, if the deposition of PW-142 is perused, and while noting the extrajudicial confession of A-22 of having raped a Muslim girl named Nasimo, it becomes doubtless that the occurrence of rape had also taken place at the site of the offence and on the date of the occurrence. The probability of outraging the modesty of Muslim women is also on record.

13) Interviews with some of the victims are also found to have been recorded on the DVD wherein also they have named some of the accused who had played lead roles.

14) The CDs and DVDs are video and audio documents wherein voices as well as gestures have been recorded. Since vide Exh-2259 the FSL report is on record, which certifies that the CDs and DVDs produced are genuine, not tampered with and not set up in any manner, this certificate makes the DVDs and CDs admissible as evidence. It is relevant, since it contains details about the incident and the interviews taken, by PW-322, with A-18, A-21, A-22 and other persons concerned with the crime.

15) The CD which was prepared from the VCDs has also been certified by the FSL for its genuineness and not having been tampered with. Hence the genuineness and even the evidentiary value of the said cassettes have not been affected.

As discussed, the cassettes and VCDs are not merely a document but are more akin to real evidence. Hence the court can take cognisance of what is seen and heard in these DVDs and VCDs.

16) It is very much on record, no new facts that did not initially form part of the case were put up by the prosecution. PW-322 had prepared transcripts of the three interviews, which were given to the defence, and those transcripts were also produced on record by PW-322. PW-322 had these transcripts in hand as he testified about some parts of them. Even a copy of the CD had been given to the defence.

a) Moreover, the 15 DVDs from which CDs were prepared were in fact on record and the certified copies prepared by the Gujarat FSL were made part of the record as *muddamal* of this case. In fact, the SIT ought to have done that. The point here is that sufficient, fair and reasonable opportunities were given to the defence and PW-322 was even extensively cross-examined by the defence. As regards the defence of A-21 and A-22, it can only be stated that in fact their conversations were not substantially challenged at all and that their conversations, placed on record by PW-322 and proved to be genuine by the scientist of the FSL, Jaipur, remained uncontroverted and unchallenged. Unsuccessful attempts were made to put forth a defence qua the conversation of A-18, which has been discussed hereinbelow.

b) Since the accused had information right from the beginning as to what they had revealed in their interviews and the accused were also given full opportunity to know the contents of the CDs and DVDs and the PW who had recorded the CDs and DVDs had also testified on the conversations and was also extensively cross-examined by the defence, no doubt whatsoever is created about the prosecution case put up through these CDs and DVDs and the oral evidence of PW-322 and other concerned witnesses…

17) PW-314, Exh-2213 to 2216

a) PW-314 was the then director of All India Radio/ Akashwani, Ahmedabad. He received Exh-2213, a request by the SIT to take voice samples of A-18, A-21 and A-22. He undertook necessary correspondence with the SIT vide Exh-2213; after receiving the sanction of the competent authority to record the voice samples, the recording was done.

Exh-2215 and 2216 are orders of the director general, Prasar Bharati, New Delhi, granting permission for voice sample recording. This witness through his staff did record voice samples of all the three and had also collected necessary documents to confirm the identity of the accused and completed necessary formalities like the certificate, sealing the CD and giving it to the SIT; a *panchnama* was drawn for it, which is at Exh-2203.

b) *Cross-examination of PW-314:* PW-314 was cross-examined on many aspects but none of the aspects is such that the revelation of it has created any doubt in the mind of the court about the official act done by PW-314 through his officers having been irregularly performed. At the cost of repetition, this, being an official act, is presumed to have been done in accordance with drawn procedure, rules and regulations. The sample voice recording of A-18, A-21 and A-22 has been proved to have been done quite properly beyond reasonable doubt.

c) *Finding on PW-314:* Hence it is held that through this PW the prosecution has proved beyond reasonable doubt that the voice samples of A-18, A-21 and A-22 had been recorded absolutely in accordance with law and proper procedure was adopted for the same. No doubt is created on the propriety of that act.

18) PW-320, Exh-2258 and 2259

a) During 2002 to 2009 this witness was at the CBI, Bombay, who received the order to carry out a preliminary inquiry registered on account of the order of the National Human Rights Commission. The inquiry was to the effect that in the news channel known as Aaj Tak, 'Operation Kalank' was telecast on 25.10.2007, in which programme, CDs and DVDs were used and that by carrying out the inquiry, the genuineness or truthfulness of those CDs and DVDs was to be examined.

b) The witness did carry out the inquiry, recording necessary statements like that of the reporter from *Tehelka*, Shri Ashish Khetan (PW-322), as it was from *Tehelka* that the news channel known as Aaj Tak had purchased the CDs and DVDs.

c) According to PW-320, Shri Khetan had prepared 15 DVDs of the sting operation (done on different persons, including the three accused herein). It is from these DVDs that five CDs of the sting operation were made. The witness had also interrogated A-18, A-21 and A-22; he had also seized the camera, recorder, laptop, hard disk, etc, and had sent all the *muddamal* to the FSL, Jaipur, to scientifically decide their genuineness. The FSL had given the report that these were genuine DVDs and CDs wherein no tampering had been done.

d) The statements of the scientific officers of the FSL were also recorded and ultimately a report was given to the NHRC by the CBI. The witness kept the DVDs and CDs from the *muddamal* and other *muddamal* was returned to *Tehelka*. The witness had then handed over those DVDs and CDs to the representative of the SIT.

e) The correspondence from the witness to the FSL, Jaipur, is Exh-2258, along with parcels. The receipt, the opinion, the script made out of the DVDs and CDs sent to the FSL, etc, from page Nos. 1-138, viz Exh-2259, were received by this witness from the FSL, Jaipur.

PW-320 wrote Exh-2258 to the FSL, Jaipur, with a request to examine the exhibit, to opine on its authenticity, opine as to whether there was any editing or tampering done in the 15 DVDs; whether shooting was done by the *muddamal* instruments; whether the five CDs were excerpts of the recording of the sting operation; and whether any addition was made in the five CDs of 'Operation Kalank'. The parcels were sealed and sent.

f) Exh-2259 is a receipt for the *muddamal* sent by the FSL, Jaipur, along with the report, admissible under Section 293 of the CrPC, from the FSL, Jaipur – results of the examination, certifying the credibility, the genuineness and authenticity of the recording, DVDs, CDs, which were found to have been without any tampering. The speech, utterances, laughter, body language, of the persons appearing in the recorded events, matched with the video signals…

g) *Cross-Examination of PW-320:* During the course of cross-examination questions related to the propriety of the procedure were raised but in the light of Section 114 (Illustration-e) of the Indian Evidence Act, it is presumed that the acts have been regularly performed, which was not rebutted by the defence. All other questions are not material, since the witness was only to decide the genuineness of the CDs and DVDs.

An important aspect becomes clear when para 31 of the testimony is read, wherein the witness has stated that the persons, including A-18, A-21 and A-22, had stated before this witness that the persons shown in the sting operation were they themselves. The fact is that the witness has admitted that A-18 had said before him that in the sting operation, he was given a script and the voice in the sting operation was his and that A-18 spoke according to the script.

h) *Finding on PW-320:* Through this witness and Exh-2258 and 2259, it is clear that this witness had obtained the opinion of the FSL about the genuineness of the DVDs and CDs, about the fact that they had not been tampered with and that the recorded voices were those of the three accused. No doubt is raised about the genuineness and propriety of the recording; the concerned recording of the voices of the three accused and the CDs and DVDs are without any tampering whatsoever.

19) PW-322, Exh-2273

a) The witness was employed at *Tehelka* in 2007, at which point of time he had an assignment for which he was in Gujarat. Thereafter, he was assigned the task to investigate about the communal riots of 2002. The witness was therefore in Ahmedabad where he met different persons from the RSS, VHP, etc. He was given a lot of information about the communal riots of 2002 and about Hindutva. He was also informed that the strongest unit of the VHP was in the Naroda area, because of which the massacre at Naroda Patiya could take place. Having learnt the telephone numbers of different persons connected with the VHP, he telephoned people; he also met many persons through inter se references.

b) The witness met A-18 on 14.06.2007 when he called in at the office of A-18. The witness introduced himself as a research scholar on the subject of Hinduism. The witness had transcripts of the conversations with all the three accused; he recorded all his meetings with the three accused with a spy camera and a diary camera which he then used to save those talks on his laptop.

c) The witness produced transcripts of the recording of the meetings and interviews with all the three accused.

The witness also reproduced, line by line, the important aspects, according to him, of the conversations he had with the three accused. The witness identified all the three accused with whom he had conversations, whom he had interviewed and on whom he did the sting operation. All the *muddamal*, including the earphone, microchip, battery, tape recorder, both the cameras used for the sting operation, were produced before the court. This court has seen all the *muddamal* produced here. The copies prepared by the FSL on DVDs and CDs have been retained in the record of this case.

d) *Cross-examination of PW-322:*

d-1) During the course of cross-examination nothing was elicited which attacked the very heart of the entire prosecution case relating to the sting operation. On the contrary, it stands confirmed that the sting operation was done by this witness, which took 50 hours or more. The appointment letter of the witness was sought during cross-examination, which was produced by the witness on a demand by the defence and is on record at Exh-2273, which confirms the case of the prosecution about the sting operation having been done by the witness while he was employed at *Tehelka*. This proves that the PW had not acted with any personal malice against the accused but had acted as a member of the press.

d-2) The witness specified and clarified that he had a duty to report the truth, which is in the public interest and in the interest of justice. He added that all that had been recorded is truth. This fact is also supported by the FSL opinion and the deposition of PW-323.

d-3) The witness was cross-examined on the fact that he had assumed a false identity by introducing himself as Shri

Piyush Agrawal and thus it was with the help of falsehood that he had done the sting operation.

In the opinion of this court, this is the age of aggressive and investigative journalism and the pivotal point of central importance is not the fake identity assumed by the witness but it is whether the sting operation on the three accused and others was done and whether it can be termed to be voluntary, truthful and reliable or not.

d-4) As has already been discussed with regard to the gestures and place of the sting operation, the place was the residence of A-22 at Chhara Nagar for A-21 and for A-18, it was his own office near Galaxy Cinema. There does not seem to be any compulsion, mistake, misrepresentation or inducement or undue influence applied on any one of the three accused. They spoke voluntarily. It absolutely seems to be voluntary and quite truthful, reliable and dependable. No element has been noticed because of which it can be doubted that it was not voluntary. They are clear, unambiguous revelations made in a fit state of mind. They seem to have been recorded while the accused were free from any element which could create a doubt about voluntariness; complete free involvement of the three accused is too apparent. No doubt is created whatsoever about this central point of consideration for this court. There is absolutely no contradiction to be highlighted and all the omissions are not material and relevant, as nothing in them is related to the three accused in this case.

d-5) The gist of the revelations by all the three accused on the DVDs and CDs has been placed in capsule form hereinabove. The relevant part of the testimony of PW-322 involving the three accused has also been highlighted hereinabove hence the same has been not repeated here. Suffice it to say here that all the three accused gave their interviews quite voluntarily and there was no element of either inducement or any other such hindering elements.

d-6) It is also notable that a defence has been raised only qua A-18, stating that A-18 was reading a script because of the inducement offered by PW-322, but this defence is found to be a totally baseless defence when this court has viewed the 15 DVDs and the four CDs (the concerned part for this case). This court found that A-18 was fully in the mood to tell of all his horrifying deeds on the date of the riots. At the cost of repetition, it is to be noted that this court keenly observed that throughout his interview he kept eye contact with this PW and not even once was he seen to have been reading and then speaking.

d-7) As far as A-21 and A-22 are concerned, no defence by way of any suggestion has been put forth for them. Hence for them, the sting operation and the admissions made therein have remained unchallenged and uncontroverted. The sting operation on the remaining two is held to be voluntary and absolutely reliable and deemed to have been admitted during the trial.

d-8) As far as the revelations are concerned, they clearly involve A-18, A-21 and A-22, as they themselves admit by way of the extrajudicial confessions before PW-322 their involvement in the crime of the Naroda Patiya massacre. The confessions by the three accused are found to be most dependable, clear, unambiguous, and they very clearly convey that the three accused and the co-accused are perpetrators of charged crimes. They pass with distinction the test of credibility.

d-9) Moreover, the extrajudicial confessions made by the three accused before PW-322 are absolutely clear, cogent and appear to have been made in the normal course without any pressure, inducement, etc, and seem to be absolutely voluntary and reliable. Hence the said extrajudicial confessions cannot be discarded and should be given due importance, as they can be the basis for conviction as laid down in *SK Yusuf vs State of West Bengal*. Here it needs a note that A-18, A-21 and A-22 are makers of the confessions hence they stand on a different footing than the co-accused whom they also involve.

d-10) PW-322 has no mala fides and if the DVDs and CDs are viewed, he had not prompted or induced any of the accused to confess but the accused themselves, in their natural free flow, entered into conversation with PW-322 who had not played any other role except to nod his head and utter one or two words. The confessions made by the accused were certainly not because of any threat or promise given by PW-322 and also not because of any inducement. Hence the extrajudicial confessions made by the three accused before PW-322 is most relevant evidence and needs to be considered in the right perspective, keeping in mind the facts and circumstances of the case.

d-11) By a submission of the defence, this court is called upon to just ignore the DVDs and CDs, which would be clearly impermissible.

A-18 had throughout the revelations expressed his then clear intention to damage and destroy properties of Muslims and to do away with Muslims four times more in number than the death toll in the Godhra carnage. He revealed that when he saw Hindu dead bodies at Godhra, there itself he had given a challenge on the previous day, viz 27.02.2002, that he would raise the death toll of Muslims at Naroda which would be four times more than at Godhra. He further stated on the DVDs that he had collected 23 firearms during the night. He also said that he had two enemies, Muslims and Christians. The conversation also reveals that A-37 came in the morning, even at 4:00 p.m., there were A-44, A-41, etc, and that he himself had collected a team of 29-30 persons on the previous night.

d-12) The sting operation on A-21 is also interesting wherein he reveals that A-18 was the lion of Hindus and at his call, the entire Chhara Nagar would come out. He states that A-55 was there, A-22 was there, A-18 was there, A-37 had instigated and had assured that "she is with them", A-37 waited for half an hour to 45 minutes, there was a Nepali

and another Marathi (both are absconding accused), etc.

d-13) The interview with A-22 is also quite interesting wherein he made the confession of having committed rape on a Muslim girl named Nasimo. A-22 revealed that more than two to four rapes must have been committed on that day. He stated that he felt a sense of vengeance on seeing any Muslim. He made the revelation that there were A-16, A-4, Sajan Didawala and A-37.

d-14) As has been held in the judgement in the matter of *Yusafalli Esmail Nagree vs State of Maharashtra* (AIR 1968 Supreme Court 147), while holding that the tape record was admissible evidence, it must be proved beyond reasonable doubt that the record was not tampered with. In the instant case, the doubt of tampering has absolutely been ruled out by obtaining the certificate of the FSL to the effect that the DVDs and CDs produced are not tampered with and are genuine.

This is the age of technology. One cannot shut one's eyes to the hard reality that use of technology is very common these days and when there is even a picture along with a voice, it becomes more reliable, as it is said that voice may be manipulated on an audiotape but it is technically nearly impossible to manipulate the picture without it being noticed. In the wake of the Information Technology Act, electronic, magnetic tape devices can be termed as valid documentary evidence and when there is no reason to disbelieve the VCDs and CDs produced on record, the same become most reliable.

e) *Effects of the extrajudicial confessions of the three accused:*

e-1) Section 30 of the Indian Evidence Act needs to be held to be in operation in this case, as its ingredients stand satisfied in the facts of the case. The basis of Section 30 is that when an accused makes a confession implicating himself, that may suggest that the maker of the confession is speaking the truth. It is not likely that the maker of the confessional statement would implicate himself untruly. This is not a weak type of evidence against the maker himself. A-18, A-21 and A-22 are themselves makers of the confessions. Hence the court needs to consider the said confessions.

As and when it comes to be applied in the case of co-accused, it is essential to first of all marshal the evidence already emerging against the said accused and if the conscience of the court is satisfied of having sufficient evidence then, if the accused are tried jointly, as are being tried in this case, the confessions of the co-accused can certainly be called into aid.

e-2) The trial is being jointly held against all the 61 accused and all of them are being tried for the same offence. By way of confession, the three accused have proved the presence, involvement and participation of many other accused as mentioned hereinabove.

In the light of Section 30 of the Indian Evidence Act, since the proved confessions also affect certain co-accused, the said confessions can be taken into consideration even for the co-accused who have been referred to, as discussed above, by the three accused who have made the confessions.

e-3) This court is conscious that the confessions of the co-accused are not substantial evidence against their co-accused but can certainly be used to fortify the prosecution case if other evidence is available on record. Therefore it is held that if any other evidence is available against A-1, A-4, A-37, A-41, A-44 and A-55 and deceased Guddu then the confessions can very well be used against the accused. As has already been discussed, there is cogent, credible and positive evidence against A-37, A-41, A-44, A-55, A-18 and A-22, of having hatched a conspiracy and of having executed it or got it executed through co-accused (for A-37), for the charged offences of race murders, etc. The evidence of extrajudicial confessions is therefore held to be corroborating the case of having hatched a criminal conspiracy, against all these co-accused…

e-4) In the light of Section 10 of the Indian Evidence Act, it is important that anything said or done by any one of the conspirators with reference to their common intention after such intention was first entertained by any one of them is a relevant fact against each of the persons believed to have conspired and also for proving the existence of a conspiracy.

e-5) The fact of A-18 having said, as a challenge at Godhra, that he would raise the death toll to four times more is obviously after the intention to take revenge on Muslims hence this is a relevant fact that was with reference to the common intention. Moreover, as has already been narrated above while noting the gist of the DVDs and CDs, his acts of making a team of many persons at night, and collecting 23 revolvers, all clearly prove the existence of a conspiracy and the hatching of a conspiracy that was thereafter executed by the accused mentioned, under the leadership of A-37.

e-6) Thus the finding of a conspiracy having been hatched, of the existence of the conspiracy at that point of time and on that day, and about the execution of the conspiracy is clearly and strongly fortified by the above points.

f) *Finding on PW-322:*

f-1) It is therefore held that A-18, A-21 and A-22 have made extrajudicial confessions before PW-322, which has been proved by PW-322 and which can be viewed on CDs and DVDs, which are most reliable and the court can safely depend on the same.

f-2) From the revelations of all the three accused, they also involve the proved presence and participation of many other accused in the crime through their extrajudicial confessions. These accused are A-37, A-4, A-16, A-55, A-41, A-44, Marathi (the exact name of Marathi is not ascertained, since in all the three lists, viz live, dead and absconding accused, there are in all four to five Marathis who are charged with the offence) and Nepali (absconding accused). If any other reliable evidence against these accused is held to be available on the record then the extrajudicial confessions of the co-accused, A-18, A-21, A-22, can be used to fortify

the prosecution case against them…

20) PW-312, Exh. 2201 to 2203

PW-312 is an unarmed Head Constable of Navrangpura Police Station, who was PSO then, who had issued the Muddamal receipt for the CD received of the sample voice recording of the three accused. The order from PW-327, which he received to carry out the task is at Exh.2201 whereas the Muddamal Pavti is at Exh.-2202. This CD of voice sample wherein the sample voice of A-18, A-21 and A-22 were recorded, was seized by drawing a Panchnama on 07/04/2010 which was sealed there. This Panchnama is on record vide Exh. 2203.

In the opinion of this court, the witness and three documents very clearly established proprietary and regularity of the official act done by PW-327 of collecting the CD containing sample voice of the three Accused.

21) PW-323, Exh-2275, 2276, 2277 (Defence)

21.1) This witness is a scientist from the FSL, Jaipur. Along with Dr Vishwas Bhardwaj and Dr Mukesh Sharma, this witness examined all the *muddamal* sent to the FSL, Jaipur, by the CBI and gave the opinion about the recording, CDs, DVDs, etc being genuine and without any tampering. Exh-2275 is a receipt for the CD of the voice samples of the three accused. Exh-2276 is the opinion of this scientist to the effect that the conversations of the three accused recorded on the CDs and DVDs are of the three accused respectively, as is confirmed upon comparison of the voices and similarity in frequency, intonation patterns, phonetics, etc, with the voice sample CD. It has been opined that the speakers, respectively A-18, A-21 and A-22, are the same whose interviews have been recorded.

21.2) The defence had sought Exh-2277, which was a letter by PW-327 to the FSL, Jaipur, with a request to give a report comparing the voices recorded in the sting operation with those recorded on the CD of voice samples.

21.3) During the course of cross-examination nothing was focused on and/or proved which can create any doubt in the mind of the court about the genuineness of the opinion given by the FSL, Jaipur…

21.5) It is also clear that Section 10 of the Indian Evidence Act is based on the principle of 'agency'; hence anything said, done or written while the conspiracy was ongoing is all receivable in evidence and in this case, what A-18, A-21 and A-22 have talked of was before the conspiracy was executed and during the execution of the conspiracy and there is nothing brought on record by the three accused which came into existence after the conspiracy was ceased hence Section 10 is applicable. As a result, the statements made, anything said or done, etc, shall be admissible against another conspirator.

22) Final Finding on Sting Operation

While concluding this topic, the following points emerged very clearly:

a) The extrajudicial confessions of A-18, A-21 and A-22 are held to have been proved voluntary, free from every doubt, and they pass the test of credibility thoroughly. As such, no corroboration is required for extrajudicial confessions of this kind but since there are ample corroborations available from the record of the case, the same need to be recorded here as a finding of the court.

The oral evidence of PW-312, PW-314, PW-320, PW-322 and PW-323 r/w documentary evidence at Exh-2201 to 2203, 2258, 2259, 2213 to 2216, 2273, etc, further viewing it with 15 DVDs shot by PW-322 and further hearing it from five CDs of 'Operation Kalank', it is clear and confirms that the extrajudicial confessions can safely be acted upon qua the three accused, which are held to be relevant, admissible, and it is safe to convict the three accused on these confessions also.

b) In the facts of the case on hand, the extrajudicial confessions given by A-18, A-21 and A-22 have been held to be truthful, voluntary and genuine confessions which are held to be admissible and relevant, free from every doubt and safe to act upon.

That against the non-maker co-accused, who are being jointly tried with the three accused whose confessions have been held to be safe to be acted upon, they cannot be treated as evidence but if, from the evidence otherwise available against the co-accused, which can be marshalled from the record of the case, if from that the co-accused are found connected with the crime then the extrajudicial confessions have corroborative value. These co-accused are A-1, A-4, A-16, A-20, A-37, A-41, A-44, A-55 and others. At the cost of repetition, let it be noted that if the evidence on record is found to be capable enough to point to their guilt then only can the confessions of the co-accused, viz A-18, A-21 and A-22, be used to corroborate the finding of this court against the said co-accused…

FAILURE OF THE SIT TO SUBSTANTIATE EVIDENCE

Mobile Call Details

1) PW-318, when read with PW-327 [Shri VV Chaudhary, IO, SIT], it becomes clear that originally the mobile phone call details of the accused were obtained by PW-318: Shri PL Mal, IO of Naroda Gaon (ICR No. 98/02), as some of the accused are common to this case and the case of Naroda Gaon. According to the prosecution case, the mobile phone call details were obtained for the mobile numbers used by A-18, A-37, A-62 and A-44. It is also related to the landline numbers of A-24, A-20 and A-62, which, in the case of A-62, is for the landline number over and above his mobile number. On requisition by the investigating officer in this case i.e. PW-327, IO Shri Mal: PW-318, had sent the mobile phone call details which he had procured during his investigation by copying the CD of the phone call details through the FSL, Gujarat, which was received by the investigating officer. Thus the source of knowledge for the investigating officer in this case, about the telephone numbers as well as the phone call details, is from the IO in the Naroda Gaon case. PW-311: Shri Gedam was the then PSI who was handed the task of mobile phone call details analysis, which he did and gave to Shri Chaudhary, the investigating officer in this case.

2) In his deposition, at para 20, PW-311: Shri Gedam, the mobile phone call details analyst, had admitted that the names of persons did not appear in the phone call details, as at that point of time the name of a mobile phone holder or, say, subscriber of a particular mobile number, was not shown if the subscriber was a subscriber of Celforce whereas in the case of the CD of AT&T, such names did appear. It was specifically admitted that in the case of the mobile number of A-44, which was of the then AT&T company, since such a facility was available with AT&T, his name appeared in the CD given by the company itself whereas in the case of the other accused, which were included in the CD of Celforce, the names did not appear in the CD of call details given by Celforce. The witness had further admitted that he did a detailed analysis of the mobile call details only for the accused whose names and numbers were given to him and that he had not gone to the mobile phone companies to specifically find out which mobile phone number belonged to whom or was subscribed to by which accused.

3) While reading para 29 of the deposition of the said witness, it stands clear that except in the case of A-44, the mobile phone companies had not provided the names of any of the subscribers, connecting the subscriber (connecting the accused) with a particular telephone number. He voluntarily added that on the basis of the forwarding letter which he had received from PW-327, he wrote these names for clarification in the mobile call details analysis he did.

4) The said forwarding letter is on record at Exh-2362. This letter is by PW-327 to PW-311, requesting him to do the phone call analysis wherein the names of A-18, A-37, A-24, A-20, A-62 and A-44 have been mentioned against the telephone numbers which, according to the prosecution case, belonged to each of them.

4.1) As clarified by this witness, he did the analysis and returned the analysis report along with a forwarding letter at Exh-2192. In Exh-2362 and Exh-2192, the mobile phone number against the name of Shri Kirpalsing is written as 9825074044 but, as has been clarified at para 7 by PW-311, the number was 9825047044.

4.2) From the above admissions, it becomes clear that in the mobile phone call details, the names of the accused and the telephone numbers have been written by this witness on the basis of the information given to him in writing by the investigating officer in this case and not on the basis of any other source.

5) In the cross-examination of PW-327, at para 261 of his testimony, the investigating officer in this case stated that he had investigated about the names of the subscribers of the telephone numbers mentioned in the letter: Exh-2192. At para 262, the witness clarified that his successor investigating officer had perhaps investigated about the subscribers of the two landlines mentioned in his letter at Exh-2362, viz, according to the prosecution case, the residence phone lines of A-24 and A-20. He thereafter produced on record the said information collected by his successor investigating officer from BSNL, vide Exh-2342 and Exh-2343 for the residence landlines of A-24 and A-20 respectively. In para 265, the witness admitted that he himself had not investigated about the subscribers of the six numbers mentioned in Exh-2192. He did however clarify that he had sought the information from the mobile companies but the same was not made available to him while he remained investigating officer.

6) From para 266 onwards, the witness admitted that as far as the mobile number 9825020333 (the number written against the name of A-18 at Sr. No. 1 in letter: Exh-2362 by the witness) is concerned, it was revealed during his investigation that the said number was not subscribed to by A-18 but the said mobile was being used by the office of the VHP in the year 2002; the mobile phone was used by the office of the VHP, which was even used by other persons over and above A-18. In para 269, he clarified that, according to the witness, it was revealed during his investigation that on the date of the occurrence, the phone was not with any of the accused in this case.

This creates many reasonable doubts about the mobile phone having been subscribed to and used by A-18 on the date of the occurrence. Hence the benefit of the doubt is granted to A-18 qua this point only.

7) In the testimony of the investigating officer in this case, Shri Chaudhary, in para 329, he admitted that he had not recorded the statements of the subscribers of the two landline numbers shown against the names of A-24 and A-20. It was further stated that in the case of both these landline numbers, no documents had been collected from the lady subscribers of the two landlines and no investigation had been done as to who stayed at those addresses.

8) From para 332, it becomes crystal clear that this investigating officer had written the names of the accused in Exh-2362 against the mobile numbers on the basis of the information he had received from Shri Mal: PW-318, the IO in the Naroda Gaon case. This clarifies that to connect the telephone numbers with the accused, this witness had only depended on PW-318. It was admitted that no crossmatching and confirmation had been done by this investigating officer.

9) If para 784 is perused then it becomes clear that the information about the four mobile phone numbers sought by him had been received. The information sent by Vodafone is at Exh-2389. Upon perusal of this documentary evidence, it is clarified that the mobile phone number which had been mentioned by this witness in his letter at Exh-2362 against the name of A-18, was in the name of one Sunil Sevani and not A-18. The number shown against the name of A-37 was subscribed to by the BJP and not by A-37 personally. The number of Kirpalsing, which, according to Vodafone, is 9825047044, was subscribed to by A-62. No further investigation was done to find out, as to the mobile number in the name of the BJP, who it was in fact used by. Hence in the absence of any evidence, it can be held that A-37 was using it on the date of the occurrence. Thus out of the four mobile numbers, the mobile numbers shown against A-18 and A-37 do not stand proved beyond reasonable doubt to have been subscribed to by the two accused in the year 2002 and were used by the accused on the date of the occurrence.

10) Exh-2390 is the letter from Idea Cellular wherein the mobile number 9824085556 is shown to have been subscribed to and hence can be inferred to have been used by A-44 on the date of the occurrence. Thus out of the four mobile numbers mentioned at Exh-2362, only two of the mobile numbers, of A-62 and A-44, stand proved to be of the accused against whose names the mobile numbers have been shown.

11) No substance is found in the defence raised by A-24 and A-20 by way of cross-examination and oral submission about the landlines having not been proved to have been used by them. Exh-2342 is the record of BSNL for the landline number shown against the name of a family member of A-24. If this documentary evidence is seen, the address where the telephone number was working and the address of A-24, which can be traced from the record of the court of the learned metropolitan magistrate when A-24 was arrested, is the same. Meaning thereby that the address where A-24 is shown to be residing is the address where the landline was working. In the same way, if Exh-2343 is seen, and more particularly internal pages 48 and 49 are seen, it is clear that the address mentioned in the record of BSNL is the address of A-20 on record when A-20 was arrested, which can also be confirmed from the record of the court of the learned metropolitan magistrate.

12) Now therefore, it is clear on the record that as far as the telephone numbers of A-20, A-24, A-44 and A-62 are concerned, the same are proved to be respectively the mobile numbers or the landline numbers, as the case may be, subscribed to or used by or found to be installed at the residences of the respective accused and it stands proved beyond all reasonable doubt that in the year 2002 the telephone numbers as mentioned in the letter of PW-327 at Exh-2362 were used or subscribed to by the respective accused as shown against their names.

13) It is true that these four accused were using or had subscribed to the mobile numbers or the landlines. But upon perusal of the phone call details, it seems that:

a) Exh-2195 is the phone call details of A-24 wherein the analysis is related to the mobile numbers of A-18 and A-37, both of whom have been granted the benefit of the doubt.

b) Exh-2196 is the phone call details of A-20 wherein the analysis is related to A-37 only.

c) Exh-2197 is of A-62 wherein also the analysis is related to the mobile number of A-37 only.

d) Exh-2198 is of A-44 wherein no analysis is made hence nothing stands proved.

Considering the above situation, the mobile and landline phone call analyses do not prove anything to help the prosecution.

14) As has been submitted by the learned advocate Mr Kikani for A-37, at Exh-2194, which is the mobile phone call details of telephone number 9825006729, there are discrepancies and apparent contents which create reasonable doubts about the genuineness of the document. He invited the attention of the court to internal page 5 wherein, after the time of 16:14, the times of 16:09, 16:11 and 16:13, etc have been written. This court is in agreement with the learned advocate Mr Kikani that in a computerised document, it is not probable that the time would not be reflected in proper order, as the time of 16:14 hours can never be before 16:09, 16:11 or 16:13 hours on the said date.

This creates a reasonable doubt about the genuineness of the document and this reasonable doubt is sufficient not to attach any value to the said documentary evidence. Hence benefit is granted to A-37 only on this count as far as the mentioned mobile number is concerned.

15) It is true that as a matter of fact, while appreciating the evidences put up before the court, that of the phone call details, no aid is available to the prosecution, as, on scrutiny, no incriminating material or probability stands revealed of hatching a conspiracy as far as communicating through the mentioned telephone numbers is concerned. Hence technically, A-37, A-18, A-44, A-62, A-24 and A-20 are able to secure the benefit of the doubt as far as these phone call details are concerned. But it is notable that in the year 2002 the mobile phone was quite popular and was freely used as a mode of communication. A-37, A-18, A-62, A-44, etc have been alleged to have been in contact through mobile phones. None of them have stated that they did not have a mobile in 2002 and that they had no telephonic contact with the co-accused. This fact is a circumstance which can certainly be considered when the hatching of a criminal conspiracy stands proved against the accused. Their agreement to do illegal acts cannot be without any communication hence it is inferred that they had communicated with one another, since they belong to the same group, the same organisation working for 'Hindutva'…

GENDER-BASED VIOLENCE
MURDER
ATTEMPTED MURDER

58. Rapes and Gang Rapes

a) It would be absolutely incorrect to believe that gang rapes had not taken place. The extrajudicial confession of A-22 and the testimonies of many PWs, including PW-205, can safely be relied upon, which prove gang rape and rapes to have taken place on that day…

… … …

i) Incident of Kauserbanu and Answer to Charge u/s 315 of the IPC

a) The first and foremost submission to be dealt with is about the probability of such an occurrence. As has come up on the record and as has already been discussed, on the date of the occurrence, an occurrence of slitting the stomach of a pregnant woman had been highlighted by the filing of a complaint and by narration of the facts in the complaint filed, which is on record at Exh-1776/22, in the record of C-Summaries brought from the court of the learned metropolitan magistrate. This complaint had not been further pursued or, say, was not investigated but the fact remains that such a complaint had been filed, which is a strong circumstance, which remained absolutely unchallenged on the record of the case thus probabilifying such an occurrence. It is therefore held that such an occurrence is probable. It would not be unlikely if the attacker dealt precise blows and was experienced in doing so. In fact, the concept of a caesarean in gynaecology is a similar process carried out in a sophisticated, surgically refined way. If the pregnant woman was lying flat because she fell or was assaulted, and if the blow of a sword was given vertically, it could cut through the layers of the stomach and even the uterus hence it is not an improbable occurrence. The stomach wall of a pregnant woman during full-term pregnancy is usually thinner because of constant stretching.

b) This court is aware that what is being referred to by the court is merely a complaint (Exh-1776/22) and the complainant has not been tried before the court. This court does not believe the complaint to be the whole truth but at the same time, this complaint brings on record a strong circumstance of the cruelty which took place on the date of the occurrence even against a pregnant woman.

c) This complaint would only assure the court that such an occurrence had been complained of and it is not imaginary. Had there been malice in filing the complaint at Exh-1776/22, the complainant would not have disappeared, as has happened. This complainant is not even a prosecution witness, which shows that the complaint had not been pursued further.

d) It is already known and has been proved that several persons were missing and unfound after the riots, several persons were reduced to grilled meat and several persons were reduced to ashes.

e) The investigation, and more particularly the previous investigation, is held to be unreliable, improper, inept, and aimed not to highlight certain accused or not to book a case against certain accused.

f) The post-mortem notes which were of unidentified dead bodies, which were later given names by PW-285, is held to be not a credible record.

The dead bodies at the Civil Hospital were from three massacres, the massacre at Naroda Gaon, the massacre at Naroda Patiya, the massacre at Gulberg Society. Thus the dead bodies which were brought for post-mortem were from two different police stations. Sixty-eight post-mortems are on record, which are of unknown persons but are of the dead bodies sent by Naroda police station and are of the victims of this case as proved.

In the case of the post-mortems of the identified dead bodies, reliance can be placed but for post-mortems of unknown and unidentified dead bodies, no reliance can be placed hence only oral evidence, if found reliable, has been depended upon.

g) Even though, normally, keeping records of post-mortems is an official act and there is presumption of its propriety, in the case on hand, for the purpose of securing compensation, naming of certain dead bodies was done and burial receipts were given to the relatives of the deceased because that must have been an administrative condition precedent for granting compensation. The relatives of the deceased, being in severe need of financial help, must not have been left with any other option. This can be inferred by the court. As regards the 68 post-mortem notes kept on the record of this case, since these dead bodies were taken from Naroda police station, it can safely be inferred that in any case, these unidentified dead bodies were from the Naroda Patiya massacre. The only point is that over and above these 68 deceased as noted, numerous more have also died. There are many complaints which have not been followed up either because of fear, migration, passage of time or lack of trust in the system.

h) The civil administration was required to name the post-mortem notes lying as post-mortems of unidentified dead bodies so as to oblige the relatives of the deceased and to clear their own record. Hence many years after the massacre, PW-285 had haphazardly given names to any dead body of any of the deceased hence that record is in a way a polluted record and cannot be depended upon. In the same way, the burial receipts, etc are also not a completely dependable record.

i) The issue of Kauserbanu remained a highly debated issue even eight years after the occurrence, when the trial had been completed. In the facts and circumstances of the case, this court is left to draw judicial inference from the entire facts and circumstances of the case, that the homicidal death of Kauserbanu was caused with all the necessary ingredients under Section 302 of the IPC. The points below need consideration:

1) As discussed in the section on the sting operation, A-18 is noted to have confessed to attacking and killing Muslims, and more particularly a pregnant Muslim woman, on the date of the occurrence.

The conversation in the sting operation is held to be scientifically proved, true, a voluntary and legally acceptable confession of A-18 which can safely be acted upon… The sting operation is genuine, dependable and credible, wherein the voluntary extrajudicial confession was made by A-18 hence the same is believed.

2) This court is of the firm opinion that PW-158 is one of the most truthful witnesses from whose evidence it stands proved that Kauserbanu was with him, alive, till the happening of the evening occurrence after about 6:00 p.m., at the *khancha* [corner near the water tank]. It is also very clearly established on record from the oral evidence of this witness that Kauserbanu died a homicidal death in the evening occurrence at the site.

3) PW-228 is a cousin brother of Kauserbanu, who was only a boy aged 14 years on the date of the occurrence and who has only studied up to Std III. This small boy spoke of the attack by A-18 on pregnant Kauserbanu in the evening occurrence; he talked about her death, that her stomach was slit, the foetus was taken out and then she and the foetus were burnt there. The court has no hesitation in believing this witness, as well remembering that his testimony is bound to be the perception of a 14-year-old boy and hence needs to be appreciated accordingly.

4) PW-225 is the husband of Kauserbanu, and he is also not a highly qualified or educated person; he spoke about the fact that at about 4:00 p.m. somebody attacked Kauserbanu at Jawan Nagar *khaada* [pit] with a sword-blow. This witness did not say whether that blow was effective, or had resulted in any kind of injury to Kauserbanu or not, because he fairly admitted that he immediately ran away. This PW is also a truthful PW.

There is no other oral or documentary evidence or even circumstantial evidence to hold that Kauserbanu died a homicidal death or was even injured at Jawan Nagar *khaada* at about 4:00 p.m.

5) On the contrary, PW-158 stated that she was with him until the occurrence. PW-228 stated that he had seen her at the hall in the evening. Assembly at the hall was after the occurrence at Jawan Nagar *khaada*. Hence it stands clear that she was alive, hale and hearty, even after the *khaada* occurrence.

There is no witness who stated that the death of Kauserbanu occurred at any other place except that of the evening occurrence and PW-228 had admittedly seen her alive, walking unaided, coming out of the hall. PW-158 had accompanied Kauserbanu throughout till the evening occurrence; this proves that until the evening occurrence, Kauserbanu was able to walk herself and was obviously alive, fit and fine.

6) While appreciating the oral testimony of PW-228, it should be kept in mind that at that time he was a 14-year-old boy and his understanding of life would obviously be quite limited.

7) Neither PW-228 nor A-18 are experts on gynaecology hence their versions related to the occurrence, which is closely associated with the subject of gynaecology, are to be understood as their personal perceptions of the occurrence but they undoubtedly prove that the occurrence of the ghastly attack on Kauserbanu had taken place.

8) On the aspect of probability of the occurrence, in addition to the circumstantial evidence as has emerged from the complaint narrated above, the concept of a caesarean needs to be kept in mind, which shows that the occurrence as narrated by A-18 is not unlikely. In fact, the occurrence was close to a caesarean. It is known that a sword cannot be less than any knife and with the help of a sword also, a caesarean is possible.

9) As has been concluded by this court, PW-225, PW-228, PW-158, and even A-18 in the sting operation, were all speaking the truth but the point is that only PW-228 and A-18 talked of the occurrence which has a connection with the subject of gynaecology.

10) Unfortunately, the prosecuting agency has not examined any gynaecology expert to prove the probability of the occurrence, the investigating agency had not investigated the scientific possibility of the occurrence happening, the previous investigators had also not collected any evidence or examined probability, the defence has also not examined any gynaecology expert to decide about the gynaecological improbability, the post-mortem record is polluted and is not reliable, the burial receipts and post-mortem reports were prepared with different aims and do not appear to be a pure record. Support for the occurrence of the homicidal death of Kauserbanu is available from the oral evidence and reliance has to be placed on circumstantial evidence as well, as has emerged on record.

11) A-18 is neither an experienced nor a trained gynaecologist who could have done a caesarean at the site with the help of a sword but the gist of his conversation is that he killed a pregnant woman with a sword-blow and while killing her, it is obvious that some piece of flesh must have become attached to the tip of the sword, which A-18 seems to have perceived to have been the foetus.

12) PW-228, the 14-year-old cousin of Kauserbanu, is also not an expert. What he had seen was his experience through his senses, viz his eyes, and he saw an attack on Kauserbanu by A-18. Such an attack was on the stomach of Kauserbanu.

Kauserbanu was a pregnant woman at full term or near full term, as emerges from the oral evidence of her husband, PW-225, who also deposed that she had gone to her parent's house for her delivery. This goes with the social custom wherein a woman goes to her parental home for her

delivery and thus the probability and possibility was that of Kauserbanu being at full-term pregnancy or at least near full-term pregnancy.

13) Now therefore, from the oral evidence of PW-228 and the confession of A-18, it becomes very clear on the record that when A-18 attacked Kauserbanu with a sword-blow to her stomach, Kauserbanu, as has been held, was at full-term pregnancy or near full-term pregnancy and, it was almost an admitted position from the oral evidence of PW-225 and PW-158, that right from noon, Kauserbanu had been moving from here to there and had undergone a lot of physical exercise along with tremendous mental stress.

PW-158 and PW-225 focused on the tremendous hardship suffered by the victims on that day. PW-225 focused on what mental agony Kauserbanu must have undergone when the sword-blow fell on Kauserbanu at the *khaada*, regardless of the fact that the same was not successful.

Because of this background, she must have been tremendously exhausted, tired, totally lost, and because of this background, the successful attack by A-18 must have resulted in her falling to the ground and becoming unconscious. The attack by A-18 was very much on the stomach of Kauser, as is very clearly proved on record, but it cannot be believed that A-18 had taken out the foetus from her body because that can only be done by a trained gynaecologist or very experienced person and not even coincidence can be accepted as probability for the removal of a foetus from the body of a pregnant woman; however, the flesh which came out seems to have been perceived by A-18 and all concerned as the foetus from her body. In a nutshell, it is held that there was a successful attack by A-18 on pregnant Kauserbanu who then fell down, who then became unconscious; the attack resulted in injuries and then ultimately she was burnt there at the site and thus her homicidal death was committed along with that of the foetus in her body. Thus A-18 is held to be the author of the homicidal death of Kauserbanu. This commission of offence, in the opinion of the court, has been proved to be as a member of an unlawful assembly and as an abettor.

14) From judicial experience, judicial wisdom, and relying upon the principle of probability, the occurrence, its cause, its effect, the natural conduct of A-18, etc, the following points can safely be concluded:

i) PW-158 is a truthful witness. From him, it becomes clear that Kauserbanu was alive until the evening occurrence and was with her mother in the company of PW-158. Her homicidal death was committed at the site of the evening occurrence, at the *khancha*.

ii) PW-228 saw her coming out of the hall in a fit condition, at which point of time she was walking; this shows that Kauserbanu was not even injured before the evening occurrence.

iii) PW-225, the husband of Kauserbanu, saw her at the *khaada* at about 4:00 p.m., the sword-blow aimed at her was not successful; PW-225 had not waited to see the effects of the said sword-blow on Kauserbanu.

iv) Kauserbanu came to the *khancha*/water tank area where PW-158 and PW-228 saw her alive; they both are credible witnesses and truthful witnesses.

v) The conversation in the sting operation in the voice of A-18, as proved from the oral evidence of PW-322 and other witnesses like the FSL expert and the CBI officer, is true, voluntary and genuine.

vi) No evidence is on record to prove the motive of A-18 for killing Kauserbanu specifically. His immense hatred for Muslims is exhibited in his genuine revelations in the sting operation but the said motive was not to kill some pregnant woman and to take out her foetus.

vii) The previous conduct of A-18, of coming to the water tank area, being an armed member of the mob of miscreants and of an unlawful assembly, stands clearly proved on record. This shows that he was present with a sword in his hand at the *khancha*.

viii) Nothing was unlikely on that day, or nothing was improbable, given the passion and commitment A-18 had on that day for doing away with Muslims, and that whatever he had stated in the sting operation is truth.

ix) When PW-225, PW-228, PW-158, have passed the test of credibility and when the extrajudicial confession of A-18 is in tune with that and when it is supported and proved by the oral evidence of PW-322, it all stands proved. The occurrence passes the test of probability.

x) As discussed above, a burial receipt is not conclusive proof and non-availability of the dead body of Kauserbanu was also probable hence no corroboration may be available from the post-mortems of unknown dead bodies. The dead body of Kauser was not identified.

xi) The most important topic related to the occurrence is the perception of A-18 and the perception of PW-228. A-18 is not a gynaecologist who would know the art of caesareans, nor had he any intention of killing a pregnant woman, nor seems he to have specifically made preparation for this. In fact, as emerges on record, coincidentally, his attack was on this pregnant woman hence his act and omission falls within the category of committing the homicidal death of Kauserbanu; it is not proved that it was committed by any of the accused with intention or *mens rea* as is required to prove the offence u/s 315 of the IPC.

xii) This court was discussing human perception; coming back to that point, since A-18 was not experienced and trained in doing caesareans on pregnant women, it cannot be expected that he would bring out the foetus on the point of a sword but the fact remains that he did not lie, he revealed a true story and that true story is to be seen through the lenses of his perception. Now, the lenses of his perception guide this court that he did attack the pregnant woman, viz Kauserbanu, with a sword, which was a successful attempt; in this attempt, he injured Kauserbanu in the stom-

ach because of which a piece of flesh must have come out, which was perceived by A-18 as the foetus. When A-18, a mature man, perceived the piece of flesh as a foetus, what of a 14-year-old boy who witnessed the incident with his little understanding about life, about pregnancy, about caesareans and many more such things; thus PW-228 was speaking the truth like A-18 was also speaking the truth.

xiii) The offence was not an individual act or committed in isolation. It was apparently a joint act of the accused in the evening occurrence hence the assembly of the evening occurrence is to be held liable for the offence r/w Section 149 of the IPC.

xiv) It is also on account of abetment by the conspirators hence guilt is to be read with Section 120B of the IPC as well.

xv) The charge at Exh-65 is for 96 murders; this is one among the said murders. This murder is of the evening occurrence. Since the charge is of 96 murders and with the inclusion of this murder, nothing beyond the charge stands proved, no prejudice is likely to be caused to the accused if, on the facts, this murder is also taken into consideration to conclude on the guilt of the accused. This is one of the murders among numerous murders proved in the evening occurrence.

ii) Section 315

a) The essential ingredient of the offence is the commission of an act or omission by the accused to prevent a child's birth and that the act of the accused must be with an intention to prevent the child from being born alive. The evidence of PW-225 and PW-228 has been believed by this court. Reading the same with the evidence of PW-158, it stands proved beyond all reasonable doubt that A-18 had killed the deceased Kauserbanu, who was pregnant, in the evening occurrence when an unlawful assembly was present and participating in the killing of Kauserbanu to the full. There is no material on record to prove that while Kauserbanu was attacked by A-18, he had an intention as required under Section 315 of the IPC. His intention was to kill any Muslim and to attack any Muslim. Kauserbanu was attacked but there is nothing that gives reason to believe that the attack was more than an attack on a Muslim person. It is certainly a homicidal death but that would fall u/s 302 of the IPC, as without any intention by A-18 to kill Kauserbanu only because she was pregnant, it cannot be held that the offence u/s 315 stands established.

All other accused, as members of the unlawful assembly in the evening, shall be held guilty. All the conspirators shall also be held guilty for abetting this murder. As a result, though A-18 and other accused shall be held liable u/s 302 r/w relevant sections of the IPC, it is difficult to hold them liable for the charge u/s 315 of the IPC.

b) While concluding, the outcome, which is drawn by inferring from the facts and circumstances on the record, and more particularly the oral and documentary evidence on record, is that the homicidal death of the deceased Kauserbanu was committed by A-18 as a conspirator and a member of an unlawful assembly, the foetus could not be brought out, Kauserbanu died there along with the foetus in her body, Kauserbanu and her unborn child were burnt there, the attack was at the site of the *khancha*, the attack was by A-18 on the stomach of Kauserbanu, the attack was successful, some flesh coming out was an obvious result, except the post-mortems of identified dead bodies, none of them are reliable, the death of Kauserbanu resulted at the site itself; and that the offence against A-18 and others stands proved, which, for want of *mens rea* as required u/s 315 of the IPC, is held to be of homicidal death, and with the intentions and motives that A-18 and other accused had, it was a case of murder of Kauserbanu proved by the prosecution quite successfully.

Hence this court is inclined to hold that the murder of Kauserbanu was committed in the evening occurrence at the site of the offence because of an attack, by an unlawful assembly through A-18, on her stomach. She was thereafter burnt alive along with her foetus.

c) *Benefit:* A-18 and others are given the benefit of the doubt for the charged offence u/s 315 of the IPC. The guilt of commission of murder of Kauserbanu by the assembly u/s 302 of the IPC is successfully brought home.

c-1) *Guilty:* The members of the unlawful assembly present in the evening occurrence are held guilty under Section 302 r/w Section 149 of the IPC for the murder of Kauserbanu only. They are A-1, 2, 10, 18, 20, 21, 22, 25, 26, 28, 30, 40, 41, 44, 52, 53, 55 and 60 (18 live accused).

c-2) *Benefit:* A-3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, 16, 17, 19, 23, 24, 27, 29, 31, 32, 33, 34, 36, 37, 38, 39, 42, 43, 45, 46, 47, 48, 49, 50, 51, 54, 56, 57, 58, 59, 61 and 62 (43 live accused) are granted the benefit of the doubt for the offence u/s 302 r/w Section 149 of the IPC.

d) *Guilty:* A-1, 2, 5, 10, 18, 20, 21, 22, 25, 26, 27, 33, 34, 37, 38, 39, 40, 41, 42, 44, 45, 46, 47, 52, 55, 58 and 62 (27 live accused), being conspirators, are held guilty for the offence u/s 302 r/w Section 120B of the IPC for the murder of Kauserbanu only.

e) *Benefit:* A-3, 4, 6, 7, 8, 9, 11, 12, 13, 14, 15, 16, 17, 19, 23, 24, 28, 29, 30, 31, 32, 36, 43, 48, 49, 50, 51, 53, 54, 56, 57, 59, 60 and 61 (34 live accused) are granted the benefit of the doubt qua the charge under Section 302 r/w Section 120B of the IPC for this murder only.

f) Accused Nos. 1 to 62 (except A-35, since abated) are granted the benefit of the doubt qua the charge under Section 315 r/w Section 149 and Section 315 r/w Section 120B but the 18 live accused are held guilty u/s 302 r/w Section 120B and Section 302 r/w Section 149, as has been held to have been proved.

g) *Final Conclusion:* Since this is one of the murders of the evening occurrence, this murder shall be taken into con-

sideration while dealing and deciding the Point of Determination No. 13 on murders.

XI-A. Point of Determination No. 11

Q: Whether the prosecution proves beyond reasonable doubt that on the date, time and place of the offence any offence of rape or gang rape by victimising any Muslim woman was committed or not? If yes, by which accused? Whether any occurrence of assaulting or using criminal force on any Muslim woman or small Muslim girl with intent to outrage her modesty has taken place or not? If yes, by which accused?

(With reference to Sections 354, 376 and 376(2)(g) r/w Section 34 of the IPC.)

XI-B. Discussion on Point of Determination No. 11

i] Qua Sections 354, 376 and 376 (2)(g) of the IPC

a) *Introduction:*

It is a settled position of law that in the tradition-bound and non-permissive society of India, normally every woman would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity, her matrimonial life or her image in society had even occurred. She would be conscious of the danger of being ostracised by society or being looked down upon by society, including her own family members, relatives, friends and neighbours. If a woman is married, the fear of being taunted by her husband and in-laws would always haunt her. The natural inclination would be to avoid giving any publicity to the incident lest the family name and family honour be brought into controversy. In case the victim of such a crime had died, then the natural inclination of the parents would be to not mention the incident at all, as it would cast its ugly shadow on the lives of the surviving children and there is even the constant fear of social stigma against the family if such an occurrence was cited.

b) In the facts of this case, many parents, kith and kin, neighbours and relatives and even husbands of the victims have cited incidents of outraging the modesty of Muslim women, rape of Muslim women and even gang rape of Muslim women, including their daughters, wives, sisters, etc. This court has no hesitation to hold that in the light of what has been discussed at point a) hereinabove, the prosecution witnesses should be held to be worthy of all credence qua their testimonies on this point except when the PW had not seen the occurrence himself but had only heard of the occurrence, since 'no personal knowledge – no evidence'. Normally, in the case of a deceased daughter, why would her parents falsely state that any such incident had happened to their daughter – it is different that in some cases, they only have hearsay knowledge. It would be most unjust to perceive that to falsely involve the accused, that too after the passage of so many years, the parents or relatives would be out to put up a case of outraging the modesty or rape of a woman in their family, viz to say something about their own daughters, wives, sisters, etc, which would surely be a stain on the chastity of that woman and which would haunt her for the rest of her life.

This court is of the view that the principle of 'hearsay evidence is no evidence' should also not be sacrificed.

It is even notable that in many of the cases, only the incident had been spelt out before the court and it had been fairly conceded that the tormentors were not known to the witnesses. This fairness adds strength to the credit which the PW already enjoys by virtue of the fact that he or she had related an incident concerning his own daughter, sister or wife.

c) PW-74, PW-112, PW-162, PW-142, PW-203, PW-158 and others testified that at the site of the evening occurrence at the *khancha* women were being raped, their clothes were being torn, they were made naked and raped, gang rapes were committed on victim Muslim women and their modesty was outraged. Here none of the accused was implicated by the PWs. The witnesses were found truthful on this aspect. Hence this general version about small Muslim girls and Muslim girls in general is found to be truthful and credible. The instances narrated by some of the witnesses, including PW-205, show that the offences of rape, gang rape and even outraging the modesty of women did take place on that day. This proves the commission of offences under Sections 354, 376 and 376(2)(g) of the IPC, etc.

d-1) PW-158 is the husband of PW-205 and he testified about the outraging of the modesty (forcefully grabbing here and there) of his wife by the attackers at the site.

d-2) Vide the testimonies of PW-106, PW-203, PW-247 and PW-257, it becomes very clear that PW-205, Zarina, the wife of PW-158, was attacked by four men and that she was gang-raped there.

d-3) PW-205 is herself a victim. She testified that four men had attacked her with the help of a sword, the string of her petticoat was cut off and a severe sword-blow was given on her hand by the attackers. Having been made naked, she was gang-raped.

d-4) In the light of the foregoing evidence on record, this court firmly believes that PW-205 is a very natural and truthful witness, she would not have falsely narrated the gang rape on her, even her husband would not have mentioned the occurrence to have happened in his presence. The testimonies of PW-106, PW-203, PW-247 and PW-257 also clearly support this occurrence of gang rape. This court had opportunity to see the expressions of PW-205, which, when seen through the lenses of judicial appreciation of evidence, were found to be credible enough to believe the occurrence to have happened. Looking at the entire evidence on record collectively, this court has no hesitation to hold that the occurrence of gang rape on the victim PW-

205 had indeed taken place, as there is an absolute ring of truth to the occurrence. The entire evidence collectively shows that the occurrence of gang rape on PW-205 had in fact happened on the date, time and place of the occurrence.

d-5) The prosecution has miserably failed to bring on record the names of those who had committed the gang rape on PW-205. There is in fact no material to support the belief that PW-205 had narrated an imaginary incident. When, for want of evidence, it has not been proved who committed the gang rape, that alone is not enough to conclude that the gang rape had not taken place. It is true that there is no medical evidence either in the form of an injury certificate or in the form of any oral evidence of any doctor. This court is not ready to subscribe to the view, as it is unjust, that just because no doctor or injury certificate had supported the happening, the happening cannot be believed. Subscribing to that view would amount to turning one's face from the hard realities of life. When PW-205 has not implicated any of the accused, it is clear that by the narration of this incident, she did not have any other intention except to make known the tremendous violation of her human rights and constitutional rights before the court. If the loud cries of such a victim are not heard by the system, it is a mockery of justice.

Here it seems quite fitting to record the deep concern of the court about the violation of human rights and constitutional rights of the victim who was subjected to gang rape. The victim of this offence had not made any prayer to this court with reference to the horrible incident she had undergone. This court firmly believes that it is the call of justice, equity, good conscience and even the prime and paramount duty of the court to address the issue even though the accusation against the accused has not been proved. This is for the reason that the court is concerned with the commission of crime primarily so as to take care of the subsistence of the rule of law. The international concern for the impacts of sexual offences on women guide this court that this victim needs to be compensated. It is nobody's case that she has been compensated in the past for this occurrence. This court further believes that the Commission for Women, Gujarat state, and the principal secretary of the Department of Social Welfare at Gandhinagar need to be directed to see to it that the case for compensation to this victim of crime be addressed appropriately and either from the Board formulated for the compensation of rape victims or from the Gujarat state exchequer, as the case may be, this victim be paid the compensation awarded by this court. This court is of the firm belief that this is a fit case to grant compensation to the victim, as she has not received any compensation for this offence committed against her and even if she has been granted any compensation for the riotous activities and injuries sustained by her then also no case can be better than this case to even grant her further compensation.

The learned advocate for the victims has submitted to this court that even in the case of family members of the deceased victims of rape offences, compensation should be granted. This court does not find this suggestion appropriate. It is reasonable to grant compensation to a victim of rape who has survived and that too a victim of gang rape, like PW-205. How can it be put out of sight that it is an admitted position that all victims of this crime have been more or less compensated. Further compensating PW-205 is mainly with a view to the fact that PW-205 was a victim of one of the worst crimes against humanity and the worst crime among sexual offences. Further, no compensation is in fact weighty enough to wipe out the permanent scars, effect and impact on the mind of the victim of the crime of gang rape. This court believes that sexual violence, apart from being a dehumanising act, is also an unlawful intrusion on the right to privacy and sanctity of any woman. The offence of gang rape gives a serious blow to her supreme honour, her self-esteem and her dignity. Unfortunately, the case of PW-205 was of no help to the justice delivery system in proving who the tormentors were, which, according to this court, cannot be a reason to disbelieve her narration. It is rather a very sound ground to believe that she has narrated the truth and the whole truth. It seems that a compensation of Rs five lakh would be helpful for the victim of this crime. It is the duty of the state to maintain the law and order situation satisfactorily so that such offences do not take place at all. When such offences do take place, the state has a responsibility to compensate the victim as the concept of the rule of law suggests. This compensation seems to be sufficient for violation of her human rights in the facts and circumstances and the compensation already admitted to have been granted to this victim.

It is therefore held that the incident of Zarina as narrated by Zarina had in fact taken place but the charge of gang rape is not held to have been proved against any of the accused. Hence, all the accused are entitled to secure the benefit of the doubt qua the charge u/s 354 and 376(2)(g) of the IPC with reference to the occurrence of Zarina. But the occurrence and commission of the offence u/s 376(2)(g) has been proved.

e) PW-150, who is found to be a truthful PW, does prove ragging, harassment and outraging the modesty of the mother and sister of a girl named Nagina. PW-150 is an eyewitness to the said occurrence. In this case, the occurrence of outraging the modesty of the mother and sister of Nagina is held to have happened but the prosecution has not proved who the tormentors in the crime were and the case qua this aspect has not been proved against any of the accused.

f) By the oral evidence of PW-158, the incidents of outraging the modesty of Farzana, her sister Saida, Saberabanu, have been proved to have occurred but the case qua any of the accused with reference to these three occurrences does not stand proved. However, it stands proved that such occurrences at the site of the *khancha* did take place.

g) As far as the oral evidence of PW-106, who talks about her own daughter, and the evidence of PW-158 is concerned, it is proved that the rape on Farhana, the deceased daughter of PW-106, was committed, which had been stated by PW-106 in her statement of the year 2002 itself; this mother stated about the outraging of the modesty and the commission of rape on her daughter during the occurrence. PW-158 supported the same.

It is again sad that the prosecution did not prove on record as to who the author of the crime was. But the fact remains that the witnesses did not lie, they spoke the truth. This court therefore holds that the occurrence of rape of Farhana is believed but it is not proved beyond reasonable doubt as to who the author of the crime was.

h) *Incident of gang rape of Sofiyabanu Majidbhai Shaikh @ Supriya (d/o PW-156):*

On perusal of Exh-2062, the inquest *panchnama*, it seems that Sofiya died at midnight, at 00:00 hours on 01.03.2002, during her treatment. The testimony of PW-156 shows that the witness was very much confused about the date of death of his daughter. His oral testimony relating the incident to the oral dying declaration of the deceased made before him does not tally with the date of death of his daughter. Since this is doubtful, the incident cannot be believed hence the benefit of the doubt is granted to the named accused.

i) The tearing off of the clothes of deceased Nasimbanu was testified by PW-142. General support for this is also available from PW-205 and PW-158, PW-162, PW-112, etc.

As has been discussed in the section on the sting operation, through the oral evidence of PW-322, the extrajudicial confessions of three accused, including A-22, are on record. If his extrajudicial confession, which is held to be voluntary, dependable, truthful and credible, is perused, A-22 is found confessing that he did commit rape on one Muslim girl. He had named the girl to be Nasimobanu, a fat girl. The prosecution has not proved whether the Nasimbanu referred to by PW-142 was the Nasimobanu referred to by A-22 or not. But the fact remains that A-22 did commit rape on one Muslim girl, according to him, named Nasimobanu, whose father was also mentioned by A-22 in the sting operation. When A-22 himself has confessed and when he talks about his own crime and when he talks about rape committed by him as an admitted fact, the same should not be and cannot be ignored on technicalities. Principally, the commission of rapes and gang rapes by different rioters, maybe known to the PWs or unknown to the PWs, has been proved on record to have been committed beyond all reasonable doubt. In these circumstances, the court has every lawful authority to take aid from the extrajudicial confession and when A-22 himself is the maker, no corroboration is even required to be sought. This corroboration is only essential to adjudicate whether A-22 is simply boasting without any basis or he is speaking the truth. The oral evidences of numerous witnesses surely confirm that the extrajudicial confession, even the part about the commission of rape by A-22, is most believable. Principally, it cannot be disputed that an extrajudicial confession is dependable evidence. If the extrajudicial confession was made before some governmental agency then it can be tested on whether it can be termed as weak or strong. But when the extrajudicial confession is made in a relaxed manner, at the residence of A-22, there is absolutely nothing on record to even suggest that there is any weakness in this evidence. The most important aspect is that this confession was not challenged in any manner and is deemed to have been admitted by A-22 twice, firstly, before PW-322 and secondly, before the court.

This court therefore firmly believes that the commission of rape by A-22 stands proved, on a Muslim girl named Nasimobanu according to him. Here what is important is the rape of a Muslim girl and not what her name was. It needs a note that the age of the said Nasimobanu is not on record. Hence considering the overall facts and circumstances of the case and viewing the description by A-22 in the sting operation, it is safe to believe that the age of the said Nasimobanu must not have been less than 16 years. No part of the confession is to the effect that the said girl was a minor. The prosecution has not proved any of the contents; it has only placed on record the sting operation and thereby the extrajudicial confession of A-22 through PW-322. This act was done by A-22 alone, who describes in detail his commission of the offence of rape. The question of giving consent for intercourse in such circumstances, where a communal riot was underway, is totally out of the question hence it is held that the necessary ingredients to bring home the guilt of A-22 for the offence u/s 376 of the IPC have been proved; the guilt of A-22 is brought home. It is true that the charge is for the offence u/s 376(2)(g) r/w Section 34 of the IPC. The said offence under Section 376(2)(g) has neither been confessed by A-22 nor been proved by the prosecution hence, qua that section, the accused is entitled to get the benefit of the doubt. In comparison to the offence u/s 376, Section 376(2)(g) of the IPC has more gravity hence the accused can be termed to have had enough notice through the charge for the allegation against him u/s 376 of the IPC. Hence there is no technical hitch in convicting the accused u/s 376 of the IPC.

The doubt about the name of the victim is indeed not material. Suffice it to say that A-22 had committed the offence of rape on a Muslim victim woman to whom A-22 refers as Nasimobanu. It is not just and proper to disbelieve the extrajudicial confession for the reason that no prosecution witnesses spoke of the rape of Nasimobanu. When the

witnesses spoke of the rape of Muslim girls, it was inclusive of Nasimobanu. What is there in a name when the guilt is brought home?

j) It stands proved beyond all reasonable doubt that A-22 had committed rape on one Muslim girl whose name was Nasimobanu according to A-22. For this act, only A-22 individually is held guilty. There is absolutely no charge for this offence to be read with Section 120B or Section 149 of the IPC. The charge is for the offence to be read with Section 34, with some of the accused against whom the charge has also been framed but then it does not stand proved that other named accused had committed this offence. Considering the record of the case, A-22 alone is held guilty for commission of the offence u/s 376.

k) Since the offence u/s 376 stands proved against A-22, the offence committed by A-22 can safely be inferred to have been committed by using criminal force on the victim woman. Even as stands proved from his confession, he did all such things which squarely fall within the definition of Section 354... The intention of A-22 can safely be held to be to outrage the modesty of the victim woman, Nasimobanu. The overall consideration of the facts and circumstances therefore also proves that A-22 had also committed the offence u/s 354 of the IPC hence he is also held guilty of and punishable for this offence...

l) ...In none of the other cases of rape or outraging the modesty of a Muslim woman has it been proved beyond reasonable doubt as to who the tormentor was.

In these circumstances, all the accused against whom the charge has been framed, except A-22, shall be granted the benefit of the doubt qua the charge u/s 354 and 376(2)(g) of the IPC. A-22 shall be granted the benefit of the doubt qua the charge u/s 376(2)(g) of the IPC.

As a result, A-22 is held guilty u/s 354 and u/s 376 of the IPC as held hereinabove. It is held that A-1, 10, 28, 40, 26, 30, 42 and 48 are the accused against whom the charge was framed. All these accused are granted the benefit of the doubt qua the charge u/s 354 and 376(2)(g) r/w Section 34 of the IPC.

For the remaining accused, the charge under these sections was not framed. It is held that:

11.1) A-1, 10, 26, 28, 30, 40, 42 and 48 have all been granted the benefit of the doubt for the charge u/s 354 and 376(2)(g) r/w Section 34 of the IPC.

A-22 shall be granted the benefit of the doubt qua the charge u/s 376(2)(g) of the IPC.

A-22 is held guilty for the offence committed u/s 354 and 376 of the IPC.

... ...

XII-A. Point of Determination No. 12

Q: Whether the prosecution proves beyond reasonable doubt that on the date, time and place of the offence any offence of attempted murder of Muslim victims was committed or not? If yes, which accused has committed the offence and which of the offences were committed? Or was it committed by an unlawful assembly or in pursuance of the conspiracy or by abetment or by instigation, or not? If yes, which accused are held guilty for the offence?

(With reference to Section 307 of the IPC, Section 307 r/w 149, Section 307 r/w 120B of the IPC.)

XIII-A. Point of Determination No. 13

Q: Whether the prosecution proves beyond reasonable doubt that on the date, time and place of the offence any offence of murder of any Muslim victim was committed or not? If yes, which accused has committed the said offence? Or was it committed by an unlawful assembly or in pursuance of the conspiracy or by abetment or by instigation, or not? If yes, which accused are held guilty for the offence?

(With reference to Section 302 of the IPC, Section 302 r/w 149, Section 302 r/w 120B of the IPC.)

XIII-B. Discussion on Point of Determination Nos. 12 and 13

I) Introduction

To avoid repetition and for the sake of convenience, both these points have been discussed together.

II) Post-mortem Notes

A) There are in all 68 post-mortem notes which are of unknown dead bodies... PW-285, based upon his personal guesswork, had endorsed inserting the names of different deceased at the top of the post-mortem notes. But, as has been discussed, this court has not believed the said endorsement to be genuine and true and it is held that because of the said endorsement, a particular post-mortem note cannot be held to be of a particular deceased. The record created by PW-285 is not held to be a faithful and believable record.

B) It needs to be noted that all the 68 post-mortem notes were from the Naroda police station. The post-mortem notes of the Naroda Gaon case had already been taken away by the respective authorities. There were only two cases at the Naroda police station hence it is safe to believe that all the 68 post-mortem notes are of the deceased from the Naroda Patiya area. All the deaths had occurred on 28.02.2002, which can link their deaths with the communal riots and the Naroda Patiya massacre which took place there.

C) It needs to be noted that out of the 68 post-mortem notes, on six of the post-mortem notes, the post-mortem doctors had opined that reasons other than extensive burns

were the cause of death. In all these six post-mortem notes, the cause of death of the deceased is shown as shock due to haemorrhage/ shock due to head injury/stab injury/abdomen injury, etc. However, on 62 post-mortem notes, the cause of death is septicaemia, shock due to extensive burn injuries.

This suggests to the court that only a few of the deceased had died on account of injuries other than burn injuries. The stab injuries and head injuries as cause of death link up with the free use of blunt and sharp cutting weapons by the rioters in the communal riots.

D) As discussed, out of 68 post-mortem notes, 62 post-mortem notes are those wherein the post-mortem doctors had opined that the cause of death was shock as a result of extensive burns all over the body. In most of these post-mortem notes, the entire body was noted to have been burnt, burns were present on the entire body, and even all these deaths can safely be connected with the communal riots and were obviously of the victim inhabitants of the Naroda Patiya area.

E) The above discussion shows that the 68 deceased had died a homicidal death and in view of the entire scenario, it becomes amply clear that these deaths were neither accidental nor suicidal but were homicidal deaths caused on account of the communal riots. As proved earlier, these deaths were the result of a preconcerted, premeditated conspiracy; the deaths of the deceased victims had been caused after full preparation had been made by the rioters. It is therefore held that all the 68 deceased had died on account of murder committed on the date of the communal riots by members of an unlawful assembly who shared common objects.

F) In all the 68 cases, the injuries were found, by the respective post-mortem doctors, to have been ante-mortem in nature, which is an important factor to decide whether the deceased were burnt or injured, or how their deaths were caused.

G) In the case of about 13 identified dead bodies, the post-mortem notes are on record. In the case of all these post-mortem reports, it is very clear that all these deceased had died during their treatment, on account of extensive burn injuries, shock due to extensive burn injuries, septicaemia as a result of burns, etc. In the case of all the above-referred deceased, the injuries sustained by them were opined, by the post-mortem doctors, to have been ante-mortem in nature; the dead bodies are identified dead bodies and the names shown in these post-mortem notes are the names of the deceased in this case who were admitted to hospital for their treatment and who died while their treatment was ongoing.

H) Upon perusal of the column of the police report, it seems that in the case of all these dead bodies, they were burnt after sprinkling petrol or kerosene on them and since they were burnt, they were brought for treatment. In one such post-mortem, it was specified that: "since burnt near Noorani Masjid, brought at hospital for treatment and died during treatment". In the case of one of the post-mortem notes, there was a specific note that on account of having sustained bullet injury at 12:30 p.m. on 28.02.2002, the deceased was brought to the hospital and he died due to shock and haemorrhage as a result of bullet injury.

In the case of some of the deceased, their dead bodies have been shown to have sustained serious bodily injuries, fractures, etc.

If all the post-mortem notes are seen cumulatively, it becomes amply clear that these were not cases of natural death but cases of murder, as such ghastly preparation presupposes intention to do away with and knowledge about the likelihood of causing death in the process.

I) Certain burial receipts have also been brought on record. It is true that for those burial receipts, the post-mortem notes have not been found on record but then it is not essential; in the light of the testimonies of their relatives, it is clear that they also died homicidal deaths in the riots on the date of the occurrences. Their deaths are permissibly presumed, as, though about eight years had passed, they had been neither heard nor seen by their family members who would naturally have heard or seen them had they been alive.

J) Thus in the light of the above discussion, it is clear that there are in all 81 post-mortem notes on the record and 11 burial receipts, and that on account of the fact that there were three to four missing persons, the death toll can safely be tallied with the prosecution case of 96 deceased having died in the occurrence. In fact, the record and permissible presumption proves the homicidal deaths of 96 Muslims in the three occurrences of the day. These murders were committed by the assembly on account of abetment, instigation and pursuance of the conspiracy hatched. The murder of Kauserbanu is one among these, which took place in the evening occurrence.

K) The testimony of the post-mortem doctors have been perused wherein all the post-mortem doctors had opined the injuries sustained by the dead to be ante-mortem in nature and the deceased to have sustained serious burns of the fourth, fifth and sixth degrees; it was also opined that the cause of the deaths was extensive burns sustained by the dead, carbon particles were noticed in the tracheae of the deceased for which the doctors had opined that if a living person had been thrown into burning flames, such symptoms were possible and that all those injuries sustained by the dead were sufficient to cause death in the ordinary course of nature.

L) The cross-examination in respect of the post-mortem reports with the endorsement on the names is mainly based on the name of the deceased shown by the endorsement and the injury alleged to have been sustained by the de-

ceased before death. As has already been discussed, the endorsement is not at all trustworthy and since the said procedure has not inspired the confidence of this court, the question of appreciating that part of the cross-examination is totally and thoroughly out of the question. As a matter of fact, even the defence had challenged the endorsement and in fact had objected to the said endorsement. It is therefore also clear that even the defence was not agreeable to the endorsement by which PW-285 had admittedly added the name of any deceased to any post-mortem report, all of which needs no further discussion.

M) Certain questions about the stage of rigor mortis, need for ossification tests, etc, are also not going to bear fruit in favour of the defence because these are the ideals but the facts and circumstances in which the dead bodies were brought in during the communal riots and the manner in which examination of those dead bodies was performed are altogether incomparable with the usual procedures adopted for post-mortems.

N) In the case of death, the injuries were opined to have been sustained to vital organs of the body, the injuries were opined to have been possible because of flames, it was also opined that if one was in a house which was set on fire and had tried to escape from such a burning house, the injuries sustained by the deceased were very much possible.

0) The cross-examination on the issue of the educational qualifications of the doctors also does not find favour with the court. It needs to be noted that in the general hospitals, there are expert doctors, there are doctors who are in fact employed by the hospital and there are student doctors as well and that the necessary treatment is always given either by the experts or in consultation with the experts. The fact that in the team, one of the doctors was under training or in the process of learning sounds very natural. No doubt is created on this aspect.

P) This court is aware that in the case of such mass casualties, as were seen during the communal riots, the usual practice of examining patients and the usual practice of doing post-mortems would not be adopted. All kinds of short-cuts would be adopted and it would not be a matter of surprise if the same had even happened in the case of all the post-mortems brought on the record of this case.

As has come up on the record, there was a shortage of doctors to perform the post-mortems and hence they were called upon from all the mofussil health centres and different units so as to meet the heavy pressure of the post-mortem work. Considering this, a textbook cannot be of help in a situation when, say, the doctor has not specified the odour. Such literature becomes a mere academic aspect. There is no reason to believe that without noting the odour, the post-mortem doctor cannot arrive at a conclusion. It has also to be borne in mind that after a time, odour goes away. Even if the doctor had not recorded some observation, the victim, and that too an injured victim, cannot be disbelieved for that reason.

Q) From the material produced, it is clear that in burn-related deaths, the facial features change due to contraction of the skin and moles, scars and tattoo marks are usually destroyed. It needs to be noted that about 68 post-mortem notes are of unknown dead bodies therefore it seems that the dead bodies must have sustained severe burn injuries.

R) In the literature, it is suggested that dental charts should be prepared and X-rays of the jaws should be taken, DNA typing is useful and in a badly charred body, the sex can be determined by finding the uterus or prostate which resist fire to a marked degree.

Theoretically, all of what has been written in the book is true but the fact remains that in the facts and circumstances of the case, all such theories cannot be invoked to disbelieve the injured witnesses who would normally not involve anyone falsely while leaving aside the true culprit…

T) As far as the post-mortem doctors who performed the 68 post-mortems are concerned, since those post-mortems are of unnamed or unknown bodies, the cross-examination on that aspect is found to be irrelevant to decide the worth of the testimonies or to decide and/or to appreciate the testimonies given by the respective relatives of such deceased persons or by eyewitnesses.

U) In some of the post-mortem notes, it was noted that rigor mortis had set in, the skin and the body were absolutely blackened, the maggots on the body were developed, burns of the fifth to sixth degree were found on the body, with the opinion that if the person had been thrown into flames, the injuries sustained by the dead were possible.

During cross-examination, attempts were made to create doubts, since certain symptoms were not found on the dead bodies and not noted in the post-mortem notes. The kind of injuries or kind of attacks mentioned by the relatives of the deceased were argued to be not tallying with the record. As has already been discussed in the case of unknown dead bodies, all such cross-examination does not help the defence to create any reasonable doubt about the case put up by the prosecution through its witnesses, viz the relatives of the deceased.

Since the inquest is of unknown dead bodies, it cannot be taken as the final truth as against the substantial oral evidence of the eyewitnesses about the murders of their deceased family members.

V) In the case of many post-mortems, it was observed by the doctor that the body was completely burnt and only a skeleton was found hence no internal examination could be done; hence concluding that the death was caused on account of shock due to burns. An opinion was also given by the post-mortem doctor to the effect that if a highly inflammable substance had been thrown on one's body and one was then set ablaze, this kind of state of a dead body, reducing it to a skeleton, was possible.

W) In some of the post-mortem notes, it was concluded by the doctors, as their observation while performing the

post-mortems, that the bodies of the respective deceased were completely burnt, there were severe deep burns, skin was adherent to bones and muscles were exposed and burnt. All these aspects tally with the existence of ingredients of intentional homicidal death of the victims.

X) An opinion was also given to the effect that the injuries sustained by the dead were possible if an inflammable substance like kerosene or petrol had been thrown and the person was then burnt; the injuries on the face, chest, etc, can be termed to be injuries to a vital part of the body, the presence of carbon particles in the tracheae suggest that the persons had inhaled carbon dioxide, smoke or fumes while still alive. This goes with the prosecution case of Muslims being torched while inside their dwelling houses.

Y) PW-103 was examined for one unknown dead body which, on account of the endorsement of PW-285, was linked with the dead body of Kauserbanu, wherein the uterus of that female dead body was noted to have been enlarged and a full-term male foetus was found of 2,500 gm (as admitted by the doctor, he had written it to be 250 gm. This shows the quality of the post-mortems performed by the doctors in the general hospital during the time of the communal riots).

It seems that the impression carried by the previous investigators was that Kauserbanu was the only pregnant woman but as a matter of fact, if the record of C-Summaries is seen, it can be made out that at Exh-1776/22 there is a case of another pregnant woman whose stomach, it has also been complained, was slit.

It is for such reasons that this court was not inclined to act upon the personal guesswork in the form of endorsement by PW-285.

Z) In the case of PW-122, instead of 01.03.2002 and 02.03.2002, the post-mortem doctor had written the dates of receiving the dead bodies as 01.02.2002 and 03.02.2002. In the same way, this witness had written 12 p.m. for 12 midnight of 02.03.2002. This is also a pointer to the kind of work done in performing the post-mortems, which strengthens the observation and conclusion of this court that merely from the post-mortem reports and testimonies of the post-mortem doctors who had done the post-mortems of unknown dead bodies, the impeachment of the witness relatives of the deceased cannot be done or the credibility of the eyewitness relatives of the deceased cannot be doubted.

A-1) As discussed, there are 13 identified bodies for which PW-47, PW-50, PW-51, PW-95, PW-96, PW-118, PW-119, PW-121 and PW-128 were examined. All these witnesses obviously supported and proved the contents of the respective post-mortem notes of the deceased.

The cross-examination on the aspect that the odour of the inflammable substance should be noticeable is not found impressive, since one of the expert PWs has opined that with passage of time, the odour goes away. Secondly, the presence of odour has a prerequisite of the post-mortem doctor noticing it and noting the kind of odour in his observations. Merely because some such observations were not recorded in the post-mortem notes, it cannot be believed that the relatives of the deceased were speaking lies about this aspect.

B-1) In the case of PW-51, he had clarified that the deceased died 12 days after the injuries had been inflicted and that the deceased had no clothes and only dressing material was found on his body. The witness explained that it was for this reason that he did not have the opportunity to note whether the odour was present or not. This is another explanation with reference to the presence of odour, which needs to be kept in mind while appreciating the evidence that the identified dead bodies were in fact of the deceased who died during their treatment, and that when a person dies during treatment, it is obvious that he would be found with dressing material on, more particularly in the case of burns, and hence, in such circumstances also, there would be no presence of odour but that alone does not create any reasonable doubt about the prosecution case on record.

C-1) Another aspect of the cross-examination was about the possible use of non-sterilised bandages, gauze, cotton or instruments being a reason for the septicaemia in addition to the fact that one of the reasons for septicaemia can also be lack of proper intake of antibiotics. This court is of the opinion that these kind of suggestions are quite general in nature and that such suggestions cannot be made applicable in the facts and circumstances of this case without showing such suggestions to have in fact existed in the case of the respective deceased which, since absent in the case, this court does not find the material to create any reasonable doubt about the prosecution case.

D-1) On the aspect of odour, this witness had given a clarification which adds one more facet to believe that odour is not a test by which to decide whether the testimony of the post-mortem doctor can link the death of the deceased with the crime or not. The witness had voluntarily opined that if the burn injuries were extensive in nature then it is very possible that the odour may not remain. This reply gives a satisfactory explanation on the aspect of cross-examination of many of the post-mortem doctors qua odour.

E-1) Another aspect of the cross-examination was on the stage of rigor mortis; the reply given by the witness clarified that even the stage of rigor mortis in fact linked the deaths with the communal riots.

F-1) The cross-examination on the issue of ossification tests has also not created a ground to throw away the facts stated by the relatives of the deceased…

G-1) PW-96 had brought on record several post-mortem reports; the contents of the said reports were proved by the said doctor and during the course of cross-examination no substantial challenge was found to have been offered to the opinion given by the doctor as an expert.

Different injuries sustained by the deceased, the observations on the dead bodies, the fact of corresponding injuries, the sufficiency of the injuries to cause death in the ordinary course of nature, etc, have all been brought on record. Vide this testimony, the use of weapons like knives, etc have also been brought on the record of the case.

H-1) During cross-examination the witness admitted that to enable him to give a perfect opinion about an injury, he is required to see the weapon and that the opinion given by the doctor is based on probability. It is true that in this case, the police had not recovered or discovered the weapons used in the commission of the offences except in five cases. But that lacuna in the investigation cannot benefit the accused in the manner desired.

Different accused were holding different kinds of weapons, some of which were blunt, some of them sharp cutting, some of which were firearms and many more kinds of weapons and the accused have attacked and assaulted the victims in groups and hence the prosecution case is not a case of the use of a singular weapon, the line taken in the cross-examination cannot help the defence because here the principle of probability suggests that the deceased might have different kinds of injuries, one may be by a sharp cutting weapon, another may be by a blunt weapon, as the tormentor in the crime was a group who all possessed different kinds of deadly weapons and the possibility and probability of the use of all such weapons to attack a single individual victim cannot be ruled out. In fact, different kinds of injuries prove the prosecution case beyond reasonable doubt, of attack and assault by an unlawful assembly where each member was holding one or other kind of deadly weapon and the weapons were used for the assault and attack.

I-1) In the case of the post-mortem note of deceased Hamid Raza, it is very clear that he had developed pus formation, viz septicaemia, in his entire body and that was the cause of his death.

J-1) In the case of the post-mortem note of Asif Shabbirbhai, injuries had been noticed on vital parts of his body like the head, neck, etc. Moreover, his burn injuries were filled with pus and here also septicaemia was concluded to have been the cause of his death.

K-1) In the case of Saidabanu Ibrahim Shaikh, the post-mortem note itself reveals that the inquest *panchnama* was to the effect that the deceased was burnt after pouring kerosene or petrol on her.

In the same way, the post-mortem note of Zubaidabanu is about the place of the occurrence, wherein the area was mentioned to have been near Noorani Masjid. In fact, this goes with the prosecution case, as "near Noorani Masjid" has to be seen in a large perspective.

L-1) Exh-2021, the inquest *panchnama*, proves the death of Mohammad Shafiq Adam Shaikh in the morning occurrence.

Exh-2075, the inquest *panchnama*, shows the death of Sakina Mehboobbhai to have been caused in her house, which was clearly a murderous attempt in which ultimately she died.

The dead bodies which were found from the hutments of Jawan Nagar were all deceased victims of the noon occurrence where Muslim chawls and Muslim dwelling houses were burnt when the deceased were inside the dwelling houses and, as the post-mortem notes suggest, their deaths were caused on account of carbon particles in their tracheae.

The daughter of PW-79 died when she was burnt; Exh-212 proves the death of Mehboob Khurshid on account of burns.

PW-76 is an eyewitness whose wife Noorjahan, mother-in-law Mahaboobi, nephew Mohsin, niece Aafrin, were burnt alive by the mob.

Exh-221 suggests that the death of Supriya Marjid had been caused in the noon occurrence, as none of the PWs support this death qua the evening occurrence. In the facts and circumstances, this seems to be a death in the noon occurrence.

Exh-662, 207, 214, 221, 224, 203, 1333, 1454, 2063, 2064, 2041, 1303, are all inquest and identification *panchnamas* which prove numerous deaths to have been caused in the evening occurrence. PW-191 proves the death of 58 persons at the *khancha*, including his wife, daughter, etc.

PW-198 had stated that his mother Mumtaz, wife Gosiya, son Akram, aunt Rabiya, Reshma, Farhana, Jadi Khala, Shabbir, Mehboob and Saira died in the evening occurrence.

PW-90 had stated that six of his family members had died in the evening occurrence; PW-156 had also stated that nine of his family members had died in the same incident, as emerges on record, and even Sarmuddin Khalid Shaikh sustained fatal injuries in the incident and died during treatment…

III) Injuries and Attempt to Murder

A) In the case of Zarinabanu Naimuddin, viz PW-205, the doctor, PW-84, had deposed that Zarina herself had given her case history about being beaten in the communal riots and that she had sustained injuries to both shoulders and the head. The injury on her shoulder was a traverse contused lacerated wound up to bone-deep, she sustained a fracture; on the internal page 3 of the compilation of medical case papers, it was noted that Zarina gave her history about having suffered an assault in the communal riots in which injury by a sharp instrument was caused. It was opined by the doctor that the injuries on both shoulders of Zarina were possible if the blunt side of a sword had been used with force. This tallied with the testimony of Zarinabanu. From the entire cross-examination, no material has been brought on record which falsifies the say of Zarina and which raises any kind of question mark against the opinion given by the expert doctor.

In the case of Zarina, the doctor was confronted on his observation about the entry wound found on the body of Zarina. It was explained by the doctor that it is true that the words "entry wound" relate to injury by firearms and that the patient, viz Zarina, had not given any such complaint but since it was a case of mass violence, the doctor thought it proper to note down his observation. During the course of cross-examination the doctor maintained his opinion about the injuries sustained by Zarina. Serious bodily injuries were caused to Zarina which apparently seem to be by the accused armed with deadly weapons. This case is a clear case of intentional attempt to murder Zarina. In fact, the attack on her, being imminently dangerous, was in all probability capable of causing her death. The same is the case for Supriya, Razzak Bhatti and Sakina Bhatti, who had sustained fatal injuries with intention to kill them, since they were burnt alive while they were in the house, and the nine who died in hospital, etc.

B) PW-43 had examined seven different patients and through her testimony, she upheld and maintained her opinion about the injuries and about the possible use of weapons, etc. The witness was confronted on the aspect that the stab injuries were caused but those stab injuries were caused by which weapon, that the witness was unable to say. But that does not indeed matter much when the injury is certified to be dangerous enough and when it comes within the purview of grievous hurt.

C) PW-42 had testified for PW-200 wherein, in the history itself, PW-200 had informed the doctor that he was severely beaten by the mob at Naroda Patiya at about 11:30 a.m. on 28.02.2002. There is no history of PW-200 having driven any vehicle or meeting with any accident, etc [as alleged by the defence]. The history given by PW-200 rather goes with his testimony.

D) PW-39 had examined about five injured victim patients. He deposed on the contents of the injury certificates; the history given by the father of the patient Ahmed Mohammad Hussain was to the effect that the patient had sustained burn injuries caused by the opposite party on 28.02.2002 at 5:00 p.m. by throwing some chemical on his body and lighting a fire, a head injury by some metal had also been observed…

All the different injury certificates and medical case papers have been brought on record; the histories given in all such cases are easily relatable to the date, time and place of the offence, the injuries also apparently seem to have occurred upon throwing petrol or inflammable substances on the bodies of the injured and then lighting a fire. It was opined by the doctors that these kind of burn injuries were possible if petrol had been poured on one's body and one was then set on fire. The doctors opined that the kind of injuries sustained by the injured tallied with the histories given by them; the observation and the opinion of the doctors were that along with the burn injures there were other injuries on different regions of the bodies of the injured, different operations, screen grafting, scraping, etc, were needed to be done to the patient victims. This all goes with intentional attempt to murder.

E) Even during the course of cross-examination, some of the histories noted by the doctors were brought on record. This in fact strengthens the prosecution case of simple to grievous hurt having been caused during the entire day in all the three occurrences. The victims, being illiterate, may not have the time sense that an urban man has but that does not successfully challenge the credibility of the victim PWs.

In cross-examination on one of the cases, the doctor agreed that in the injury certificate of the 20-day-old infant, the history of the mother was written but this does not change the fact of the infant having sustained injuries in the communal riots, on the date, time and place of the offence. This goes with the inability of the mother PW to communicate.

F) In the cross-examination of PW-39, it was suggested, and admitted by the doctor that a burn injury picks up severity if not attended to in time. In the humble opinion of this court, this admission does not create any reasonable doubt about the opinion given by the doctor in each of the cases for which he had given an injury certificate. In the same way, it was also admitted by the doctor that the opinion he had given was based on the case papers and not on personal evaluation. It needs to be noted that the doctor is an expert, he is indeed required to opine based upon the case papers of a patient if the patient was not personally present in court. The doctor came to court to give an account of that day when he had treated or examined the patient and therefore it is rather very natural that every doctor would give his testimony based upon the case papers.

On a question by the court, the doctor admitted that he was personally involved in the treatment of all the five patients for whom he had issued injury certificates and that the injury certificates were issued based upon his personal knowledge. In the opinion of this court, this is sufficient and satisfying to hold that the doctor witness is quite credible.

G) Along with the deposition, the defence had given xerox copies of certain pages of a book on forensic medicine wherein it is highlighted that there are varieties of burns and in the case of burns caused by kerosene oil, petrol, etc, the burns are usually severe and cause sooty blackening of the parts and have a characteristic odour.

H) It is true that in some of the cases, the history written does not tally with what was stated before the court by the injured. In the case of PW-158, the history seems to be that: "the occurrence took place at about 6:00 p.m. at Naroda Patiya. Having come home, they burnt us with kerosene and petrol." As has already been discussed, if the injured were burnt at their houses, there was no reason for the

injured to lie even while giving their history to the doctors. It is rather possible that the histories had been haphazardly taken and haphazardly written by the doctors without due care to the fact that histories should be written after eliciting proper information only. Moreover, in this case, about 28 seriously injured victims were taken to the hospital by the police. Victims and injured were also brought from other police station areas hence those were not usual circumstances where it can be believed that the histories were taken by the doctors strictly from the injured only. The accompanying policemen, neighbours, relatives, family members, may also have given histories to the doctors. Hence it would be a severe injustice to depend on the words of the history before a doctor to discredit the injured. Be that as it may, the fact remains that this court firmly believes that in the case of the injured when there is nothing on record to disbelieve the injured, he should not be disbelieved on any count. In all such cases of injuries, the doctors had opined that the injuries sustained by the injured were possible if the injured had been burnt with kerosene or petrol. This proves the prosecution case.

I) In the case of Jetunbanu, the witness was found to have been subjected to severe assault and the history of the assault is on the record. In some of the cases, the doctors had also opined that if the injured had been attacked with a blunt weapon, the kind of injuries sustained by the patients were possible.

J) In the light of the fact that on account of the occurrence of mass crimes and widespread communal riots in the entire city, the rush of patients in the government hospital must have been huge, the record of the government hospital cannot be and shall not be used to disbelieve the injured witnesses.

The injured witnesses were taken by the police to the hospital for treatment. Accordingly, it is worthy to be noted that the frame of mind of the injured at that point of time should and must have been such that they would speak the truth or would not speak at all. If they had given a history to the doctors, it must have been given in its true spirit.

K) In the light of what has been discussed above, this court does not find anything to doubt in the testimony of any of the injured witnesses. At the cost of repetition, it needs to be noted that the injured persons had stated before the doctors that the burn injuries were sustained by them at about 6:00 p.m. at Naroda Patiya where they were burnt with kerosene or petrol. This tallies with the description of the *khancha* incident and there is no reason to disbelieve the injured witnesses.

L) As has been admitted by PW-44 during the course of cross-examination, in spite of the fact that a detailed description was given by the injured and noted by the doctor in the case papers, while issuing the injury certificate, only one word, "burns", had been written. In fact, this cross-examination throws focus on the working style of the general hospitals; considering this too, it is not safe, just and proper to disbelieve the injured witnesses based upon such insincere records of the general hospital. This witness also admitted that in the certificate, he had not opined as to which injury was possible by what, the period of treatment and the kind of hurt sustained by the injured. According to this court, even this part of the cross-examination counsels the court not to solely depend upon the testimony of the doctors to disbelieve the versions put forth by the injured victims.

M) In the cross-examination of some of the doctors, other possibilities in which similar injuries could have been sustained were suggested, with which the doctor PWs had agreed. In the opinion of this court, some such admissions by the doctors cannot be taken in the spirit desired by the defence. It cannot be believed that the injured witnesses had given a false account of the occurrence.

N) PW-134 had issued an injury certificate for the victim named Kulsumbanu which proves several fractures to have been sustained by the witness and the history given by the witness about being beaten or being injured in the communal riots.

During the course of cross-examination, the witness was confronted on the fact that his statement was not recorded by the police. But, as is already known, the police do not record the statements of the doctors, the injury certificate issued by them itself is their statement, hence no substance was found in the cross-examination on this aspect.

O) Experts like PW-286 were also confronted on the ground that since the witness had not given treatment, he cannot be held to be the right person to give his opinion. But, as was opined by the doctor, he, being an expert, can form his opinion even by looking at the papers. That being the position, the cross-examination has not created any reasonable doubt about the testimony of the doctor.

P) To inquire about the then position of the general hospitals, this court questioned PW-288, who replied that during the period of communal riots (of 2002) there was an unusual, unprecedented and tremendous workload, the heaviest workload he had faced in his entire career. There was a tremendous inflow of riot victims as well as usual patients and the inflow was many, many times more than the routine inflow. The witness also stated that they had to work 18 to 20 hours each day during that period.

Q) PW-287 is the doctor who had treated PW-255 for a bullet injury which, according to the history, was inflicted by the opposite party (and not by the police). The patient needed to be operated on, the kind of injury sustained by the patient could have resulted in permanent disability.

During cross-examination, the witness had shown his ignorance about whether he had sustained the injury in police firing or not. Be that as it may, the fact remains that such kind of serious bullet injuries were also sustained by the victims at the site of the offence.

R) PW-127 is a post-mortem doctor with the educational qualification of an MD in forensic science. He has performed about 25,000 post-mortems in his career; considering this, it is clear that he was the most experienced post-mortem doctor witness from among those who were examined before this court.

In this case, the burn injuries need to be held as grievous hurt and in cases where the victims had to be in hospital for more than 20 days, it is clear that the victims must have undergone severe bodily pain and in the facts and circumstances of this case, when victims were burnt by pouring or sprinkling inflammable substances like petrol, kerosene, etc, and when they were burnt alive, such injuries certainly need to be treated as grievous hurt and as life-endangering. Some of these injuries are such as can clearly be held to be attempts to murder.

The burn injuries sustained by the victims in this case are not accidental burn injuries, these burn injuries were voluntarily caused, with all the necessary preplanning, necessary preparation, using inflammable substances or throwing the victims into flames, etc, hence the grievous hurt sustained by the victims in this case has to be decided considering their stay in hospital and their hospitalisation. The grievous hurt sustained by the PWs who then survived after treatment satisfies the requisites of Section 307 of the IPC. It is clearly nothing but an attempt to murder the respective PWs.

S) It is clear on the record that the victim witnesses were admitted to general hospitals, it was the time of the communal riots, there was an unusual and unprecedented inflow in the hospitals, hence it cannot be believed that the victims would have remained as indoor patients even after their condition stabilised.

In this situation, continuance as indoor patients itself suggests the seriousness of their condition. Therefore, in the peculiar facts and circumstances of this case, the stay in the hospital has to be treated as a very important factor to decide the kind of hurt or to decide whether it was an attempt to murder or not.

T) The treating doctors were frequently confronted on the fact of non-visibility of the injuries showing use of blunt weapons or showing use of sharp cutting weapons. This aspect of cross-examination does not create any reasonable doubt and does not falsify the say of the injured witnesses in any manner whatsoever.

U) PW-127, being an expert, this court had sought certain clarifications from him as an expert doctor. What was testified by him remained unchallenged and uncontroverted, as neither side cross-examined the doctor.

What the doctor said has been reproduced hereinbelow for ready reference so as to make the record clear that even if the injuries were not visible, the injured witness can still be held credible. The witness testified that: "there are various types of injuries. If an injury is caused by the blow of a hard and blunt object then it involves the deeper layers of the skin as well as fat under the skin. In the case of superficial burn injuries i.e. up to the second or third degree, deeper injury can be visible. If the degree of burns is beyond the third or fourth degree, deeper tissues are also involved. Hence in such cases, deeper injury is not visible. Normally, the body gets roasted by fifth to sixth-degree burns.

"In the case of burn injuries and visibility of injuries, a number of factors, like exposure of the burning body to the atmosphere, kind of inflammable material, quantity and quality of the inflammable substance, type of clothing, the area of the body covered by clothing, whether a burning beam or substance fell on the body, need to be seen. In case the person is dead and thereafter the burning substance falls on the body, fifth or sixth-degree burns cause charring or roasting of the body. In some cases, deeper degrees of burns can be found. After an injury, if one becomes unconscious on account of fumes or smoke or the injury and if the burning process continues, deeper degrees of burns are possible.

"In my opinion, the degree of burns itself cannot be the sole deciding factor to know about the prognosis and gravity of the case. It may happen that if the burns cover a larger surface area of the body then even superficial burns can lead to death. It is also important which part of the body was affected due to burns, if the burn is on the face and neck or chest region then even if the burn is of the second or third degree, death is possible; rather, at times these burn injuries are more serious than burn injuries of the same degree found on the extremities or other parts of the body. In the case of burn injuries, normally, the patient remains oriented and conscious until his death if he is hospitalised and treated. However, if the burn injury is associated with the head or other injuries on vital parts of the body, there is possibility of his becoming unconscious."

V) The above opinion of an expert has provided a clue to the court that there are many more factors to be considered while deciding the kind of burn injury, its effect, visibility of the injury, etc. It is also clear that the degree of a burn may be less severe but if it is on a vital part of the body, it is to be counted as a serious problem – grievous hurt or attempt to murder, as the case may be.

With this cross-examination, it also becomes clear that even if the injuries which are claimed to have been caused by weapons are not noticeable, it is not sufficient to hold that the eyewitness relatives of the deceased were not speaking the truth.

W) The cross-examination in the case of PW-95 is on the aspect that the age of the burn injuries on the victim cannot be assessed. Even this is not found impressive by the court. This fact has to be appreciated keeping in mind that the dead body has a police case reference number, the deceased was admitted to hospital either on the date of the communal riot or immediately after the communal riot, the

body had burn injuries and that the address of the deceased was in the area, viz Naroda Patiya, where communal riots had effectively spread.

Upon noting all such surrounding factors, if the reply in this cross-examination is perused, it is clear that it is incapable of creating any reasonable doubt about the prosecution case that the victims had sustained burn injuries during the communal riots which were caused by the accused members of an unlawful assembly according to the prosecution case. The injuries were caused on account of the offences committed by the accused. In fact, except the accused who were members of the unlawful assembly, none other is alleged to have committed the offences against the Muslim victims. It is a proved fact that the accused had intention to do away with Muslims, the accused had knowledge that the injuries caused by them were sufficient to cause the death of the victims in the ordinary course of nature… The hurt to the victims has been proved to have been caused because of the acts of the accused. It therefore comes within the purview of Section 307 of the IPC.

X) In the case of the post-mortem of Sakinabanu Mehboobbhai, the history of burns on 28.02.2002 stands revealed on the record of the case. In the case of Sakinabanu Babubhai Bhatti, she was admitted to hospital on the date of the occurrence and died on 10.03.2002. It is clear that the death of the deceased was on account of the burn injuries and their complications. (The case of Sakina Babubhai Bhatti is a fit case to establish that there were attempts to commit murder in the morning occurrence, as the case of Sakina Bhatti is one such glaring illustration.)

In all these cases where the post-mortems are of identified dead bodies, the deaths had occurred during treatment and since these 13 persons had died after succumbing to their injuries, it is clear that their injuries were very severe in nature and were clearly attempts to murder. As a result, all these illustrations fall within the category of the offence punishable u/s 307. All the deceased had injuries on vital parts of their bodies. Looking to their addresses, names, etc, it becomes very clear that the deceased were Muslims and looking to the date of sustaining the injury and the date of admission to hospital, it stands proved that all these deaths can safely be linked with the offences committed by the accused on the date of the communal riots.

Y) Wherever the doctors have brought the injury certificates on record along with the medical case papers, the doctors had testified that a relative of the patient had given the history of burns, upon perusal of which it can safely be linked with the attempt to murder or grievous hurt that occurred during the communal riots…

Z) Another aspect, about the possible use of weapons in this case, cannot be held to be an effective rebuttal on record or a challenge to the testimonies of the eyewitnesses to the occurrence. This is for the reason that it is a proved fact that the offences were committed by an unlawful assembly; they were committed after having hatched a criminal conspiracy and after necessary preparations were made on the part of the accused.

A-1) PW-248 testified that Aabid had sustained a bullet injury in private firing. This is clearly an attempt to commit murder in the morning occurrence.

PW-191 testified that Peeru and the son of Hamidali had sustained injuries in firing.

The wife of PW-79 was given a sword-blow and was thrown into the fire in the noon occurrence.

Sarmuddin Khalid Noormohammad sustained fatal injuries before his death.

Supriya Marjid sustained fatal injuries before her death.

PW-191 proves that 28 persons had been taken by the police for treatment, of whom two women died on the way.

PW-191 rescued 12 persons from near the fire and after the police reached, another 14 were also saved…

a) *Guilty:* This court therefore holds that A-1, 2, 5, 10, 18, 20, 21, 22, 25, 26, 27, 33, 34, 37, 38, 39, 40, 41, 42, 44, 45, 46, 47, 52, 55, 58 and 62 (27 live accused) are held guilty for commission of offences under Section 302 and Section 307, both read with Section 120B of the IPC, for their acts as conspirators.

b) *Benefit:* A-3, 4, 6, 7, 8, 9, 11, 12, 13, 14, 15, 16, 17, 19, 23, 24, 28, 29, 30, 31, 32, 36, 43, 48, 49, 50, 51, 53, 54, 56, 57, 59, 60 and 61 (34 live accused) have been granted the benefit of the doubt qua the charge under Section 302 and Section 307, both read with Section 120B of the IPC.

c) *Guilty (For the occurrence when they were present):* A-1, 2, 4, 5, 10, 18, 20, 21, 22, 25, 26, 27, 28, 30, 33, 34, 38, 39, 40, 41, 42, 44, 45, 46, 47, 52, 53, 55, 58, 60 and 62 (31 live accused) are hereby held guilty for commission of offences under Section 302 and Section 307, both read with Section 149 of the IPC, as members of an unlawful assembly.

d) *Benefit:* A-3, 6, 7, 8, 9, 11, 12, 13, 14, 15, 16, 17, 19, 23, 24, 29, 31, 32, 36, 37, 43, 48, 49, 50, 51, 54, 56, 57, 59 and 61 (30 live accused) have been granted the benefit of the doubt for the charge under Section 302 and Section 307, both read with section 149 of the IPC.

FINAL OPERATIVE ORDER

1] The following named and numbered accused have been held guilty by this court on 29.08.2012 for commission of different offences.

A-1: Naresh Agarsinh Chhara
A-2: Morlibhai Naranbhai Sindhi @ Murli
A-4: Ganpat Chhanaji Didawala (Chhara)
A-5: Vikrambhai Maneklal Rathod (Chhara) @Tiniyo
A-10: Haresh @ Hariyo, son of Jivanlal @ Agarsing Rathod (Chhara)
A-18: Babubhai @ Babu Bajrangi, son of Rajabhai Patel
A-20: Kishan Khubchand Korani
A-21: Prakash Sureshbhai Rathod (Chhara)
A-22: Suresh @ Richard @ Suresh Langdo, son of Kantibhai Didawala (Chhara)
A-25: Premchand @ Tiwari Conductor, son of Yagnanarayan Tiwari
A-26: Suresh @ Sehjad Dalubhai Netlekar (Marathi Chharo)
A-27: Navab @ Kalu Bhaiyo Harisinh Rathod
A-28: Manubhai Keshabhai Maruda
A-30: Shashikant @ Tiniyo Marathi, son of Yuvraj Patil
A-33: Babubhai @ Babu Vanzara, son of Jethabhai Salat (Marvadi)
A-34: Laxmanbhai @ Lakho, son of Budhaji Thakor
A-37: Dr Mayaben Surendrabhai Kodnani
A-38: Ashok Hundaldas Sindhi
A-39: Harshad @ Mungda Jilagovind Chhara Parmar
A-40: Mukesh @ Vakil Ratilal Rathod, son of Jai Bhavani
A-41: Manojbhai @ Manoj Sindhi, son of Renumal Kukrani
A-42: Hiraji @ Hiro Marvadi @ Sonaji, son of Danaji Meghval (Marvadi)
A-44: Bipinbhai @ Bipin Autowala, son of Umedrai Panchal
A-45: Ashokbhai Uttamchand Korani (Sindhi)
A-46: Vijaykumar Takhubhai Parmar
A-47: Ramesh Keshavlal Didawala (Chhara)
A-52: Sachin Nagindas Modi
A-53: Vilas @ Viliyo Prakashbhai Sonar
A-55: Dinesh @ Tiniyo Govindbhai Barge (Marathi)
A-58: Santoshkumar Kodumal Mulchandani, known as Santosh Dudhwala
A-60: Pintu Dalpatbhai Jadeja (Chhara)
A-62: Kirpalsing Jangbahadursing Chhabda

Note: Here onwards, the accused shall be referred to only by their numbers for the sake of brevity.

2] Accused Nos. 1, 2, 4, 5, 10, 18, 20, 21, 22, 25, 27, 28, 30, 33, 34, 38, 39, 40, 41, 42, 44, 45, 46, 47, 52, 53, 55, 58, 60 and 62 (in all, 30 accused) are convicted of the offence under Section 143 r/w Section 149 of the IPC wherein each of them is sentenced to suffer rigorous imprisonment for six months, and shall also pay a fine of Rs 200 each, in default, to suffer further rigorous imprisonment for seven days.

3] Accused Nos. 1, 2, 4, 5, 10, 18, 20, 21, 22, 25, 27, 28, 30, 33, 34, 38, 39, 40, 41, 42, 44, 45, 46, 47, 52, 53, 55, 58, 60 and 62 (in all, 30 accused) are convicted of the offence under Section 144 r/w Section 149 of the IPC wherein each of them is sentenced to suffer rigorous imprisonment for two years, and shall also pay a fine of Rs 200 each, in default, to suffer further rigorous imprisonment for 15 days.

4] Accused Nos. 1, 2, 4, 5, 10, 18, 20, 21, 22, 25, 27, 28, 30, 33, 34, 38, 39, 40, 41, 42, 44, 45, 46, 47, 52, 53, 55, 58, 60 and 62 (in all, 30 accused) are convicted of the offence under Section 147 r/w Section 149 of the IPC wherein each of them is sentenced to suffer rigorous imprisonment for two years, and shall also pay a fine of Rs 200 each, in default, to suffer further rigorous imprisonment for 15 days.

5] Accused Nos. 1, 2, 4, 5, 10, 18, 20, 21, 22, 25, 27, 28, 30, 33, 34, 38, 39, 40, 41, 42, 44, 45, 46, 47, 52, 53, 55, 58, 60 and 62 (in all, 30 accused) are convicted of the offence under Section 148 r/w Section 149 of the IPC wherein each of them is sentenced to suffer rigorous imprisonment for two years, and shall also pay a fine of Rs 200 each, in default, to suffer further rigorous imprisonment for 15 days.

6] Accused Nos. 1, 2, 5, 10, 18, 20, 21, 22, 25, 27, 33, 34, 38, 39, 40, 41, 42, 44, 45, 46, 47, 52, 55, 58 and 62 (in all, 25 accused) are convicted of the offence under Section 295 r/w Section 149 of the IPC, and A-37 is convicted for the offence under Section 295 r/w Section 120B of the IPC, (thus in all, 26 accused) wherein each of them is sentenced to suffer rigorous imprisonment for two years, and shall also pay a fine of Rs 200 each, in default, to suffer further rigorous imprisonment for 15 days.

7] Accused Nos. 1, 2, 4, 5, 10, 18, 20, 21, 22, 25, 27, 28, 30, 33, 34, 38, 39, 40, 41, 42, 44, 45, 46, 47, 52, 53, 55, 58, 60 and 62 (in all, 30 accused) are convicted of the offence under Section 427 r/w Section 149 of the IPC, and A-37 is convicted for the offence under Section 427 r/w Section 120B of the IPC, (thus in all, 31 accused) wherein each of them is sentenced to suffer rigorous imprisonment for two years, and shall also pay a fine of Rs 200 each, in default, to suffer further rigorous imprisonment for 15 days.

8] Accused Nos. 1, 2, 4, 5, 10, 18, 20, 21, 22, 25, 27, 28, 30, 33, 34, 38, 39, 40, 41, 42, 44, 45, 46, 47, 52, 53, 55, 58, 60 and 62 (in all, 30 accused) are convicted of the offence under Section 435 r/w Section 149 of the IPC, and A-37 is convicted for the offence under Section 435 r/w Section 120B of the IPC, (thus in all, 31 accused) wherein each of them is sentenced to suffer rigorous imprisonment for two years, and shall also pay a fine of Rs 200 each, in default, to suffer further rigorous imprisonment for 15 days.

9] Accused Nos. 1, 2, 4, 5, 10, 18, 20, 21, 22, 25, 27, 28, 30, 33, 34, 38, 39, 40, 41, 42, 44, 45, 46, 47, 52, 53, 55, 58, 60 and 62 (in all, 30 accused) are convicted of the offence under Section 436 r/w Section 149 of the IPC, and A-37 is convicted for the offence under Section 436 r/w Section 120B of the IPC, (thus in all, 31 accused) wherein each of them is sentenced to suffer rigorous imprisonment for 10 years, and shall also pay a fine of Rs 1,000 each, in

default, to suffer further rigorous imprisonment for 30 days.

10] Accused Nos. 1, 2, 4, 5, 10, 18, 20, 21, 22, 25, 27, 28, 30, 33, 34, 38, 39, 40, 41, 42, 44, 45, 46, 47, 52, 53, 55, 58, 60 and 62 (in all, 30 accused) are convicted of the offence under Section 440 r/w Section 149 of the IPC, and A-37 is convicted for the offence under Section 440 r/w Section 120B of the IPC, (thus in all, 31 accused) wherein each of them is sentenced to suffer rigorous imprisonment for five years, and shall also pay a fine of Rs 500 each, in default, to suffer further rigorous imprisonment for 20 days.

11] Accused Nos. 1, 2, 4, 5, 10, 18, 20, 21, 22, 25, 27, 28, 30, 33, 34, 38, 39, 40, 41, 42, 44, 45, 46, 47, 52, 53, 55, 58, 60 and 62 (in all, 30 accused) are convicted of the offence under Section 153 r/w Section 149 of the IPC, and A-37 is convicted for the offence under Section 153 r/w Section 120B of the IPC, (thus in all, 31 accused) wherein each of them is sentenced to suffer rigorous imprisonment for one year, and shall also pay a fine of Rs 200 each, in default, to suffer further rigorous imprisonment for seven days.

12] Accused Nos. 1, 2, 4, 5, 10, 18, 20, 21, 22, 25, 27, 28, 30, 33, 34, 38, 39, 40, 41, 42, 44, 45, 46, 47, 52, 53, 55, 58, 60 and 62 (in all, 30 accused) are convicted of the offence under Section 153A r/w Section 149 of the IPC, and A-37 is convicted for the offence under Section 153A r/w Section 120B of the IPC, (thus in all, 31 accused) wherein each of them is sentenced to suffer rigorous imprisonment for three years, and shall also pay a fine of Rs 300 each, in default, to suffer further rigorous imprisonment for 20 days.

13] Accused Nos. 1, 2, 5, 10, 18, 20, 21, 22, 25, 27, 33, 34, 38, 39, 40, 41, 42, 44, 45, 46, 47, 52, 55, 58 and 62 (in all, 25 accused) are convicted of the offence under Section 153A(2) r/w Section 149 of the IPC, and A-37 is convicted for the offence under Section 153A(2) r/w Section 120B of the IPC, (thus in all, 26 accused) wherein each of them is sentenced to suffer rigorous imprisonment for three years, and shall also pay a fine of Rs 300 each, in default, to suffer further rigorous imprisonment for 20 days.

14] Accused Nos. 1, 2, 4, 5, 10, 18, 20, 21, 22, 25, 27, 28, 30, 33, 34, 38, 39, 40, 41, 42, 44, 45, 46, 47, 52, 53, 55, 58, 60 and 62 (in all, 30 accused) are convicted of the offence under Section 323 r/w Section 149 of the IPC, and A-37 is convicted for the offence under Section 323 r/w Section 120B of the IPC, (thus in all, 31 accused) wherein each of them is sentenced to suffer rigorous imprisonment for six months, and shall also pay a fine of Rs 200 each, in default, to suffer further rigorous imprisonment for seven days.

15] Accused Nos. 1, 2, 4, 5, 10, 18, 20, 21, 22, 25, 27, 28, 30, 33, 34, 38, 39, 40, 41, 42, 44, 45, 46, 47, 52, 53, 55, 58, 60 and 62 (in all, 30 accused) are convicted of the offence under Section 324 r/w Section 149 of the IPC, and A-37 is convicted for the offence under Section 324 r/w Section 120B of the IPC, (thus in all, 31 accused) wherein each of them is sentenced to suffer rigorous imprisonment for one year, and shall also pay a fine of Rs 200 each, in default, to suffer further rigorous imprisonment for 15 days.

16] Accused Nos. 1, 2, 4, 5, 10, 18, 20, 21, 22, 25, 27, 28, 30, 33, 34, 38, 39, 40, 41, 42, 44, 45, 46, 47, 52, 53, 55, 58, 60 and 62 (in all, 30 accused) are convicted of the offence under Section 325 r/w Section 149 of the IPC, and A-37 is convicted for the offence under Section 325 r/w Section 120B of the IPC, (thus in all, 31 accused) wherein each of them is sentenced to suffer rigorous imprisonment for seven years, and shall also pay a fine of Rs 500 each, in default, to suffer further rigorous imprisonment for 20 days.

17] Accused Nos. 1, 2, 4, 5, 10, 18, 20, 21, 22, 25, 27, 28, 30, 33, 34, 38, 39, 40, 41, 42, 44, 45, 46, 47, 52, 53, 55, 58, 60 and 62 (in all, 30 accused) are convicted of the offence under Section 326 r/w Section 149 of the IPC, and A-37 is convicted for the offence under Section 326 r/w Section 120B of the IPC, (thus in all, 31 accused) wherein each of them is sentenced to suffer rigorous imprisonment for 10 years, and shall also pay a fine of Rs 1,000 each, in default, to suffer further rigorous imprisonment for 30 days.

18] Accused Nos. 1, 2, 4, 5, 10, 18, 20, 21, 22, 25, 28, 30, 40, 41, 44, 46, 52, 53, 55 and 60 (in all, 20 accused) are convicted of the offence under Section 188 of the IPC wherein each of them is sentenced to suffer rigorous imprisonment for six months, and shall also pay a fine of Rs 200 each, in default, to suffer further rigorous imprisonment for seven days.

19] No separate sentence has been recorded for the offence committed under Section 135(1) of the Bombay Police Act and 120B of the IPC.

20] Accused No. 22 is convicted of the offence under Section 354 and under Section 376 of the IPC wherein he is sentenced to suffer rigorous imprisonment respectively for two years and for 10 years, and shall also pay a fine of Rs 200 and Rs 500. In default, he shall suffer rigorous imprisonment respectively for two months and six months.

21] Accused Nos. 1, 2, 4, 5, 10, 18, 20, 21, 22, 25, 27, 28, 30, 33, 34, 38, 39, 40, 41, 42, 44, 45, 46, 47, 52, 53, 55, 58, 60 and 62 (in all, 30 accused) are convicted of the offence under Section 307 r/w Section 149 of the IPC, and A-37 is convicted for the offence under Section 307 r/w Section 120B of the IPC, (thus in all, 31 accused) wherein each of them is sentenced to suffer rigorous imprisonment for 10 years, and shall also pay a fine of Rs 1,000 each, in default, to suffer further rigorous imprisonment for 30 days.

22] Accused No. 37 is convicted of the offence under Section 302 r/w Section 120B of the IPC and is sentenced to suffer rigorous imprisonment to serve a minimum sentence of 18 years in jail without remissions before consideration of her case for premature release, and shall also pay a fine of Rs 5,000, in default, to suffer further rigorous imprisonment for 40 days.

23] Accused Nos. 1, 2, 10, 22, 25, 41 and 44 are convicted of the offence under Section 302 r/w Section 149 of the IPC and are sentenced to suffer rigorous imprisonment

to serve a minimum sentence of 21 years in jail without remissions before consideration of their case for premature release, and shall also pay a fine of Rs 5,000, in default, to suffer further rigorous imprisonment for 40 days.

24] Accused No. 18 is convicted of the offence under Section 302 r/w Section 149 of the IPC and is sentenced to suffer rigorous imprisonment for the remaining period of his natural life subject to remission or commutation at the instance of the government for sufficient reason only, and shall also pay a fine of Rs 500, in default, to suffer further rigorous imprisonment for 15 days in case, if his case is considered for commutation or remission.

25] Accused Nos. 4, 5, 20, 21, 27, 28, 30, 33, 34, 38, 39, 40, 42, 45, 46, 47, 52, 53, 55, 58, 60 and 62 (in all, 22 accused) are convicted of the offence under Section 302 r/w Section 149 of the IPC wherein each of them is sentenced to life imprisonment (to be meant in usual terms), and shall also pay a fine of Rs 3,000, in default, to suffer further rigorous imprisonment for 20 days.

26] As has been discussed and held while discussing Point for Determination No. XI, since PW-205 named Zarinabanu Naimuddin Shaikh was subjected to the crime known as the worst form of human rights violation of a woman, viz the commission of the offence of sexual violence, in the light of international concern for the growing menace of sexual violence against women and since she was a victim of the offence of gang rape which gives a serious blow to her supreme honour, her self-esteem and her dignity as a woman, this court gives direction to appropriately consider the case of compensation of PW-205, who is hereby ordered to be paid compensation of Rs 5,00,000 for the gang rape committed on her. The Commission for Women in Gujarat state, the principal secretary of the Department of Social Welfare, Sachivalaya, Gandhinagar, Gujarat state, and the Board formulated for the compensation of the rape victim in the state of Gujarat shall see to it that the compensation as awarded of Rs 5,00,000 from the Gujarat state exchequer shall be paid to PW-205 at the earliest upon due verification and proper procedure to be adopted for her identity…

27] All the substantive sentences, except the sentences for imprisonment for life, the applicable meaning of which has been given by this court in this order with reference to each of the accused, shall run concurrently.

28] The sentences of imprisonment for life, the applicable meaning of which has been given by this court in this order with reference to each of the accused, shall run after the expiration of the concurrent sentences for imprisonment for the mentioned terms.

29] Sessions case No. 236/09 is ordered to be kept pending in the original file of this court till the non-bailable warrant issued against A-26 stands executed. The matter qua A-26 has now been kept on 03.09.2012 for the execution of the non-bailable warrant and/or for production of an action taken report by the investigating agency.

All the mentioned seven cases for all the mentioned accused, and sessions case No. 236/2009 for all the accused except for A-26, hereby stand disposed of in the light of the further final order passed hereinabove.

30] All the accused shall be entitled for set-off in accordance with law.

31] As far as A-52 is concerned, he shall be entitled for set-off in accordance with law for all the substantive sentences for the mentioned terms.

32] A-52 shall be protected against the imposition of life sentence a second time on him while the first sentence is in operation hence he shall be entitled to his statutory right under Section 427(2) of the CrPC…

(Dr Smt Jyotsna Yagnik)
Special Judge,
Court for Conducting Speedy
Trial of Riot Cases,
SIT Courts,
Navrangpura, Ahmedabad
31.08.2012

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The entire judgement can be read at:
www.cjponline.org/gujaratTrials/narodapatiya/NP%20Full%20Judgmnt/Naroda%20Patiya%20-%20Common%20Judgment.pdf.