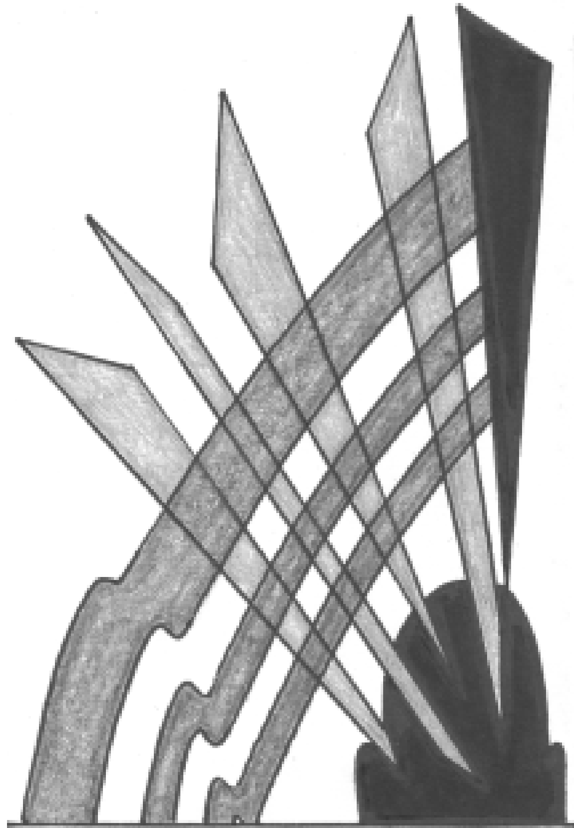

GENDER-BASED VIOLENCE
MURDER
ATTEMPTED MURDER

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.

O) 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.