PREVIOUS INVESTIGATION GUJARAT POLICE

a) Introduction

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

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

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

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

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

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

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

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

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

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

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

b) On 27.02.2002

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

e) Third IO and all IOs from the Crime Branch

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

f) General Observations about the Previous Investigation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

g) Appreciation of the Previous Investigation in General

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

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

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

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

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

3) *Background:*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

h) Final Finding on Previous Investigation

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

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

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