IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL CONFIRMATION CASE NO. 1 of 2011
With
CRIMINAL CONFIRMATION CASE NO. 2 of 2011
TO
CRIMINAL CONFIRMATION CASE NO. 10 of 2011
With
CRIMINAL APPEAL NO. 556 of 2011
WITH
CRIMINAL APPEAL NO. 557 of 2011
With
CRIMINAL APPEAL NO. 585 of 2011
TO
CRIMINAL APPEAL NO. 587 of 2011
With
CRIMINAL APPEAL NO. 590 of 2011
TO
CRIMINAL APPEAL NO. 593 of 2011
With
CRIMINAL APPEAL NO. 628 of 2011
WITH
CRIMINAL APPEAL NO. 629 of 2011
With
CRIMINAL APPEAL NO. 713 of 2011
With
CRIMINAL APPEAL NO. 717 of 2011
With
CRIMINAL APPEAL NO. 718 of 2011
With
CRIMINAL APPEAL NO. 727 of 2011
TO
CRIMINAL APPEAL NO. 729 of 2011
With
CRIMINAL APPEAL NO. 732 of 2011
WITH
CRIMINAL APPEAL NO. 733 of 2011

With

CRIMINAL APPEAL NO. 743 of 2011

WITH

CRIMINAL APPEAL NO. 744 of 2011

With

CRIMINAL APPEAL NO. 798 of 2011

With

CRIMINAL APPEAL NO. 831 of 2011

With

CRIMINAL MISC.APPLICATION NO. 17914 of 2011

In

CRIMINAL APPEAL NO. 586 of 2011

With

CRIMINAL MISC.APPLICATION NO. 11376 of 2014

In

CRIMINAL MISC.APPLICATION NO. 17914 of 2011

With

CRIMINAL MISC.APPLICATION NO. 11629 of 2014

In

CRIMINAL APPEAL NO. 713 of 2011

WITH

CRIMINAL MISC.APPLICATION NO. 3101 of 2015

In

CRIMINAL APPEAL NO. 556 of 2011

With

CRIMINAL MISC.APPLICATION NO. 2168 of 2015

In

CRIMINAL APPEAL NO. 590 of 2011

With

CRIMINAL MISC.APPLICATION NO. 1665 of 2015

In

CRIMINAL APPEAL NO. 629 of 2011

With

CRIMINAL MISC.APPLICATION NO. 4143 of 2015

In

CRIMINAL APPEAL NO. 743 of 2011

With

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE ANANT S. DAVE

and

HONOURABLE MR.JUSTICE G.R.UDHWANI

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

STATE OF GUJARAT....Appellant(s)

Versus

BILAL ISMAIL ABDUL MAJID SUJELA @ BILAL HAJI....Respondent(s)

Appearance:

MR JAYANTKUMAR M PANCHAL, SPECIAL PUBLIC PROSECUTOR, SIT GUJARAT STATE; WITH NARENDRA N PRAJAPATI, SPECIAL ASSISTANT PUBLIC PROSECUTOR, SIT GUJARAT STATE; WITH MR ALPESH Y KOGJE, SPECIAL ASSISTANT PUBLIC PROSECUTOR, SIT GUJARAT STATE; WITH MR KAMALNAYAN J PANCHAL, ADDITIONAL PUBLIC PROSECUTOR, SIT GUJARAT STATE

MR RS JAMUAR, SPECIAL PUBLIC PROECFUTOR FOR SIT

MR AD SHAH, MS NITYA RAMKRISHNAN SENIOR ADVOCATE WITH MR SM VATSA, MR IH SYED, MR MA KHARADI, MR YM THAKKAR, MR MHM SHAIKH, MR KHALID G SHAIKH, MR EKANT AHUJA, FOR ACCUSED PERSONS

MR BB NAIK SENIOR ADVOCATE WITH MR VIJAY PATEL, MR SURESH B BHATT, MR HM PRACHCHHAK, MR HARNISH V DRAJI, MR PRAVIN GONDALIA, MR JAYESH A DAVE, MR SAMIR J DAVE, MR BHARAT K DAVE, MR SUDHANSHU S PATEL, MR SURESH B BHATT, MR YATIN SONI AND NIRAV C THAKKAR FOR VICTIMS

CORAM: **HONOURABLE MR.JUSTICE ANANT S. DAVE**
and
HONOURABLE MR.JUSTICE G.R.UDHWANI

Date : 09/10/2017

COMMON CAV JUDGMENT
(PER : HONOURABLE MR.JUSTICE ANANT S. DAVE
&
HONOURABLE MR.JUSTICE G.R.UDHWANI)

VOLUME-I

PART I

1 All these cases arise out of the **judgment and order dated 01.03.2011** rendered by the learned Sessions Judge, Panchmahals at Godhra, Camp at Central Jail, Sabarmati, Ahmedabad in **Sessions Case No.69 of 2009 to Sessions Case No.86 of 2009 and Sessions Case No.204 of 2009**.

1.2 **Upon conviction of 11 accused under Section 302** of the Indian Penal Code and **sentencing them for capital punishment `to be hanged by neck till death**' by the learned Sessions Judge, Confirmation Case Nos.1 to 10 of 2011 are referred to this Court under **Section 28(2) read with Section 366 of the Criminal Procedure Code, 1973** [for short, `the Code'] arising out of **Sessions Case Nos.69, 70, 71 [2**

accused], 72, 73, 77, 79, 81, 82 and 84 of 2009.

1.3 **Criminal Appeal Nos.556, 557, 585, 586, 587, 590, 591, 592, 593, 628 and 629 of 2011 are filed by the accused persons under Section 374(2) of the Code challenging the conviction under Section 302 and other offences of the IPC and other penal statutes and sentencing 11 accused for capital punishment and 20 accused for life imprisonment, as the case may be.**

1.4 **Criminal Appeal Nos.713, 717, 718, 727, 728, 729, 732, 733, 798, 831 of 2011 are filed by the victims under Section 372 of the Code against acquitting accused or convicting for lesser offence or awarding inadequate or no compensation.**

1.5 **Criminal Appeal No.744 of 2011 is filed by the State of Gujarat under Section 377 of the Code for enhancement of sentence awarded to the accused persons.**

1.6 **Criminal Appeal No.743 of 2011 is also filed by the State of Gujarat under Section 378 of the Code against acquittal of the accused persons** for the charges levelled against them by the learned Sessions Judge.

1.7 **Criminal Misc. Application No. 17914 of 2011 [disposed of] is filed by Salim @Salman Yusuf Sattar Zarda for taking additional evidence under Section 391 of the Code of Criminal Procedure, 1973 in Criminal Appeal No.586 of 2011.**

1.8 Criminal Misc. Application No.11376 of 2014 is filed by Nilkanthbhai Tulsibhai Bhatiya to be joined as necessary party.

1.9 Criminal Misc. Application No.11629 of 2014 is filed by Nilkanthbhai Tulsibhai Bhatiya to delete Hussain Abdul Rahim Kalota – Original Accused No.42 of Sessions Case No.69 of 2009 from Criminal Appeal No.713 of 2011.

1.10 Criminal Misc. Application Nos.3101 of 2015, 2168 of 2015, 1665 of 2015 and 4143 of 2015 are filed seeking temporary bail.

OPERATIVE PART OF THE IMPUGNED JUDGMENT OF CONVICTION & SENTENCE READS AS UNDER:

> "Under the above circumstances, considering all the relevant factors, this Court is unable to find any mitigating circumstances to refrain from imposing the death penalty on the convicted accused persons who had played role in hatching conspiracy, collecting, unloading, storing, and shifting inflammable liquid petrol from petrol pump to place of incident, making holes by knife on the upper part of carboys, cutting canvas vestibule by knife(Chharo), opening eastern side sliding door forcibly from outside, entering into Coach S-6, opening of East South corner door of Coach S-6, pouring petrol after entering into coach with carboys, sprinkling petrol from outside, and setting the coach on fire by putting/throwing burning rag into Coach No. S-6. Though this Court has deep sympathy for the members of the family of the convicted accused persons, is constrained to reach the inescapable conclusion that this is a case where imprisonment for life can never be said to be an adequate sentence to meet the end of justice and death sentence is required to be imposed upon the following convicted accused persons (names shown in para-A).

Having regard to the facts of the case and all the surrounding circumstances, in the interest of justice, I pass the following final order:

FINAL ORDER

Para-A The accused persons named below (in Schedule-A) are hereby sentenced under Section-235(2) of the Criminal Procedure Code, to undergo the punishment, as mentioned in Para-B (Schedule-B) below, for the charges proved against them.

Schedule-A			
Sr. No.	S.C.No.	Accu. No.	Name of Accused
1	69/2009	48	Bilal Ismail Abdul Majid Sujela @Bilal Haji
2	70/2009	2	Abdul Razak Mohmmad Kurkur
3	71/2009	3	Ramjani Binyamin Behra
4	71/2009	4	Hasan Ahmed Charkha @Lalu
5	72/2009	2	Jabir Binyamin Behra
6	73/2009	1	Mehboob Khalid Chanda
7	77/2009	1	Salim @Salman Yusuf Sattar Zarda
8	79/2009	1	Siraj Mohmmad Abdul Raheman
9	81/2009	2	Irfan Abdul Majid Ghanchi Kalandar @Irfan Bhobho
10	82/2009	1	Irfan Mohmmad Hanif Abdul Gani Pataliya
11	84/2009	1	Mehbub Ahmed Yusuf Hasan @Latiko

Schedule-B				
No.	Offence Punishable under Sections / Act	Rigorous Imprisonment (years)	Fine (Rs.)	Simple Imprisonment in default

				(days)
1	302 r/w 120-B, 149 IPC	**Death Sentence**	1000/-	30 (thirty)
2	307 r/w. 120-B, 149 IPC	5	1000/-	30 (thirty)
3	323 r/w. 120-B, 149 IPC	1	1000/-	30 (thirty)
4	324 r/w 120-B, 149 IPC	2	1000/-	30 (thirty)
5	325 r/w 120-B, 149 IPC	3	1000/-	30 (thirty)
6	326 r/w. 120-B, 149 IPC	4	1000/-	30 (thirty)
7	332 r/w. 120-B, 149 IPC	2	1000/-	30 (thirty)
8	435 r/w 120-B, 149 IPC	5	1000/-	30 (thirty)
9	395 r/w. 120-B, 149	5	1000/-	30 (thirty)
10	397 r/w. 120-B, 149 IPC	7	--	--
11	143 r/w. 120-B, 149 IPC	6 (Months)	1000/-	30 (thirty)
12	147 r/w. 120-B, 149 IPC	1	1000/-	30
13	148 r/w.120-B, 149 IPC	2	1000/-	30 (thirty)
14	153/A r/w.120-B, 149 IPC	1	1000/-	30 (thirty)
15	186 r/w. 120-B, 149 IPC	3 (Months)	500/-	7 (seven)
16	188 r/w. 120-B, 149 IPC	1 (Month)	200/-	7 (seven)
17	Sec.141 Indian Railways Act r/w. 120-B, 149 IPC	1	500/-	7 (seven)
18	Sec.150 Indian Railways Act r/w. 120-B, 149 IPC	3	--	--
19	Sec.151 Indian Railways Act r/w. 120-B, 149 IPC	5	1000/-	30 (thirty)
20	Sec.152 Indian Railway Act r/w. 120-B, 149 IPC	5	--	--
21	Sec.3 Prevention of Damages to Pub. Pro. Act r/w. 120-B, 149 IPC	6 (Months)	1000/-	30 (thirty)
22	Sec.4 Prevention of Damages to Pub.Pro. Act r/w. 120-B, 149 IPC	1	1000/-	30 (thirty)
23	Sec.135(1) Bombay Police Act r/w. 120-B, 149 IPC	30 (Days)	100/-	7 (seven)

Para-B/1- Execution of Death Sentence:

As re-affirmed by the Hon'ble Supreme Court, the execution of sentence of death 'by hanging till death' is not 'ultra vires' the Constitution, and the hanging by neck till death is a scientific and one of the least painful methods of execution of death sentence. Accordingly, the convicted accused persons named above in Para-A (Schedule-A), " be hanged by neck till death". However, the execution of sentence of death imposed (Section-53, Part-first), shall be subject to confirmation by the Hon'ble High Court, as provided in Section-28(2) of the Criminal Procedure Code.

Para-C The accused persons named below (in Schedule-C) are hereby sentenced under Section-235(2) of the Criminal Procedure Code, to undergo the punishment, as mentioned in Para-D (Schedule-D) below, for the charges proved against them.

Schedule-C			
Sr. No.	S.C.No.	Accu. No.	Name of Accused
1	69/2009	29	Suleman Ahmad Hussain @Tiger – Musalman
2	69/2009	40	Abdul Rehman Abdul Majid Dhantiya @Kankatto
3	69/2009	49	Kasim Abdul Sattar @Kasim Biryani Gaji-Ghanchi – Musalman
4	69/2009	50	Irfan Siraj Pado Ghandhi – Musalman
5	69/2009	51	Anwar Mohmmad Mehda @Lala Shaikh
6	71/2009	1	Siddik @Matunga Abdullah Badam - Shaikh
7	71/2009	2	Mehbbob Yakub Mitha @Popa
8	75/2009	1	Soheb Yusuf Ahmed Kalandar
9	75/2009	5	Saukat @Bhano Farook Abdul Sattar Pataliya
10	75/2009	6	Siddik Mohmmad Mora (Moraiya)
11	77/2009	2	Abdul Sattar Ibrahim Gaddi Asla
12	78/2009	1	Abdul Rauf Abdul Majid Isa @Dhesli @Kamli

13	78/2009	2	Yunus Abdulhaq Samol @Ghadiyali
14	78/2009	5	Ibrahim Abdul Razak Abdul Sattar Samol @Bhano
15	79/2009	3	Bilal Abdullah Ismail Badam Ghanchi
16	79/2009	4	Farook @Haji Bhuriyo Abdul Sattar Ibrahim Musalman – Gaji
17	82/2009	2	Ayub Abdul Gani Ismail Pataliya
18	82/2009	3	Saukat Abdullah Maulvi Ismail Badam
19	82/2009	4	Mohmmad Hanif @Hani Abdullah Maulvi Ismail Badam
20	85/2009	1	Saukat Yusuf Ismail Mohan @Bibino

Para-D The following punishments (as mentioned below in Schedule-D) are awarded for the respective charges proved against the convicted accused persons shown above in Para-C (Schedule-C).

Schedule-D				
No.	Offence Punishable under Sections / Act	Rigorous Imprisonment (years)	Fine (Rs.)	Simple Imprisonment in default (days)
1	302 r/w 120-B, 149 IPC	**Life Imprisonment**	1000/-	30 (thirty)
2	307 r/w. 120-B, 149 IPC	5	1000/-	30 (thirty)
3	323 r/w. 120-B, 149 IPC	1	1000/-	30 (thirty)
4	324 r/w 120-B, 149 IPC	2	1000/-	30 (thirty)
5	325 r/w 120-B, 149 IPC	3	1000/-	30 (thirty)
6	326 r/w. 120-B, 149 IPC	4	1000/-	30 (thirty)
7	332 r/w. 120-B, 149 IPC	2	1000/-	30 (thirty)
8	435 r/w 120-B, 149 IPC	5	1000/-	30 (thirty)
9	395 r/w. 120-B, 149	5	1000/-	30 (thirty)
10	397 r/w. 120-B, 149 IPC	7	--	--

11	143 r/w. 120-B, 149 IPC	6 (Months)	1000/-	30 (thirty)
12	147 r/w. 120-B, 149 IPC	1	1000/-	30 (thirty)
13	148 r/w.120-B, 149 IPC	2	1000/-	30 (thirty)
14	153/A r/w.120-B, 149 IPC	1	1000/-	30 (thirty)
15	186 r/w. 120-B, 149 IPC	3 (Months)	500/-	7 (seven)
16	188 r/w. 120-B, 149 IPC	1 (Month)	200/-	7 (seven)
17	Sec.141 Indian Railways Act r/w. 120-B, 149 IPC	1	500/-	7 (seven)
18	Sec.150 Indian Railways Act r/w. 120-B, 149 IPC	3	--	--
19	Sec.151 Indian Railways Act r/w. 120-B, 149 IPC	5	1000/-	30 (thirty)
20	Sec.152 Indian Railsay Act r/w. 120-B, 149 IPC	5	--	--
21	Sec.3 Prevention of Damages to Pub. Pro. Act r/w. 120-B, 149 IPC	6 (Months)	1000/-	30 (thirty)
22	Sec.4 Prevention of Damages to Pub.Pro. Act r/w. 120-B, 149 IPC	1	1000/-	30 (thirty)
23	Sec.135(1) Bombay Police Act r/w. 120-B, 149 IPC	30 (Days)	100/-	7 (seven)

Para-E Sentence of imprisonment, except default sentence, awarded above, shall run concurrently and not consecutively.

Para-F The above named convicted accused persons shall be entitled to get benefit of set-off, of the period of their respective detention as an Under-Trial Prisoner, during the investigation and trial, as provided in Section-428 of the Criminal Procedure Code.

Para-G Reference be made to the Hon'ble High Court for confirmation of death sentence.

Para-H Muddamal Articles to be preserved, as certain accused persons are still absconding.

Para-I Original judgment and one certified copy thereof, be kept with the records of original Sessions Case No. 69/2009, whereas a soft-copy of the judgment be kept with records of remaining each consolidated Sessions Case.

Para-J Certified copy of the judgment be provided to each convicted accused person, free of cost, as expeditiously as possible.

Para-K This Court places on record its appreciation for admirable cooperation extended by the Ld. Special Public Prosecutors appearing for the prosecution and the Ld. Advocates for the defence, as well as the Members/ Police Officials of the SIT and also, the Jail Authorities, in smoothly conducting the entire trial proceedings at Central Jail, Sabarmati, Ahmedabad".

PART II

1 Before we proceed to record details about facts of all these reference cases and various appeals and submissions made by learned counsels for defence and learned Special Public Prosecutors for the respective parties, we would like to reproduce para 9 of the decision of the Apex Court in the case of **Masalti vs. State of U.P. reported in AIR 1965 SC 202** about the duty caste upon the High Court while exercising its appellate powers in appeals, more particularly, in reference cases in which convicts are imposed sentence for capital punishment for

conviction under Section 302 of IPC, which are referred by the learned trial Judge. Para 9 of the above judgment read as under:

> "9. We are not impressed by this argument. It is perfectly true that in a murder trial when an accused person stands charged with the commission of an offence punishable under S. 302, he stands the risk of being subjected to the highest penalty prescribed by the Indian Penal Code; and naturally judicial approach in dealing with such cases has to be cautious, circumspect and careful. In dealing with such appeals or reference proceedings where the question of confirming death sentence is involved, the High Court has also to deal with the matter carefully and to examine all relevant and material circumstances before upholding the conviction and confirming the sentence of death. All arguments urged by the appellants and all material infirmities pressed before the High Court on their behalf must be scrupulously examined and considered before a final decision is reached. The fact that 10 persons had been ordered to be hanged by the trial Judge necessarily imposed a more serious and onerous responsibility on the High Court in dealing with the present appeals. ....."

2 That entire record viz. exhibited documents, prosecution witnesses, description thereof, relevant pages of the paper book and admitted documents, are reproduced herein below, as Table-A and Table-B respectively:

TABLE-A

S.No.	**Exh.No.**	**PW**	**Description**	**Page Nos.**
1	-		Rojnama	1 to 327
2	28		List of Document (complainant)	
3	29		Charge	328 to 508
4	30 to 37		Statements of Accused Nos. 1 to 8	509 to 1775
5	38 to 46		Statements of Accused Nos. 10 to	1776 to

			18	3439
6	47 to 71		Statements of Accused Nos. 20 to 46	3440 to 7877
7	72 to 79		Statements of Accused Nos. 47 to 54	8255 to 9722
8	83		Receipts of Muddamal	9723 to 9770
9	84	PW-1	Deposition of Sureshbhai Dhanamal	9771 to 9784
10	85		Panchnama (Mark 28/3)	9785 to 9789
11	86		Panchnama (Mark 28/339)	9790 to 9791
12	92	PW-2	Deposition of Pavan Kumar Narayandas	9792 to 9801
13	93		Panchnama (Mark 28/4)	9802 to 9805
14	94 to 95		Slip of Signature on Carba by Panch	9806
15	97	PW-3	Deposition of Inderkumar	9807 to 9812
16	98		Panchnama (Mark 28/48)	9812 to 9814
17	100	PW-4	Deposition of Harshadkumar Nagindas Rana (Complainant)	9814 to 9822
18	101		Panchnama (Mark 28/50)	9823 to 9824
19	102		Passport of Accused-Bilal Ismail Sujela, Muddamal Article No.71	9825
20	103		Submission of Deposition of witness Harsadbhai N.Rana S.C.133102 Exh.120 (Certified Copy) by Adv. Hasan	9826 to 9827
21	104	PW-5	Deposition of Devidas Ghanshyamdas Lakhani (Complainant)	9828 to 9835
22	105		Panchnama (Mark 28/52)	9836 to 9837

23	106	PW-6	Deposition of Prakash Kundandas (Complainant)	9838 to 9842
24	107		Panchnama (Mark 28/54)	9843 to 9844
25	110	PW-7	Deposition of Mohanlal Pesumal Dhanwani (Complainant)	9844 to 9849
26	111		Panchnama (Mark 28/53)	9850 to 9851
27	112	PW-8	Deposition of Hemang Hasmukhlal Patel (Complainant)	9852 to 9861
28	113		Panchnama (Mark 28/56)	9861 to 9863
29	115	PW-9	Deposition of Hiralal Longmal (Complainant)	9864 to 9868
30	116		Panchnama (Mark 28/58)	9869 to 9870
31	118	PW-10	Deposition of Rajubhai Maganbhai Jamandas Lakhvani (Complainant)	9871 to 9876
32	121	PW-11	Deposition of Narendrabhai Jamandas Lakhvani (Complainant)	9877 to 9882
33	122		Panchnama (Mark 28/59)	9883-9884
34	125	PW-12	Deposition of Ajaysingh Rammurtisingh (Complainant)	9885 to 9888
35	126		Panchnama (Mark 28/91)	9889 to 9890
36	129	PW-13	Deposition of Ismial Abdul Majid Durves (Complainant)	9891 to 9896
37	130		Panchnama (Mark 28/60)	9897 to 9898
38	133	PW-14	Deposition of Mehbub Ismail (Complainant)	9899 to 9902
39	134		Panchnama	9903 to 9904
40	135 to 136		Receipts of Muddamal Slip sign by Panch	9905

41	137 to 138		Receipts of Muddamal slip sign by Panch	9906
42	139	PW15	Deposition by Girish Nathalal	9907 to 9912
43	140		Panchnama (Mark 28/62)	9913 to 9914
44	146		Panchnama (Mark 28/10)	9915
45	147		Panchnama (Mark 28/11)	9916
46	148		Panchnama (Mark 28/12)	9917
47	149		Panchnama (Mark 28/13)	9918
48	150		Panchnama (Mark 28/14)	9919
49	151		Panchnama (Mark 28/15)	9920
50	152		Panchnama (Mark 28/16)	9921
51	153		Panchnama (Mark 28/17)	9922
52	154		Panchnama (Mark 28/18)	9923
53	155		Panchnama (Mark 28/19)	9924
54	156		Panchnama (Mark 28/20)	9925
55	157		Panchnama (Mark 28/21)	9926
56	158		Panchnama (Mark 28/22)	9927 to 9928
57	159		Panchnama (Mark 28/23)	9929
58	160		Panchnama (Mark 28/24)	9930
59	161		Panchnama (Mark 28/25)	9931
60	162		Panchnama (Mark 28/26)	9932
61	163		Panchnama (Mark 28/27)	9933
62	164		Panchnama (Mark 28/28)	9934
63	165		Panchnama (Mark 28/29)	9935
64	166		Panchnama (Mark 28/30)	9936
65	167		Panchnama (Mark 28/31)	9937
66	168		Panchnama (Mark 28/32)	9938
67	169		Panchnama (Mark 28/33)	9939
68	170		Panchnama (Mark 28/34)	9940
69	171		Panchnama (Mark 28/35)	9941
70	172		Panchnama (Mark 28/36)	9942

71	173		Panchnama (Mark 28/37)	9943
72	174		Panchnama (Mark 28/38)	9944
73	175		Panchnama (Mark 28/39)	9945
74	176		Panchnama (Mark 28/40)	9946
75	177		Panchnama (Mark 28/41)	9947
76	178		Panchnama (Mark 28/43)	9948-9950
77	179	PW-16	Deposition of Karsanbhai Jadavbhai (Complainant)	9951 to 9952
78	180	PW-17	Deposition of Ramaben Kantilal Goswami (Complainant)	9953 to 9955
79	181		Panchnama (Mark 28/8	9956 to 9963
80	182	PW-18	Deposition of Arvind Kantilbhai	9964 to 9971
81	183		Panchnama (Mark 28/64)	9972 to 9976
82	184 to 191		Slip of Muddamal sign by Panch Article No.95	9977 to 9980
83	193	PW-19	Deposition of Prahaldbhai Somabhai Patni (Complainant)	9981 to 9983
84	194		Panchnama (Mark 28/65)	9984 to 9985
85	195	PW-20	Deposition of Sureshbhai Laxmanbhai	9986 to 9988
86	196		Panchnama (Mark 28/66)	9989 to 9991
87	197	PW-21	Deposition of Umangbhai Gunwantlal Thakkar	9992 to 9995
88	198		Panchnama (Mark 28/67)	9996 to 9997
89	199		Panchnama (Mark 28/68)	9998 to 9999
90	202	PW-22	Deposition of Shantilal Baballas (Complainant)	10000 to 10001
91	203		Panchnama (Mark 28/52)	10002

				to 10003
92	204	PW-23	Deposition of Rangitbhai Bhikhabhai (Complainant)	10004 to 10007
93	205		Panchnama (Mark 28/223)	10008 to 10009
94	206		Panchnama (Mark 28/278/A)	10010
95	209	PW-24	Deposition of Manishkumar Virendrabhai Rana (Complainant)	10011 to 10016
96	210		Panchnama (Mark 28/262)	10017
97	211		Panchnama (Mark 28/263)	10018 to 10019
98	212		Slip of Muddamal sign by Panch for Mobile	10020
99	213		Muddamal Article No.26/09/2	10021
100	215	PW-25	Deposition of Trilokchand Virendrabhai Rana (Complainant)	10022 to 10028
101	216		Panchnama (Mark 28/270)	10029 to 10030
102	217	PW-26	Deposition of Dasarthbhbai Shanabhai Baria (Complainant)	10031 to 10032
103	218		Panchnama (Mark 28/233)	10033 to 10034
104	219	PW-27	Deposition of Bhupatsinh Motisinh Chauhan (Complainant)	10035 to 10039
105	220		Panchnama (Mark 28/225)	10040 to 10042
106	222	PW-28	Deposition of Babulal Lokamal (Complainant)	10043 to

				10045
107	223		Panchnama (Mark 28/226)	10046 to 10047
108	224	PW-29	Deposition of Asokkumar Khanderav (Complainant)	10048 to 10050
109	225		Panchnama (Mark 28/228)	10051 to 10052)
110	226	PW-30	Deposition of Deepakkumar Bharatbhai (Complainant)	10053 to 10056
111	227		Panchnama (Mark 28/229)	10057
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710	1468		Letter addressed to Central Jail Supdt.	13334
711	1469		Confessional statement of Jabir Binyamin Behra	13335 to 13341
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714	1478		List of Document	13349
715	1480		Mark (28/202) Handwriting report	13350
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718	1483		Certificate of Dead bodies Mark (@8/216) FSL report dated 27/5/2003	13361 to 13362
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721	1529		Appln. By Spl. PP for issuance of witness summons	13742
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726	1558		Questionnaire of accused of Irafan Mahommad Patadiya Dy. S.P.	13783
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729	1561		Letter addressed to C.J.M Godhra by S.P., Vadodara	13793
730	1562		Questionnaire of accused Mehabub Mahammad Yusuf Hasan	13794
731	1563		Questionnaire of Accused Mehabub Mahamaad Yusuf Hasan	13797
732	1566		Questionnaire of accused Soukat Yusuf Ismail @ Biliyo	13800
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734	1576	PW-249	Deposition of S.G.Bhati (Complainant)	13807
735	1577		Questionnaire of accused Soukat @ Bhano	13810
736	1578	PW-250	Deposition of J.K.Ghogahra, Sr.C.J. (Complainant)	13816
737	1586	PW-251	Deposition of J.K.Bhatt, DIG, Vadodara	13825
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739	1591		Letter addressed to C.J.M, Godhra by Salim Yusuf Jarda	13835
740	1592		Statement of accused Salim Yusuf Jarda U/s. 30(5) of Pota	13836
741	1597		Questionnaire of accused Soukat Farukh Patadiya	13840
742	1598	PW-253	Deposition of P.G.Vyas, Sr.C.J. (Complainant)	13842
743	1599		Questionnaire of accused Irafan Mohammad Hanif Pataliya	13846
744	1603		Closing pursis by Sp.PP	13848
745	1612		Application of accused Avd. U/S. 91 of C.R.P.C.	13849
746	1614		Written reply by Spl.P.P.	13851
747	1622		Application for partly modified Ex.1612	13852
748	1626		Reply to the application Ex.1622	13855
749	1628		Fresh Appln. Of accused advocate C.R.P.C.91	13856
750	1634		Written Reply by Spl.P.P. Of Ex. 1628	13889
751	1635		Written submission of accused Adv. I.M.Munsi	13892
752	1638		Copy of letter of Central Jail No.ACP/UTP/2422/10 dtd. 30.7.2010	13897
753	1639		Copy of letter of Central Jail,	13898

			Ahmedabad No.ACP/UTP/4023/10/dtd. 30.7.2010	
754	1663		Written argument by accused adv. Charkha	13900
755	1676		Written argument by accused adv. A.D.Shah	14035
756	1687		Written argument by accused adv. I.M.Munsi with 26 photos	14183
757	1715		Written argument by Spl. A.P.P.	14347
758	1880		Copy to occurrence book register of Fire Brigade Godhra	14604
759	1781		Mark (28/200) report addressed to FSL Ahmedabad	14605
760	1782		Mark (28/214) report addressed to FSL Ahmedabad Dtd. 18/2/03 for Narco Psycho Test of accused	14607
761	1783		Mark (@8/286) permission of Home Department, Sachivalaya, Gandhinagar, Dtd.7.7.2004	14609
762	1784		Mark (28/287) permission of Home Department, Sachivalaya, Gandhinagar Dtd.9.7.2004	14613
763	1785		Mark (28/294) permission of Home Department, Sachivalaya, Gandhinagar, Dtd. 24.8.2004	14616
764	1786		Mark (28/303) permission of Home Department, Sachivalaya, Gandhinagar, Dtd.4.11.2004	14620
765	1787		Mark (28/312) permission of Home Department, Sachivalaya, Gandhinagar, Dtd.1.1.2005	14624
766	1788		Mark (28/313) permission of Home Department, Sachivalaya, Gandhinagar, Dtd.1	14628
767	1789		Mark (28/313) Permission of Home Department dated 25.8.2005	14630
768	1790		Mark (28/326) Permission of Home Department, Sachivalaya,	14636

			Gandhinagar Dtd. 15/10/2005	
769	1791		Mark (28/327) Permission of Home Department, Sachivalaya, Gandhinagar, Dtd. 22.12.2005	14640
770	1792		Mark (28/337) Permission of Home Department	14644
771	1801		Mark (749/1) Xerox copy of F.S.of witness Nitin	14648
772	1809		Mark 873/1 X-Ray form Xerox	14649
773	1812		Mark 912/1 Panchnama	14650
774	1814		Mark 931/2 Cash Memo Bill	14651
775	1823		Mark 115/1 xerox copy of Ticket Page No. 1635	14652
776	1824		Mark 12461/1 xerox copy of letter written by I.O. addressed to C.J.M., Dated 22.9.2003	14653
777	1825		Mark 1246/2 xerox copy of letter written by I.O. addressed to Exe. Magistrate., Godhra Dtd.4.4.2004	14654
778	1826		Mark 1246/3 Xerox copy of letter written by I.O., Dtd.8.4.2004	14655
779	1864		Mark 1389/1 Para Military Form	14656
780			Index before Judgement	
781	1875		Judgement	14661
782	1882		Joint copy of accused Commitment Warrant, Face Identification Statement & Xerox copy of final order vide O.W.No.4/11, dtd. 1/3/11	To
783	1887		Carbon copy to the Registrar General Gujarat High Court Ahmedabad, vide O.W.No.110/11 dtd. 7/3/11 U/s 366 of Cr.P.C.	15574

TABLE-B

ADDMITTED DOCUMENTS

ON BEHALF OF THE COMPLAINANT-STATE PROSECUTION HAS SUBMITTED THE LIST OF DOCUMENTS WHICH HAS EXHIBITED AS Exh: 28 IN S.C.No. 69/09 to 86/09 (204/09) AND THE FOLLOWING DOCUMENTS WERE ADMITTTED BY THE ADVOCATE FOR THE ACCUSED AND THEREFORE DOCUMENTS WERE EXHIBITED AS UNDER:

ADMITTED DOCUMENTS

Sr No.	Part & Page No.	Exh. No.	Items Under Exh: 28	Particulars	Date
1	28/9915	146	28/10	Panchnama of Identification of Dead Body of deceased.	28.02.2002
2	28/9916	147	28/11	Panchnama of Identification of Dead Body of deceased.	28.02.2002
3	28/9917	148	28/12	Panchnama of Identification of Dead Body of deceased.	28.02.2002
4	28/9918	149	28/13	Panchnama of Identification of Dead Body of deceased.	28.02.2002
5	28/9919	150	28/14	Panchnama of Identification of Dead Body of deceased.	28.02.2002
6	28/9920	151	28/15	Panchnama of Identification of Dead Body of deceased.	28.02.2002
7	28/9921	152	28/16	Panchnama of Identification of Dead Body of deceased.	28.02.2002
8	28/9922	153	28/17	Panchnama of Identification of Dead Body of deceased.	28.02.2002
9	28/9923	154	28/18	Panchnama of Identification of Dead Body of deceased.	28.02.2002
10	28/9924	155	28/19	Panchnama of Identification of Dead Body of deceased.	28.02.2002
11	28/9925	156	28/20	Panchnama of Identification of Dead Body of deceased.	28.02.2002
12	28/9926	157	28/21	Panchnama of Identification of Dead Body of deceased.	28.02.2002
13	28/9927-28	158	28/22	Panchnama of Identification of Dead Body of deceased.	28.02.2002
14	28/9929	159	28/23	Panchnama of Identification of Dead Body of deceased.	28.02.2002
15	28/9930	160	28/24	Panchnama of Identification of Dead Body of deceased.	28.02.2002

16	28/9931	161	28/25	Panchnama of Identification of Dead Body of deceased.	28.02.2002
17	28/9932	162	28/26	Panchnama of Identification of Dead Body of deceased.	28.02.2002
18	28/9933	163	28/27	Panchnama of Identification of Dead Body of deceased.	28.02.2002
19	28/9934	164	28/28	Panchnama of Identification of Dead Body of deceased.	28.02.2002
20	28/9935	165	28/29	Panchnama of Identification of Dead Body of deceased.	28.02.2002
21	28/9936	166	28/30	Panchnama of Identification of Dead Body of deceased.	28.02.2002
22	28/9937	167	28/31	Panchnama of Identification of Dead Body of deceased.	28.02.2002
23	28/9938	168	28/32	Panchnama of Identification of Dead Body of deceased.	28.02.2002
24	28/9939	169	28/33	Panchnama of Identification of Dead Body of deceased.	28.02.2002
25	29/9940	170	28/34	Panchnama of Identification of Dead Body of deceased.	28.02.2002
26	30/9941	171	28/35	Panchnama of Identification of Dead Body of deceased.	28.02.2002
27	31/9942	172	28/36	Panchnama of Identification of Dead Body of deceased.	28.02.2002
28	32/9943	173	28/37	Panchnama of Identification of Dead Body of deceased.	28.02.2002
29	33/9944	174	28/38	Panchnama of Identification of Dead Body of deceased.	28.02.2002
30	34/9945	175	28/39	Panchnama of Identification of Dead Body of deceased.	28.02.2002
31	35/9946	176	28/40	Panchnama of Identification of Dead Body of deceased.	28.02.2002
32	36/9947	177	28/41	Panchnama of Identification of Dead Body of deceased.	28.02.2002
33	NOT IN P.B.	989	28/42	A.S.M. Yusufali M. Saiyed has produced the Certificate about Time Schedule of impugned Train	28.02.2002
34	28/9948-50	178	28/43	Panchnama of 18 un-identification of Dead Body of deceased	28.02.2002
35	NOT IN P.B.	990	28/45	P.S.O.Dalabhai Akhambhai has produced the extract of Vardhi	03/03/02
36	NOT IN	991	28/69	Letter of Ticket Inspector,	

	P.B.			Ratlam	
37	NOT IN P.B.	993	28/221	Report from research Designed & Standard Organization, Lakhnow	20.09.2002
38	36/12213-14	1001	28/239	**ORDER of Home Department of State of Gujarat granting Sanction Under Section 153(A) to file the Charge sheet against accused**	16.10.2002
39	28/10079-80	244	28/241	Body Panchnama of A/3 of S.C.No. 70/09, Nannumiya @ Nikki Tamjadali Chaudhary	13.10.2002
40	28/10081-82	245	28/242	Seizure Panchnama of Register from Hotel CLASSIC	13.10.2002
41	28/10083-84	246	28/243	Seizure Panchnama of Register from Hotel PRINCE	19.10.2002
42	28/10085-86	247	28/244	Seizure Panchnama of Register from Hotel VRUNDAVAN	20.10.2002
43	28/10087-88	248	28/245	Seizure Panchnama of Register from Hotel VISHWA	20.10.2002
44	28/10089-90	249	28/246	Seizure Panchnama of Register from Hotel SHAHIL	21.10.2002
45	28/10091-95	250	28/248	Panchnama of Search of House of A/5 of S.C.No. 71/09, Mohammad Hanif @ Motto Chamro Abdul Rahim Bhatuk.	28.10.2002
46	28/10096-97	251	28/249	Seizure Panchnama of Register from Hotel MOUNT SHIVA	13.11.2002
47	NOT IN P.B.	995	28/250	Letter to Madrassa & Maulvi's informing that not to give shelter to the absconding accused.	29.11.2002
48	NOT IN P.B.	996	28/251	Letter to Madrassa & Maulvi's informing that not to give shelter to the absconding accused.	29.11.2002
49	36/12215-16	**1002**	**28/253**	**ORDER of Home Department of State of Gujarat granting Sanction Under Section 153(A) to file the Charge sheet against accused**	**18.12.2002**
50	28/10098-99	**252**	**28/254**	Body Panchnama of A/1 of S.C. No.72/09, Idrish Ibrahim Charkha @ Shaka	**18.01.2003**

51	36/12217-19	**1003**	**28/261**	**ORDER of Home Department of State of Gujarat granting Sanction Under Section 153(A) to file the Charge sheet against accused**	**16.04.2003**
52	36/12220-21	1004	28/261	**ORDER of Home Department of State of Gujarat granting Sanction Under Section 153(A) to file the Charge sheet against accused**	**02/05/03**
53	36/12222-25	1005	28/277	**ORDER of Home Department of State of Gujarat CORRIGENDUM**	**01/10/03**
54	28/10100	253	28/278	Body Panchnama of A/1 of S.C. No.76/09, Yakub Abdul Sattar Shaka	**08/04/04**
55			28/278/A	Body Panchnama of A/1 of S.C. No.72/09, Idrish Ibrahim Charkha @ Shaka	**08/04/04**
56	36/12209	997	28/280	Arrest Panchnama of A/2 of S.C.No. 76/09 Abdul Karim Haji Hussain Badam	05/05/04
57	28/10101-10102	254	28/280	Body Panchnama of A/1 of S.C. No.77/09, Salim @ Salman Yusuf Sattar Zarda	10/06/04
58	28/10103	255	28/283	Body Panchnama of A/2 of S.C. No.77/09, Abdul Sattar Ibrahim Gaddi Asla	05/07/04
59	28/10104-10105	256	28/288	Body Panchnama of A/1 of S.C. No.78/09, Abdul Rauf Abdul Majid Isa @ Dhesli @ Kamli	10/08/04
60	28/10106-10107	257	28/289	Body Panchnama of A/2 of S.C. No.78/09, Yunus Abdulhaq Samol 2 Ghadiyali	11/08/04
61	28/10116-19	262	28/304	Seizure Panchnama of Coach S/6 of Sabarmati Ex. Train	08/11/04
62	28/10120-21	263	28/305	Body Panchnama of A/4 of S.C. No.79/09, Yunus Abdullaq Samol 2 Ghadiyali Farook @ Haji Bhiriyo Abdul Sattar Ibrahim Musalman-Gaji	18.11.2004
63	36/12210	998	28/307	**Letter from S.P.W.Rly. Vadodara to Sr. D.E.E. (T.R.O.) Vadodara**	18.07.2002
64	36/12211	999	28/308	Letter from Sr. D.M.E.Vadodara To Executive Director (Coaching) R.D.S.O. Luknow	04/04/03

65	36/12212	1000	28/309	Letter from Div. Mechanical Engineer, W. Rly. Vadodara To Dy. S.P. W. Rly. Vadodara-along with Letter dated 06.05.2003 of R.D.S.O. Lucknow.	21.12.2004
66	28/10123-24	264	28/311	Body Panchnama of A/1 of S.C. No.80/09, Siddik Abdul Rahim Abdul Sattar Bakkar Muslim Shaikh	24.12.2004
67	28/10123-24	265	28/315	Body Panchnama of A/1 of S.C. No.81/09, Rayeesh Hussain Ismail Mitha @ Bhaina Ghanchi-Musalman	03/06/05
68	28/10125-26	266	28/316	Body panchnama of A/2 of S.C. No. 81/09, Irfan Abdul Majid Ghanchi Kalandar @Irfan Bhabho	28.06.2005
69	28/10127-28	267	28/318	Body Panchnama of A/1 of S.C. No.82/09, Irfan Mohmmad Hanif Abdul Gani Pataliya	26.07.2005
70	28/10129-30	268	28/319	Body panchnama of A/2 of S.C.No. 82/09, Irfan Mohammad Hanif Abdul Gani Pataliya	26.07.2005
71	28/10130-31	269	28/321	Body panchnama of A/3 of S.C.No. 82/09, Saukat Abdullah Maulvi Ismail Badam	03.08.2005
72	28/10131-32	270	28/323	Body panchnama of A/4 of S.C.No. 82/09, Mohammad Hanif @ Hani Abdullah Maulve Ismail Badam	06.09.2005
73	28/10133-34	271	28/325	Body panchnama of A/1 of S.C.No. 83/09, Mohammad Hanif @ Hani Abdullah Maulve Ismail Badam	27.09.2005
74	28/10135-36	272	28/328	Body panchnama of A/1 of S.C.No. 84/09, Mehbub Ahmed Yusuf Hasan @ Latiko	16.02.2005
75	28/10137-38	273	28/330	Body panchnama of A/1 of S.C.No. 85/09, Saukat Yusuf Ismail Mohan @ Bibino	10.04.2006
76	36/12226-27		28/334	**ORDER OF Home Dept. Of State of Gujarat granting Sanction U/s 153 (A) to file the charge sheet against the accused.**	**09.05.2006 (10.5.2006)**

77	36/12228-29		28/335	**ORDER OF Home Dept. Of State of Gujarat granting Sanction U/s 153 (A) to file the charge sheet against the accused.**	**03.07.2006 (4.7.2006)**
78	36/12244-45	1016	988/1	Body panchnama of A/1 of S.C.No. 204/09, Ibrahim Adam Dhantiya @ Kachuko	25.08.2009
79	36/12246-47	1017	988/2	panchnama of Seizure of Passport of A/1 of S.C.No. 204/09, Ibrahim Adam Dhantiya @ Kachuko	25.08.2009
80	28/10139	274	28/336	Body panchnama of A/1 of S.C.No. 86/09 Siddik Ibrahim Hathila	12.11.2007
81	36/12230-31 &32, 33	1008	28/338	Report given by Sr. Section Engineer, Ahmedabad giving the Coach Numbers & 2 drawings of Coach wherein the A.C.P. Systems were installed.	19.09.2005

COMPLAINT

Mark. 28/1 S.C. No. 69/ 2009 Dt. 25-06-2009 Sd/- ASJ.
Exh.1190 Dt. 15-03-10, Sd/- ASJ., PMS. At. Ah'd.

Dt. 27-02-2002

My name is Rajendrarav Raghunathrav, by Caste – Jadav, Age 44 years, Occupation – Railway Driver, Residing at - Marathavas, Nr. Ratlam Topkhana, M.P..

Having declared the fact of my complaint in person, I dictate that, I have been performing duty as a Railway Engine Driver in Ratlam Head Quarters for the last seven years.

Today, at 04:50 am on 27-02-2002, I left with Sabarmati Express – Train No. 9166 – AP to reach to Vadodara Railway Station from Ratlam. The Assistant Driver - Mukesh Raghuvirprasad Pachori and the Guard - Mr. S.M. Verma were with me. We reached to Godhra Railway Station at 07:40 am with this train and stopped the train on platform no. 1 and on receiving signal, we started the train at 07:45 o' clock and left towards Vadodara and when 4 to 5 coaches passed from the

platform, the chain pulling occurred at 07:47 o' clock. Therefore, the train was stopped and as our Assistant Driver - Mukeshbhai and the Guard made inquiry, the chain pulling occurred in coach Nos. 83101, 5443, 51263, 88238. Therefore, the Master was informed through walkie-talkie and after resetting chain pulling, we started the train. As the train reached near Godhra 'A' Cabin, the chain pulling occurred again and the stone pelting was started from the platform side. We saw that, the mob of about 900 to 1000 persons was pelting stones on the train and some persons out of them set Coach no. 93498 – S/6 on fire. Therefore, I immediately informed the S.S. [Station Superintendent], Godhra through walkie-talkie to send police assistance and fire brigade immediately and as the train may not roll, we stopped the train by putting OT (wooden pieces). During that period, Railway Police, R.P.F. and Fire Brigade persons came and the police used tear gas to disperse the mob and also did *lathi charge,* however as the mob was not dispersed, the police resorted to firing and the mob ran towards the city while pelting stones and Fire Brigade started extinguishing the fire. After extinguishing the fire, we saw in the coach that, the inside portion of the coach was completely burnt and as the police who were with us examined, about ten burnt dead bodies were found lying on one another and some other persons (passengers) sustained injuries due to stone pelting and burning. As they went to the hospital themselves, it can't be said as to how many persons sustained injuries and the luggage of the passengers was completely burnt in the coach of the said train. The coach of the Railway is completely burnt and the police have arrested some persons.

Therefore, today on 27-02-2002, between 07:47 to 08:20 o' clock in the morning, about 900 to 1000 persons of the Muslim community of Signal Faliya and surrounding area of Godhra City did chain pulling illegally in our Sabarmati Express Train no. 9166 – AP, pelted stones, set one coach on fire and burnt it completely, tried to set on fire the passengers inside the coach and as about 10 passengers were burnt alive with their luggage, and as they have run away on *Lathi charge* and firing being made by the police, it is my lawful complaint against them. I don't know the name and address of any person out of this mob. My colleague Assistant Driver, the Guard and those who found in the investigation etc. are my witnesses.

Date : 27.02.2002
Time : 9:30 am

Gist of the case of the prosecution and the Charge framed by the learned Additional Sessions Judge containing relevant facts, which have bearing on the case are as under:

Crime Register No. 9/2002, Godhra Railway Police Station.

IPC Sections : 302, 307, 147, 148, 149, 436, 153-A r/w 120-B and

Sections – 141, 150, 153 Indian Railways Act.

Date of Offence : 27.02.2002

Total number of Deaths : 59

Total number of Passengers injured : 48

Value of Damage to Public Property : Rs.17,62,475/-

Total Number of Charge sheets filed – 19

Sessions Case No. 69/2009 to 86/2009 & 204/2009.

Total number of accused chargesheeted : 101

Abatement of Trial qua : Five accused.

Total number of Juvenile accused : 2 chargesheeted but trial separated and 3 others directly sent to Juvenile court.

Total witnesses : 253

[Reference given in Judgment in the trial court Page No.14713 line No.13]

Total documentary evidence : 780

[a] Documentary evidence produced by prosecution : 748
[Reference given in Judgment in the rial court Page No.14706 to 14709 Column No.20]

[b] Documentary evidence produced by defence : 32
[Reference given in Judgment in the rial court Page No.14710 to 14711 Column No.21]

Total Exhibits : 1875

[including Exhibit given to the depositions of witnesses, misc. papers applications, yadi, vakalatnama, pursis, etc.]

Judgment is given Exh.1875

Against 31 accused proved
Against 63 accused not proved
Other accused absconding

Convicted	:	Capital Punishment	- 11
		Life sentence	- 20
Acquitted	:		- 63

We are informed that Saukat @Bhano Farook Abdul Sattar Pataliya, accused No.5 of Sessions Case No.75/2009 died during pendency of these appeals and copy of jail record is made available. In view of the above, appeal qua Saukat @Bhano Farook Abdul Sattar Pataliya is abated.

Charges framed for offences U/s. 143, 147, 148, 302, 307, 323, 324, 325, 326, 332, 395, 397, 435, 186 and 188 r/w 120-B, 149, 153-A, 212 of the IPC, and Sections – 14, 150, 151 and 152 of the Indian Railways Act, Sections – 3 and 4 of the Prevention of Damages to Public

Property Act, and Section 135(1) of the Bombay Police Act.

The Charge Framed by the trial court reads as under:

THE CHARGE

"BEFORE THE GODHRA [PANCHAMAHAL] ADDITIONAL SESSIONS JUDGE COURT
CAMP :: AHMEDABAD
Sessions Case No. 69/2009
EXH. 29

Complainant :: The State of Gujarat
Versus
Accused :

1. Mohmed Ansar Qutubuddin Ansari
2. Betulla Kader Taili
3. Firozekhan Gulabkhan Pathan
4. A. Rehman Yusuf Dhantiya
5. Juniyad Farukh Hayat
6. Ishak Yusuf Luhar
7. Firozekhan Jafarkhan Pathan
8. Fakruddin Yusuf Musalman [expired]
9. Sabir Anwar Ansari
10. Inayat A. Sattar Jujara
11. Nasirkhan Sultankhan Pathan
12. Sadikkhan Sultankhan Pathan
13. A. Sattar Ismail Giteli
14. Yasin Habib Malek
15. Alauddin Alimuddin Ansari
16. Yusufkhan Alubhai Bakzubhai Kazi
17. Yusuf Sabir Ismail Pathan
18. Yahmohmed Shafi Mohmed Chhakda
19. Gulzarali Agnu Ansari [expired]
20. Abdul Asu Mistry
21. Rafik Ahmed Jamnu
22. Ahmed A. Rahim Hathibhai
23. Shamshekhan Sultankhan Pathan
24. Idrish Abdulla Umarji Shaikh
25. Hussain Mohmed Dhobi [expired]
26. Azgarali Kamruddin Voraji
27. Kamal Badshah Mohmed Sharif

28. Taiyab a. Hak Khoda
29. Suleman Ahmed Hussain @ Tiger
30. Mohmed Mushrafkhan Ashrafkhan Pathan
31. Abidbhai Karimbhai Shaikh.
32. Mohmed Ibrahim Shaikh
33. Hussain A. Sattar Durvesh
34. Shaukat Mohmedbhai Shaikh
35. Ahmed A. Rahim Kala
36. Asif @ Babu Sidik Kader
37. A. Rahim Kalu
38. Anwar Hussain A. Rahim Pittal Shaikh
39. Mohmed A. Salam Giteli
40. A. Rehman A. Majid Dhatiya @ Kankato
41. Salim A. Gafar Shaikh
42. Mohmed Hussain A. Rahim Kalota
43. A. Gani Ahmed Shaikh
44. Jabir Abdul Kala
45. A. Rauf Ahmed Yayman
46. Sirajbhai Abdulla Jamsa [expired]
47. A. Razak A. Rahim Dhatiya @ Dungariya
48. Bilal Ismail A. Majid Sujela
49. Kasim A. Sattar @ Kasim Biryani
50. Irfa Siraj Pada Ghanchi
51. Anwar Ahmed Meda @ Shaikh
52. A. Razak Yakub Ismailwala
53. Mohmed Saed A. Salam Badam Shaikh
54. Ishak Mohmed Ghanchi Mamdu

And other persons, and the absconding accused.
Ibrahim Adam Dhantiya @ Kachuka and other 16 persons.

CHARGES

I, P.R. Patel, Additional Sessions Judge, Godhra [Panchamahal] District Court, Camp – Sabarmati Central Jail Compound, Ahmedabad frame these charges against the accused that,

[1] On the occasion of Ram Yagya Ahuti organized at Ayodhaya Kar Sevaks from all over the country had gone and of them several Kasevaks were returning on 27/2/2002 in the Sabarmati Express Train No. 9166-UP, the scheduled time of arrival of the said train at Godhra Railway Station was late at night at 2.55 a.m and the

stoppage at the Godhra Railway Station was 5[five] minutes.

[2] You were aware of the above facts, from amongst the accused the below mentioned accused had on 26/02/2002 at about nine o'clock planned criminal conspiracy for achieving your common object,

[1] Salim @ Salman Yusuf Jarda [accused No. 1 Sessions Case No. 77/09]

[2] Shaukat Ahmed Charkha @ Lalu [absconding accused No. 7, Sessions Case No. 86/09]

[3] Salim Haji Ibrahim Badam @ Salim Panwala [absconding accused No. 8 Sessions Case No. 86/09] [absconding accused paiki No. 8]

[4] Jabir Binyamin [accused No. 2 Sessions Case No. 72/09]

[5] Abdul Razak Kurkur [accused No. 2 Sessions Case No. 70/09].

[3] As a part of the said criminal conspiracy, you had constituted unlawful assembly and the above accused had gathered in the Room No. 8 in the Aman Guest House of the accused No.2 [Sessions Case No.70/09] Abdul Razak Kurkur for discussions, and during discussion it was decided to take petrol from the petrol pump of Kalabhai at Godhra, and accordingly from amongst the accused following accused had used the parrot green colour loading rickshaw No. GJ-6-U-8074 and placed seven carboys of 20 liter petrol capacity and gone to Kalabhai's petrol pump on 26/2/2002 at night, and accordingly in all the seven carboys filled approximately 20-20 liters of petrol and brought the tempo rickshaw No.GJ-6-U-8074 from the petrol pump and parked the tempo on the rear of the Aman Guest House.

[1] Salim Haji Ibrahim Badam @ Salim Panwala [absconding accused No. 8 Sessions Case No. 86/09]

[2] Salim @Salman Yusuf Jarda [accused No.1

Sessions Case No.77/09]

[3] Shaukat Ahmed Charkha @ Balu [absconding accused No. 7, Sessions Case No.86/09]

[4] Siraj Mohmed Abdul Rehman @ Bala [accused No.1 Sessions Case No.79/09]

[5] Jabir Binyamin Behra [accused No. 2 Sessions Case No.72/09].

At that time from amongst the accused, the accused No.2[Sessions Case No. 70/09] Abdul Razak Kurkur had also taken his M-80 Moped and accompanied them to the petrol pump. By such act Siraj Mohmed Abdul Rehman Meda, @Bala [accused No.1 Sessions Case No. 79/09] had also joined in spite of the knowledge of unlawful object of the unlawful assembly.

[4] As noted above, all the seven carboys filled with petrol were brought to the rear portion of Aman Guest House, at that time amongst the accused,

[1] Imran Ahmed Batuk @Sheru [absconding accused No.10 Sessions Case No. 86/09]

[2] Hasan Ahmed Charkha and [accused No.4 Sessions Case No. 71/09]

[3] Mehboob Khalid Chanda [Accused No.1 Sessions Case No. 73/09] also came to the said place and all these accused joined the unlawful assembly. And all above accused have together placed the said petrol filled carboys in the house of accused No.2 [Sessions Case No.70/09] Abdul Razak Kurkur in the Signal Faliya on 26/2/2002 at night time.

[5] In the meanwhile from amongst the accused,

[1] Bilal Ismail Abdul Majid Sujela @Bilal [accused No.48 Sessions Case No.69/09]

[2] Farukh Mohmed Bhana [absconding accused No.2 Sessions Case No.86/09] also joined the unlawful

assembly and you had also come to the said place at Aman Guest House and you have informed the above accused, who were present there that,

> 'We have met with Maulvi Hussain Haji Ibrahim Umarji and Maulvi Hussain Haji has issued orders to burn the coach No. 6 of the Sabarmati Express train arriving from Ayodhaya."

[6] Thus, for achieving the common object of the unlawful assembly for discussions on further action all the above mentioned accused have again assembled in the Aman Guest House for discussions, and in the meanwhile from amongst the accused, Salim Haji Ibrahim Badam @Salim Panwala had gone to the Godhra Railway Station for knowing the exact time of arrival of Sabarmati Express Train and on receiving the information that the said train was running late by four hours, returned to Aman Guest House and appraised these facts to the other accused present there. Thereafter all the above accused who were present in the Aman Guest House at night had decided to gather on 27/2/2002 in the early morning at 6 to 6.30 at Aman Guest House, thereafter the above accused had separated at Aman Guest House and went to their respective places.

[7] The said Sabarmati Express Train No.9166-UP arrived on 27/2/2002 in the early morning at 7.43 hours on the Godhra Railway Station and stopped on platform No.1 and in the said train at that time over and above the Kar Sevaks other passengers were also travelling, when the train stopped at the platform then from amongst the Kar Sevaks and other passengers several descended on platform for tea and refreshments. At the said time Kar Sevaks that descended from the train were shouting slogans of 'Jai Shree Rama' and etc.

[8] From amongst the said Kar Sevaks that descended on the platform for tea and refreshments had altercations and scuffle with Muslim community hawkers selling tea and refreshments on the platform. In the meanwhile a Muslim community girl came on the platform for boarding other train with her mother and sister. Amongst several Kar Sevaks a Kar Sevak had tried to tease her, so the girl and her mother and sister ran and went into the nearby booking office.

[9] Taking advantage of the above quarrel and teasing the girl, as a part of criminal conspiracy constituted on the previous night amongst the accused, from amongst the accused the accused,

> [1] Salim Haji Ibrahim Badam @ Salim Panwala [absconding accused No. 8, Sessions Case No.86/09] had shouted and gathered the Muslim hawkers on the platform, in the meanwhile from amongst the accused Mehboob Ahmed Hasan @Latiko [accused No. 1, Sessions Case No. 84/09] ran towards the edge of the platform and went near the compound wall and shouted and gathered the Muslim inhabitants of Signal Faliya near the Station Office and Parcel Office.

[10] In the meanwhile, the said Sabarmati Express Train had started, so amongst the accused, Salim Haji Ibrahim Badam @Salim Panwala [absconding accused No.8, Sessions Case No. 86/09] had wrongly instigated saying that, 'Kar Sevaks are beating Muslim community persons'. 'Muslim girl is abducted in train' in spite of the knowledge that the said Muslim Girl with her mother and sister are in the booking office, but as a part of previously constituted criminal conspiracy instigated and sent three hawkers to the coach of the said railway train and done chain puling through them and forced the train to stop after starting from the platform.

[11] As stated above, due to the chain pulling the train stopped on the platform, so the Muslim community persons that had gathered near the Station and Parcel office started pelting stones on the train immediately to achieve their common objects, but in the meanwhile R.P.F. and the policemen immediately came on the platform and tried to control the situation and then the train started again.

[12] In spite of this, from amongst the accused,

> [1] Salim Haji Ibrahim Badam @ Salim Panwala [absconding accused No. 8, Sessions Case No. 86/09]
>
> [2] Abdul Razak Mohmed Kurkur [accused No.2 Sessions Case No. 70/09]

have as part of their preplanned criminal conspiracy made three hawkers to board the running train, and both reached "A" cabin and near the "A" cabin again chain pulling in the train was done and pressurized to stop and instigated, and thereafter you both, Salim Haji Badam and Abdul Razak Kurkur had dispatched one petrol carboy on one red colour M-80 moped towards "A" cabin.

[13] In the meanwhile, when there was stone pelting on the platform at that time from amongst the accused present, you accused,

> [1] Shaukat Ahmed Charkha @Lalu [absconding accused No. 7, Sessions Case No. 86/09]
>
> [2] Hasan Ahmed Charkha @Lalu [accused No.4, Sessions Case No. 71/09]
>
> [3] Mehboob Ahmed Hasan @ Latika [accused No.1 Sessions Case No. 84/09]
>
> [4] Imran Ahmed Bhatuk @ Sheru [absconding accused No.10, Sessions Case No. 86/09]
>
> [5] Jabir Binyamin Behra [accused No. 2, Sessions Case No.72/09]
>
> [6] Irfan Abdul Majid Kalander @ Bhobha [accused No. 2, Sessions Case No. 81/09]
>
> [7] Irfan Hanif @ Hani Patadiya [accused No. 1, Sessions Case No. 82/09]
>
> [8] Rafik Hussain Bhatuk and [absconding accused No. 11, Sessions Case No. 86/09]
>
> [9] Ramzani Binyamin Vachka

ran from the platform and reached the lane behind Aman Guest House in Signal Faliya and from amongst the accused from the rear of the house of the accused Adul Razak Kurkur [accused No.2, Sessions Case No.70/09], as per the preplanned conspiracy loaded eight carboys in which 20 liters petrol was filled and collected as part of preplanned

conspiracy in the loading rickshaw GJ-6-U-8074 along with other deadly weapons and with rickshaw went via Ali Masjid side temporary road and reached near "A" cabin.

[14] As per the above preplanned conspiracy, due to chain pulling again in the train the train had to stop again at the decided place near "A" cabin and in the meanwhile due to shouts of 900 to 1000 Muslims mob came from nearby Signal Faliya and gathered near "A" Cabin and from amongst them several had started pelting stones on the train, and, in the meanwhile from amongst the accused,

> [1] Mehboob Yakub Mitha @ Popa [accused No. 2, Sessions Case No. 71/09]
>
> [2] Mehboob Khalid Chanda [accused No. 1, Sessions Case No. 73/09]
>
> [3] Ayub Abdulgani Patadiya [accused No. 2, Sessions Case No. 82/09]
>
> [4] Yunus Abdul Haq Ghadiyali [accused No. 2, Sessions Case No. 78/09]
>
> [5] Kadri Abdulgani Patadiya [absconding accused No. 5, Sessions Case No. 86/09]
>
> [6] Anwar Abdulla Kalander [Juvenile] [accused No. 3, Sessions Case No. 77/09]
>
> [7] Anwar Mohmed Meda @ Lala and [accused No. 51, Sessions Case No. 69/09]
>
> [8] Sikander have with the intentions to achieve their common objects reached the said train coach No. S/2 carrying weapons and started to break windows glasses and tried to set fire to the coach from outside.

[15] During this same time period, **for achieving your common objects** from amongst the accused,

> [1] Abdul Razak Mohmed Kurkur and [accused No. 2, Sessions Case No. 70/09]

[2] Salim Haji Ibrahim Badam @ Salim Panwala [absconding accused No. 8, Sessions Case No. 86/09]

both reached the train Coach No.6 and amongst them the accused No.2 [Sessions Case No.79/09] Abdul Razak Mohmed Kurkur had taken the petrol filled carboy and placed his foot on the stairs of the door of the S-6 towards the engine and placed the mouth of the carboy in the broken window on the side of the toilet and at that time from amongst the accused, the accused No.8 [Sessions Case No.86/09] Salim Ibrahim Badam @Salim Panwala had lifted the bottom and spilled the petrol from the carboy into the coach.

[16] In the meanwhile, **as per the preplanned conspiracy** in the said coach S-6 in the other part, that is, near the door towards the Godhra Railway Station, amongst the accused,

[1] Shaukat Ahmed Charkha @Lalu [absconding accused No.7, Sessions Case No.86/09]

[2] Imran Ahmed Bhatuk @ Sheru [absconding accused No. 10, Sessions Case No. 86/09]

[3] Jabir Binyamin Behra [accused No. 2, Sessions Case No. 72/09]

[4] Irfan Abdul Majid Kalander @ Irfan Bhobha [accused No.2, Sessions Case No. 81/09]

[5] Irfan Hanif @ Hani Patadiya [accused No. 1, Sessions case No. 82/09]

[6] Rafik Hussain Bhatuk and [absconding accused No. 11, Sessions Case No. 86/09]

[7] Ramjani Binyamin Vachka [accused No. 3, Sessions Case No. 71/09]

have taken other carboys full of petrol and reached the space between S-6 and S-7 and placed the said carboys on the land.

[17] During the said period from amongst the mob standing

near S-2, the accused,

[1] Mohmed Sakir @Babu Abdul Patadiya [Juvenile Court, accused No. 3] [Sessions Case No. 78/09]

[2] Kadir Abdulgani Patadiya [absconding accused No. 5, Sessions Case No. 86/09]

[3] Mehboob Yakub Mitha @ Popa [accused No. 2, Sessions Case No. 71/09]

[4] Yakub Abdulgani Patadiya [absconding accused No. 4, Sessions Case No. 86/09]

[5] Ibrahim Samol @Bhano [accused No. 5, Sessions Case No. 78/09]

[6] Anwar Abdulla Kalander [Juvenile][accused No.3, Sessions Case No. 77/09]

[7] Anwar Mohmed Meda @Bala [accused No.51 Sessions Case No. 69/09]

[8] Soab Yusuf Ahmed Kalander [accused No.1, Sessions Case No. 75/09] and

[9] Yunus Abdul Haq Samol @Ghadiyadi [accused No.2, Sessions Case No.78/09]

and others had **come near S-6 and due to the stone pelting the doors and windows of the said coach S-6 were closed** the same were tried to be broken using sticks, pipes, rods and etc.

[18] During this period from amongst the accused,

[1] Hasan Ahmed Charkha @Lalo [absconding accused No.7, Sessions Case No.86/09]

[2] Mehboob Ahmed Hasan @Latiko [accused No.1, Sessions Case No.84/09]

both also came there and the carboys lying on the land between S-6 / S-7 of these carboys on two carboys the

accused Mehboob Ahmed Hussain had made 3 to 4 holes near the mouth using knife and using the same knife made a big slit in the vestibule common between S-6/S-7 coach, therefore there was space created and so Mehboob Ahmed Hassan and accused No.2 [Sessions Case No.72/09] Jabir Binyamin Behra both had climbed, thereafter the accused No.1 [Sessions Case No. 84/09] Mehboob Ahmed Hasan had handed over the knife in his hands to the accused Shaukat Ahmed Charkha [absconding accused No.7, Sessions Case No.86/09] so he had made holes in the remaining carboys full of petrol near the mouth of the lid. In the meanwhile the accused Jabir Binyamin [accused No.2 Sessions Case No.72/09] and Mehboob Ahmed Hassan [accused No.1, Sessions Case No.84/09] had kicked and used force to open the door to the corridor of S-6 and opening of stopper, so the door was opened.

[19] Thereafter from amongst the accused, Shaukat Ahmed Charkha [absconding accused No.7, Sessions Case No.86/09] handed over two carboys full of petrol from carboys having holes been made, to the accused,

[1] Mehboob Ahmed Hassan [accused No. 1, Sessions Case No. 84/09]

[2] Jabir Binyamin [accused No.2, Sessions Case No.86/09] and they took the carboys and both of you had gone into the corridor and entered the coach No.S-6, and on this same way the accused No. Shaukat Ahmed Charkha @Lalu had also climbed and the accused No.11 Rafik Hussain Bhatuk [Sessions Case No.86/09] had handed over one such carboy to absconding accused No.7 Shaukat Ahmed Charkha [Sessions Case No.86/09] and taking it he had entered the coach No.S-6, and after going inside opened the door on the backside of the coach towards Godhra from inside, therefore through that door from amongst the accused,

[1] Rafik Hussain Bhatuk [absconding accused No. 11 Sessions Case No. 86/09]

[2] Irfan Abdul Majid Kalander @ Irfan Bhobho

[accused No. 2 Sessions Case No. 81/09]

[3] Imran Ahmed Bhatuk [absconding accused No. 10, Sessions Case No. 86/09]

thus, all the three persons had carried three different carboys filled with petrol and entered into the Coach No. S-6 and the above all accused who had entered the coach in this manner carrying carboys they had poured / spilled the petrol towards the inside of the Coach No.S-6 and thereafter all the accused had immediately come out from the said coach.

[20] At this stage, from amongst the accused,

[1] Hassan Ahmed Charkha @ Lalu [accused No. 4, Sessions Case No. 71/09]

[2] Irfan Hanif @Hani Patadiya [accused No.2, Sessions Case No. 82/09]

[3] Ramjani Binyamin [accused No.3, Sessions Case No.71/09]

All the three persons have from outside the coach from the remaining carboys full of petrol and with holes were poured / spilled inside the coach No. S-6 from the broken windows.

[21] Thereafter from amongst the accused, Hasan Ahmed Charkha @Lalu [accused No. 4 Sessions Case No. 71/09] burnt a rag and with the help of stick thrown inside the Coach S-6 as per the criminal conspiracy to burn alive the Kar Sevaks and other passengers travelling in S-6 coach and burnt the coach No. 6.

[22] In this manner the coach No.S-6 was burnt by spraying petrol and thereafter the above accused ran from there and at the time of running away in this manner amongst you,

[1] Jabir Binyamin [accused no.2, Sessions Case No 72/09]

[2] Sidik Mohmed Morya [accused No.6, Sessions

Case No. 75/09]

[3] Shaukat @ Bhano Farukh Abdul Satar Patadiya [accused No. 5, Sessions Case no. 75/09

[4] Shaukat Yusuf Mohan @Bibi [accused No.1, Sessions Case No. 85/09]

have, held one passenger making attempt to descend from the off-side of the train coach for saving themselves, and caused injuries using the weapons in their hands and looted two gold rings and one gold chain.

[23] In the meanwhile with regard to the burnt coach information was given to the Godhra Municipality Fire Fighter Department so the Municipality Fire Fighters immediately departed from its place via Signal Faliya via Bhamaiya Nala to the place of "A" cabin, but at that time from amongst the accused,

[1] Abdul Rehman Abdulmajid Dhantiya @Kankatto @Jamburo [accused No.4, Sessions Case No.69/09]

[2] Bilal Ismail Abdulmajid Sujela @Bilal Haji [accused No. 48, Sessions Case No. 69/09]

and the other accused have together pelted stones on the fire fighter, and caused injuries to the staff and caused obstructions in performing their duties, and the fire fighter driver side head light was broken and the vacant side door glass and the glass above the said door was broken and fire fighter No.GRQ-8041 public property was caused damaged and with a view that they may not reach immediately to extinguish the fire thereby willfully caused obstructions.

[24] During the above incident, the other accused and other Muslims in the mob came carrying weapons and etc. and attacked the Kar Sevaks and other passengers and shouted slogans, 'Pakistan Zindabad', 'Hindustan Murdabad', 'Hindu Kafiro ko jala do', and with malafide instigated communal sentiments, and as stated above committed criminal offences and in the coach S-6 coach the Kar Sevaks / passengers

travelling of them 59 [men, women and children] were burnt alive and caused death whereas other 48 women, men and children were caused simple and grievous injuries with fire and stone etc, and by such act attempted to cause their death.

[25] As stated above the coach No.S-6 was fully burnt and the coach No.S-5 and S-7 were affected by flames and stone pelting and on other coaches pelted stones and the said railways property was intentionally caused damage of Rs.17,62,475/- and also caused damage to the baggage of the passengers.

[26] From amongst the accused, Nannumiya Tamjad Ali Chaudhary [accused No. 3, Sessions Case No. 70/09] was previously serving as Constable in the C.R.P.F. and you were dismissed from the said department thereafter also the official box was not submitted with the department, and stayed in the Aman Guest House, and during the trafficking of charas, came in contact with Abdul Razak Kurkur of the said Guest House, and from amongst the accused,

[1] Irfan Siraj Pada [accused No. 50, Sessions Case No. 69/09]

[2] Jabir Binyamin Behra [accused No.2, Sessions Case No.72/09]

[3] Imran Ahmed Bhatuk @ Sheru [accused No. 10, Sessions Case No. 86/09]

[4] Kasim Abdul Satar @Kasim Biryani [accused No.49 Sessions Case No. 69/09]

[5] Hasan Ahmed Charkha @Lalu [accused No.4, Sessions Case No. 71/09]

[6] Mehboob Khalid Chanda [accused No. 1, Sessions Case No. 73/09]

imparted training to use weapons and throwing bomb, and during the tours to Kashmir discussed the Jehadi activities, and instigated so that there should not be any harmony between the Hindu Muslim.

[27] From amongst the accused, Maulvi Hussain Haji Ibrahim Umarji [accused No. 1, Sessions Case No. 74/09] has played the major role in the above criminal conspiracy, and instigated the other accused, and made all possible efforts for achieving the above criminal conspiracy and abated the accused involved in the offence in absconding / giving shelter, in spite of the knowledge that it is an offence and in spite of clear instructions every month such accused were provided assistance of Rs. 1500/- per month.

[28] Thus, the accused have preplanned conspiracy, with a view that there should not be any harmony between Hindu Muslim and without bothering that in future there will be communal riots as a part of the criminal conspiracy for achieving your common intentions committed the above unlawful acts and abetted the main active accused in the offence, and carried weapons publicly, breached the notification of prohibition against carrying weapons, and as stated above caused the death of 59 persons, injured 48 persons, damaged the government property, looted the property of the passengers, and burnt and all the accused, have committed the criminal offence punishable under Indian Penal Code sections 302, 307, 323, 324, 325, 326, 332, 395, 397, 435, 186, 188 read with sections 120-b, 153-a, 212, 143, 147, 148, 149 and Indian Railways Act sections 141, 150, 151, and 152 and Prevention of Damages to Public Property Act section 3, 4 and Bombay Police Act section 135(1) within the jurisdiction of this court as is prima facie evident thus the trial for the said offences be held against all the accused.

Date :: 25/6/2009
Central Jail, Sabarmati
Ahmedabad

sd/-
[P.R.Patel]
Additional Sessions Judge
Panchamahal, Godhra
Camp – Sabarmati Central Jail
Ahmedabad"

PART III-A

SUBMISSIONS OF MR. A.D.SHAH, LEARNED COUNSEL FOR DEFENCE

AND REFERENCE TO PARAGRAPHS OF RELEVANT TESTIMONIES OF THE WITNESSES TO TEST THEIR CREDIBILITY AND RELIABILITY ALONG WITH NATURE OF CONTRADICTIONS, OMISSIONS, DISCREPANCIES, IMPROVEMENTS, EXAGGERATIONS, ETC.

1 Mr. A.D.Shah, learned counsel would make submissions on behalf of defence in three different sets viz. [1] eye witnesses, who saw the incident which also include injured eye witnesses, Kar sevaks, passengers travelling in Sabarmati Express including in ill-fated coach S/6 which consisted of authorised as well as unauthorised passengers; [2] [GRPF, RPF and Godhra Town Police] Police personnel, FSL, railway employees, Fire Brigade employees; and [3] confessional statements of one of the accused vis. Jabir Binyamin Behra, which needs corroboration and other statements of witnesses recorded under Section 164 of the Code by concerned Magistrates.

2 As the charge sheet was filed on 22.05.2002 and supplementary charge sheets, later on qua CR. No.9 of 2002 was registered on the day of incident i.e. 27.02.2002 for which charge was framed by learned trial Judge vide Exh.29 on 25.06.2009, to which detailed reference is made in earlier part of this judgment.

3 A reference is made to the incident in question which took place on 27.02.2002 at 7:43 am Sabarmati Express, Train No.9166 UP arrived at platform No.1 at Godhra Railway Station and was running behind its schedule arrival at 2:55 am. That item Nos.8, 9 and 10 of the charge, refers to mob consisting of 900 to 1000 persons and Item Nos.14 and 15 of the charge refers to Coach Nos.S/2, S/6, S/5 and S/7. It further refers about breaking open of sliding door of S/6. Item Nos.19, 20, 21 and 24 refer to death of 59 persons and about receiving grievous and simple injuries by 48 persons [details of translated charge framed by learned Sessions Judge is supplied by learned counsel appearing for the

defence].

4 According to Mr. A.D.Shah, some dispute arise out of misbehaviour of Kar Sevaks with vendors / hawkers of refreshment at platform No.1 at Godhra Railway Station, including usage of provocative words by Kar Sevaks against hawkers belonging to Muslim community. That hue and cry was raised when one of the Kar Sevaks tried to drag a Muslim lady to a coach of the train but she could relieve herself and rushed to office of Station Master. Upon shouting by one of the hawkers, stone pelting started, but in the meanwhile Railway Police personnel arrived and train started. First chain pulling took place due to some of Kar Sevaks could not board train and upon noticing such chain pulling, Guard and Assistant Driver re-set it and within few minutes train started and proceeded towards Vadodara. That second time train stopped around 7:57 am and it was alleged that such chain pulling was a part of conspiracy hatched at Aman Guest House situated nearby Railway Station, where loose petrol purchased in 7 carboys of 20 liters each was stored and loaded in tempi on the previous night and the tempi was driven to the place of incident near A cabin where the train had stopped. That unlawful assembly targeted the train and particularly coach S/2, S/4, S/6 and S/7 by throwing burning rags, acid and patrol bulbs and by using iron rods, swords, dharias, damaged windows of the bogies and even caused injuries to some of the passengers of S/6 coach consisting of 72 seats, but it was overcrowded than the capacity and more than 170 passengers were travelling therein. When coach S/6 was set on fire by conspirators by entering from the side of S/7 coach by cutting the canvas vestibule and opening sliding door of S/6 by applying force and set it on fire and ultimately fire engulfed the coach. The passengers noticed smoke initially and ultimately those who could not make their escape good, succumbed to asphyxiation by smoke or burn

injuries, or both and 59 persons died, 48 persons received serious and grievous injuries and 48 persons could come out of coach, out of which 3 persons; one male and two female jumped from window of S/6 towards onside viz. platform side on a heap of metal nearby A Cabin.

5 Volume-37 PW-228 Exh.1189 Page-12612 - Rajendraprasad Raghunathrao Jadav, Engine Driver of Sabarmati Express, who also lodged complaint Exh.1190 referred in his testimonies about the incident and entries in the Driver Book and paras 11, 15, 19 and 22 of testimonies are important. However, vital omissions appeared, when testimonies of this PW is appreciated at page 12622 to 12625.

6 Volume-33 PW-131 Exh.760 page-11452 Mukesh Raghuvir Pachori, Assistant Driver of Sabarmati Express, who narrated about the incident, first chain pulling, where no untoward incident according to him had taken place and along with Satyanarayan Pachuram Varma PW-135 Exh.777 Guard of the train re-set the chain pulling and the train started. Here also, omissions appears. A reference is made to exhaust pipe malfunction and second chain pulling was doubted in view of his belief or impression that it may be due to failure of hose pipe.

7 Volume-34 PW-135 Exh.777 Page-11475 Satyanarayan Pachuram Verma, Guard of the train. According to him Sabarmati Express contained 18 coaches and S/1 to S/10 were reserved and 6 coaches were general and 2 contained luggage, etc. A reference is made to Guard Book at Exh.778 about stone pelting, fall of vacuum and setting S/6 on fire. Page 11484 to 11487 contain testimonies of Guard.

8 Volume-34 PW-136 Exh.780 Page-11488 Sajjanlal Mohanlal Ranivala TTE of Sabarmati Express deposed about arrival, departure and

first chain pulling at platform No.1 at Godhra Railway Station and about second stoppage nearby A cabin. Paras 11 and 12 of his testimonies referred to Zero vacuum.

9 Volume-33 PW-126 Exh.742 page-11384 Mr. Harimohan Fulsinh Meena, Assistant Station Master. At the time of incident he was with the Deputy Station Superintendent Mr. Saiyed. This PW referred to arrival of train at 7:42 am, departure by 7:48 am and first chain pulling within a minute thereafter and second chain pulling around 7:58 am.

10 Exh.743 charge book referred to beginning of second phase of stone pelting.

11 Volume-33 PW-127 Exh.744 page-11391 Rajendraprasad Misrilal Meena, Assistant Station Master `A' cabin. He referred to arrival of train at 7:43 am and 7:45 first departure and within one or two minutes first ACP had taken place and after reset the train started around 7:55 am and second chain pulling at 8:00 am, when S/6 had crossed A cabin. Exh.745 is M.R.No.33/09 Article 7 is A cabin Book to which reference is made to para 9 of the testimony that the train had stopped nearby poll No.468/39 at para 11 and 12.

12 PW-128 Exh.748 page-11399 Akhilkumar Guljarilal Sharma. According to him, timings of the train for arrival at 7:43, first departure around 7:45 am, first ACP at 7:48 am, train re-start around 7:53 am, and second ACP soon thereafter. Relevant paras 5, 6 and 7.

13 According to Mr. A.D.Shah, learned counsel, none of the above employees had seen the mob carrying carboy of petrol.

14 PW-111 Exh.712 Page-11287 Fatehsinh Dabhsinh Solanki, Points-man of Railway. In para-3, this witness stated that according to him coach S/6 passed A cabin and guard coach reached near Nallah.

15 It is stated that no statement was recorded of Mr. Saiyed, Assistant Superintendent of Station and Mr. Katija, Superintendent of Station at Godhra.

16 Exh.919 – distance from Ali Masjid to A cabin is 810 ft and 750 meters from Aman Guest House to Ali Masjid.

17 Volume-36 PW-185 Exh.917 page-12114 Janak Upendra Popat, Junior Engineer of Railways. He prepared map at Exh.918 to give a broad idea about Godhra Railway Station and its surroundings. According to him, distance from end of platform No.1 to A cabin is about 900 to 1000 feet and para 14 last 5 lines of testimonies may be seen.

PART III-B

EVIDENCE OF PANCH WITNESSES OF SCENE OF OFFENCE

1 Volume 27 PW-1 Exh.84 page-9771 Sureshbhai Dhanamal Mariyani. The panchnama was prepared on 27.02.2002 between 13:00 to 15:00 pm. Certain questions were asked to impeach credibility of this witness. Page No.9778 is about description of the incident including police chowki No.7 situated at railway station and A cabin contain glass windows or not. This very witness referred to A cabin Poll No.468/33 and 3 carboys of white and black colours of 10 liters each wherein findings of acid, kerosene, bricks, glasses, stones, plastic bottles, etc. Page 9785 and 9789 may be considered and scrutinize closely.

2 Exh.86 page-9790 – panchnama of S/6 coach where 38 samples were collected. It was drawn on 28.02.2002 between 5:45 pm to 7:45 pm which contain four doors and 9 compartments and 3 steps. On 28.02.2002 FSL officers were present. No un-burnt luggage was seen nor any reference was made about dead bodies and no notice was made that which portion of compartment was heavily damaged and compartment Nos.1 to 4 were damaged much in comparison to compartment Nos.5 to 9 which were heavily damaged / burnt.

3 Volume-34 PW-138 Exh.783 page-11507 Gulabsinh Laxmanshin Tadvi, Clerk at platform No.1.

4 PW-153 Exh.822 page-11737 Rajubhai Laljibhai Rathod, Points-man.

PART III-C

PASSENGERS TRAVELLING IN SABARMATI EXPRESS

Particularly in coach S/6.

1 Volume-32 PW-81 Exh.625 Page-11084 Pujaben B. Kushwah. When the incident took place she was aged 13 years and travelling on seat Nos.4, 5 and 6. This witness in her further statement recorded on 11.07.2002 mentioned about tearing of vestibule between S/5 and S/6 by his father and that made their escape good. According to learned counsel for the defence, this statement is relevant and made in view of recording of statement of Ajay Baria under Section 164 of the Code on 09.07.2002. Paras 9, 10, 11 are omissions and para 13 about

throwing petrol like substance may be considered accordingly.

2 Volume-32 PW-77 Exh.614 page-11059 Rajendra Ramfersingh Rajput, a passenger travelling on seat Nos.62, 63 and 64 in S/6 boarded from Lucknow did not mention about fire inside the coach.

3 Volume-32 PW-78 Exh.615 page-11066 Raju Krupashankar Pandey. He was travelling in seat No.45 from Kanpur. His statement is recorded so as to support prosecution case that fire took place from rear side of S/6.

4 Likewise, other passengers being PW-79 Exh.619 page-11070 Amarkumar J. Tiwari, travelling on seat Nos.17, 18 and 20 [paras 7, 9 and 10 of testimonies to be considered].

5 Volume-32 PW-80 Exh.621 page-11078 Gyanprasad Lallanprasad Chorasiya. At that time he was 13 years old, father and mother sustained burn injuries and his nephew and son of sister died. He was travelling on seat Nos.8 and 72.

6 Volume-32 PW-82 Exh.627 page-11092 Veerpal Chandilal Pal. He is sergeant and Ex-Air force employee travelling in S/6 and seat Nos.58, 59 and 61.

7 That testimonies of the above witnesses according to Mr. A.D.Shah are very important which reveal in para 4 that reserved seat was occupied by unauthorized passengers viz. Kar Sevaks and though he requested them to vacate the seat as his daughter-in-law was pregnant, same was not acceded to by them. In para 5, he stated that he thought it fit to get down at Jhansi, for making alternative arrangement to travel.

In para 6, it is stated that Kar Sevaks were insisting not to purchase tea from Muslim tea vendors at Godhra and in paras 7 to 9 narration of events took place due to the conduct of kar sevaks and sudden reaction. Para 10 it is stated that even TTE was also not allowed to perform his duties and behaviour of kar sevaks was rude and inhuman. That, as a measure of retaliation persons belonging to Muslim community lost their temper and started pelting stones. However, till train started on second occasion no stone pelting had taken place. Even kar sevaks were shouting slogans against Muslim community [paras 12 and 17 some contradictions appeared about smoke was noticed first and fire flames later on] and para 19 about noise due to throwing of bottle of glass.

8 Volume-33 PW-89 Exh.648 page-11147 Premaben Ayodyaray Mali seat Nos. 25 to 29 in S/6 coach.

9 Volume-29 PM notes of Shailendra 4½ years died Exh.407 p-10460.

10 Reference is made of FSL page-12519 and stone pelting from platform side.

11 Volume-33 PW-90 Exh.650 page-11151 Rubidevi Shriram, 13 years. At the time of incident she had reservation in S/6 and was sitting near toilet on engine side.

12 PW-86 Exh.638 page-11130 Hariprasad Maniram Joshi, seat Nos.41 and 44 in S/6. His other colleagues were travelilng in S/4, S/7 and S/8. According to this witness, burning cloth rags were thrown. Initially wife of this PW had a quarrel with kar sevaks for occupying her reserved seat. Unfortunately, she died.

13 PM note of wife of this PW is at Exh.457 page-10716 volume-31. In para 9 this PW stated that he had not seen any person moving towards S/5 or S/7.

14 Volume-33 PW-99 Exh.674 page-11209 Prakash Hiralal Taili having seat nos. 25 to 28 in S/7. According to this PW, door between S/6 and S/7 was closed and he saw smoke first and then fire. Likewise other PW 102 Exh.680 page-11224 Rampal Jigilal Gupta also travelled in S/7.

15 Volume-33 PW-103 Exh.681 page-11231 Somnath Sitaram Kahar travelling in S/7 on seat Nos.66 to 71. Para 9 may be considered.

16 Volume-34 PW-119 Exh.729 Punamkumari Sunilkumar Tiwari travelling in S/6 seat Nos.18 to 21. According to her, burning rag was thrown. Father-in-law and mother-in-law both died. In para-5 some contradictions and omissions appeared.

17 It is submitted that whether entry from S/7 canvas vestibules to S/6 is possible by cutting it with knife particularly when canvas contained iron net?

18 None of the passengers, as above deposed having seen three persons entering into S/6 by cutting open canvas vestibules of S/7 and opening slide door of S/6 by applying force and pouring petrol from 3 carboys by any miscreant / conspirator.

19 Volume-33 PW-113 Exh.715 Radheyshyam Ramchandra Mishra, Havaldar in Army travelilng in S/7 seat Nos.8 and 72, but when

the incident took place he was in S/6. A reference is made by another PW-170 Pravinkumar Amthabhai about this witness.

20 Mr. A.D.Shah, learned counsel also made reference to passengers other than reserved category on the same line and they are PW-88 Exh.642 page-11143 Shantibhai Shankarbhai Patel.

21 PW-93 Exh.657 page-11161 Shardaben.

22 Volume-36 PW-202 Exh.1024 Govindsinh Ratansinh Panda. According to learned counsel Mr. A.D.Shah, this PW is travelling in S/6, seat No.9 and referred to by another PW-170 Pravinkumar Amthabhai Patel and his testimonies paras 3, 4, 5, 7, 6 and 8 to be considered whereby it is stated that doors and windows were closed. In para 12 there appears to be contradictions. According to him, he had smell of burning of rubber and alighted from right side.

23 Volume-37. A reference is made to PW-216 Exh.1115 page-12428 Mohammad Imdad, seat Nos.17 and 20 in S/2.

24 Volume-36 PW-183 Exh.915 page-12108 Sofiyabibi Suleman Dhantya. When she was waiting on platform No.1 she was molested by kar sevaks and PW-184 Exh.916 page-13111 Jaitunbibi Siraj Ahmed, mother of Sofiyaben PW-183 in her testimony deposes about misbehaviour and molestation of her daughter and manhandling of tea vendors belonging to Muslim community which resulted into some stone pelting etc.

25 Volume-27 contain Exh.855, scene of offence panchnama and page 9786 and 9787 referred to Pole No.468/35-36, lying of 3

carboys, one white and two black each having capacity of 10 liters liquid.

26 Volume-37 PW-227 Exh.1161 page-12546 Dipakkumar Bhagwandas Talati, Assistant Director FSL. Samples were collected on 27.02.2002, however, no official of FSL visited the place. Learned counsel highlighted importance of this PW for the purpose of linking with scene of offence panchnama as alleged by prosecution.

27 Two sealed carboys Mark-1 acid HCL, mark-2 kerosene hydrocarbon. Paras 8, 10, 11 and 12 to be considered. FSL report dated 20.03.2002 Vol. 37 page 12558 about recovery of 2 carboys from arrested persons, pages 12559 and 12563 it was forwarded to FSL. Mark 24/1, 24/2 and 24/3, 3 carboys recovered from scene of offence. Marks 25 and 26 are bottle and sand page-12571 Exh.1173 report of FSL dated 20.03.2002. Item Nos.15, 16 and 17 i.e. 24/1, 24/2, 24/3 first two items petrol was found and in third hydrocarbon was found.

28 Page-12576 analysis of bottles contained petrol, hydrocarbon, and acid. Page-12586, 11 samples – page 12590 opinion / analysis - `no definite opinion'.

29 Exh.1178 page 12591 and 12599 dated 04.05.2002 page 12602 dated 17.05.2002.

30 Page-12605 for item Nos.1 and 2. No petrol

31 Page-12606 clothes of injured [none of remnants of bodies of dead was sent for FSL and no panchnama was drawn on 27.02.2002. Delay in collecting and dispatching samples is vital to the case of the

prosecution and conspiracy of 7 carboys of capacity of 20 liters of liquid, each, is not supported.

32 Volume-34 PW-151 Exh.184 page-11665 Dipakbhai Nagindas Soni. A local resident of Godhra and trader and activist of VHP, who had gone to receive and offer tea / snacks to kar sevaks. According to this Panch Witness, a violent mob resorted to heavy stone pelting and in his chief-examination he further stated that inflammable material was sprinkled and by usage of weapons assault was made. This PW named and identified 4 accused. In para 1 to 14 credibility of this witness impeached by suggesting his political background, criminal record, including involvement in a murder case. Paras 15, 16 and 19 cross-examination about his presence on other side of cabin. Paras 23, 25, 28 , 31, 32, 33, 37 to 42 and 44 are to be considered. Likewise other PWs are also referred.

33 Volume-35 PW-159 Exh.834 page-11813 Rajeshbhai Vithalbhai Darji. A local resident and trader, who was present to offer refreshment to kar sevaks at platform No.1, Godhra Railway station. Later on he was standing nearby A cabin [paras 5, 10, 15, 18, 24 with contradictions in para 32 may be considered]. Para 33 about sting operation which is not placed on record.

34 Volume-35 PW-167 Exh.11934 Harsukhlal Tejandas Advani.

35 PW-172 Exh.878 page-12026 Nitinkumar @Kukulkumar Hariprasad Pathak, both are VHP members and Volume-34 PW-149 Exh.810 page-11644 is deposition of Janakbhai Kantibhai Dave. PW-154 Exh.823 page-11743 Chandrashankar Narhuram Soniya. PW-155 Exh.825 page-11757 Manoj Hiralal Advani, all are VHP workers and

from Volume-36 PW-203 Exh.1040 page-12284 Dilipsinh Ujamsinh Dasadiya. PW-208 Exh.1067 page-12335 Murlidhar Rochiram Mulchandani. Some of these PWs were nearby S/6 coach and had seen accused carrying six carboys sprinkling inflammable material and pouring through 3 windows viz. toilet and door nearby Compartment No.9.

PART III-D

FIRE BRIGADE EMPLOYEES

1 Volume-34 PW-156 page-11777 Pradipsinh Bholasinh Thakor, driver referred to Bilal, who stopped fire brigade vehicle and instigated the mob. Paras 16, 20 and 24 are contradictions. Ex.1880 page-14604 – Occurrence Book may be seen and page 11784 mark 826/1.

2 Volume-33 PW-133 Exh.766 page 11458 Rupsinh Chhaganbhai. PW-129 Exh.755 page 11408 Kanubhai Chhaganbhai Varia. PW-130 Exh.757 page-11425 Vijaykumar Ramchandra Sharma. PW-165 Exh.855 page-11903 Sureshgiri Mohangiri G.

3 Volume-38 PW-240 Exh.1347 **Mohinder Dahiya**, Deputy Director, FSL, Gandhinagar, who visited the place on 01.05.2002 between 10:30 a.m to 4:30 pm and prepared rough notes Exh.1362 and submitted report on 17.05.2002 page-13002 to 13004 Exh.1349 and 1350. That testimonies in paras 10, 11, 12, 20, 22, 25, 26, 27 and 28 be considered. According to this witness when the incident took place, all windows of bogies were closed. The effect of fire was not seen below windows more particularly in S/6. Fire marks were not seen below

windows outside coach S/6. That possibility of throwing inflammable liquid from outside was ruled out. [even another report was submitted on 02.09.2004 Exh.1354]. No report is submitted about short circuit, but possibility was ruled out upon oral discussion with other officers of FSL. Canvas vestibules containing thin wire coating cannot be cut by knife. S/7 vestibule was observed.

4 Exh.1353 page-13008 dated 25.08.2004 letter dated 12.06.2002 page 13010 for clarification of certain issues.

5 Page-13012 dated 02.09.2004 reply by FSL, Gandhinagar.

6 Page-13015 letter dated 24.10.2008 by SIT, Gandhinagar to provide clear opinion on S/6 that 21 different issues / queries.

7 Page-13017 dated 07.11.2008 reply to above 21 queries is given by FSL, Gandhinagar, to which reference will be made in the later part of the judgment. The above queries were raised by the Investigating Officer after SIT came to be constituted and according to learned Senior Advocate Mr. A.D.Shah, answers given to queries by the experts are only with a view to fill up the gap or loopholes in the investigation and do not lead to any conclusion about setting the coach on fire by the accused.

PART III-E

EVIDENCE OF POLICE PERSONNEL

1 Volume-34 PW-140 Exh.786 Page-11532 Pujabhai B. Patanvadia, Head Constable, Railway Police, GRP [para-11 of his

testimony states about Noel Parmar taking over investigation in July, 2002]. Paras 19, 24, 26, 30 and 31 may be considered.

2 Volume-35 PW-136 Exh.852 P-11887 Chhatrasinh Gambhirsinh Chauhan, ASI, at GRP. Paras 2 and 3 he states that he identified Junaid with carboy containing kerosene, Firoz with Gupti and Siddik Bakkar. In para 4 he admits complaint of Siddik Bakkar about misbehaviour of kar sevaks. Para-6 is about first instant of pelting stones etc. by a mob of more than 50 to 60 persons [paras 9 and 14 may be considered].

3 Volume-37 PW-230 Exh.1196 Page-12634 – Mohabbatsinh Juvansinh Zala [paras 3 and 4 about complaint of Engine Driver – Rajendra Jadav is mentioned]. Paras 8, 9, 10, 16 to 20, 23, 31 to 36 may be considered. With regard to this PW, it is submitted that though accused were apprehended, they were not named in the complaint which was lodged after the incident. That later on when violent mob attacked passengers, miscreants were apprehended and around 11:00 am. Another FIR No.10/2009 was filed. No weapon was seized, no case diary was maintained. On the same day viz. 27.02.2002, 41 persons were arrested during combing operation, nowhere it is mentioned till 28.02.2002 about persons, who were arrested and no material / evidence was recorded. Nothing is mentioned in panchnama and record was concocted later on. Paras 38, 43, 48 to 53 and 62, 66, 67 and 68 may be considered.

4 Mr. George, PSI of RPF was available, but was not examined as a witness.

5 Volume-38 PW-238 Exh.1262 page-12876 Bhaskar Simpi,

Dy.S.P., who was in-charge SP at Vadodara and upon receiving message started around 9:30 am and reached at 11:00 am at Godhra. Paras 5, 6, and 8 about presence of Range IG, Vadodara, DSP, District Collector is admitted. He was also not aware about sliding door of S/6 and no knowledge about it. Paras 9 and 12 may be considered.

6 Volume-38 PW-242 Exh.13089 Raju B. Bhargav, DSP, Godhra. Paras 3, 4, 6, 10, 11, 12 to 31 may be considered. This witness was on Railway Platform between 8:15 to 8:31 and reached in his official vehicle and passed through police Chowki No.7 Signal Falia and saw Kalota and Bilal and asked Kalota to take Bilal away. He has not seen any person rounded up or cordoned off. In para 13 it is stated that he had seen on offside as well as Kalota and Bilal. There are other 4 witnesses including PW-189 Exh.941 page-12138.

7 Volume-36 189 941 Firozbhai Ibrahim Posti, a tea vendor and panch of recovery of carboy on 04.09.2002 viz. 7 black coloured each of 10 liters and six small one liter each.

8 Volume-36 PW-206 Exh.1060 page-12308 Bhikhabhai Harman Baria, hawker at Railway Station paras 2 and 3 TI parade and knew one Kadir Patangi. His statement is dated 25.07.2002. His identity is kept in a sealed cover. Paras 6, 7, 8, 12, 20 and 23 may be considered.

9 Volume-36 PW-205 Exh.1047 page-12305 Shardulsinh Balchand Gajjar, photographer and photographs are produced at Exh.912. Paras 3, 4 and 5 may be considered. This witness has deposed in his cross about sting operation, which was not re-examined by public prosecutor.

10 Volume-36 PW-190 Exh.952 Vinodbhai Ganpatbhai Chauhan, a hawker on platform No.2. [This witness is also referred to by Mr. Syed, learned counsel with regard to purchase of milk from shop of Razak Kurkur, who is present there. Later on Razak Kurkur ran towards A cabin.

PART III-F

WITNESSES ABOUT EVIDENCE OF CONSPIRACY AT KALA PETROL PUMP

1 Volume-37 PW-224 Exh.1139 page-12488 Ranjitbhai Jodhabhai Patel. Para-3 is about first statement recorded on 10.04.2002, second statement was recorded on 23.02.2003, under Section 164 of the Code, 3rd statement was recorded on 11.03.2003. Para-4 about TI parade. Three out of four accused were identified incorrectly. Paras 4, 5, 6, 7, 10, 16, 17, 18 and 21 of his testimonies may be considered.

2 Volume-37 PW-231 Exh.12206 Prabhatsinh Gulabsinh Patel, an employee of Kala Petrol Pump. Razak Kurkur was not identified. Para 23 other two employees viz. Gopal and Mohan, in-charge of delivery of diesel were inquired, but were not examined. Paras 27, 36 and 37 it is stated that he knew accused before TI Parade.

3 Summary of both these witnesses viz. Ranjit and Prabhat recorded on 10.04.2002 state about correctness of their statements made before police, as above. Even Ismail Majid PW-13 also referred to the statement of both the above witnesses in his testimony that no loose

petrol was sold on 26th and 27th February, 2002.

4 On 23.02.2003 what is stated before learned Magistrate under Section 164 of the Code is to be believed than earlier statement dated 10.04.2002 is to be discarded and if that statement under Section 164 of the Code dated 23.02.2003 is correct, prosecution failed to explain earlier statement dated 10.04.2002. There is a gap of one year and statement before learned Magistrate under Section 164 of the Code was recorded after statement of Jabir Behra was recorded on 05.02.2003. In a sting operation, whereby, Ranjit had stated before TV reporter that he was given Rs.60,000/- by Neol Parmar, I.O. to state about alleged incident in a particular manner in his testimonies before the trial court. It is stated that he was paid Rs.2,000/- by TV reporter and on a false promise that a character will be offered in a story or drama. According to the learned counsel for defence the above witness is wholly unreasonable and further he knew almost all accused. However, Razak Kurkur was not identified before the court. Both the witnesses identified a wrong person and, therefore, foundation of conspiracy collapses. Both the above witnesses are pliable and not inspiring confidence.

5 PW-232 and PW-234 Ilyas Hussain Mulla and Anwar Abdul Sattar Kalandar turned hostile. One of the defence counsels submitted that even statement of Ilyas was recorded after statement of Pujabhai one of the passengers, who survived.

6 Volume-38 PW-236 Exh.1231 page-12782 Ajay Kanu Bariya, a hawker of platform and one of the main accused of prosecution for Section 120B. Paras 3 and 4 are about Kar Sevaks shouting slogans and beating one Siddiq Bakkar and Mehbub Latika. That is first part of

incident para-5 about first chain pulling, carboys were loaded in a tempi. Para-6 again by accused persons viz. pouring of petrol in S/6 from carboys. Para-7 about his statement dated 09.07.2002 under Section 164 of the Code before Railway Magistrate. Para-8 about TI Parade before the Executive Magistrate, 16 persons were identified. Paras 13, 14 and 15 about statement before Magistrate dated 09.07.2002 under Section 164 of the Code and subsequent statement is dated 03.08.2002. Paras 31, 32, 35, 38 and 39 may be considered. Before recording his statement by learned Magistrate, statements were recorded on 4th July and 5th July, 2002 before police and nothing appears on record about 2nd and 3rd July statements made by this witness before the police. Paras 41 and 42 in cross-examination it is stated that witness is assured by police of no harassment and that he would not be joined as an accused. Para-46 he states that he is operating a tea stall at Kuber Bhavan, Vadodara where the office of DSP, Railway is situated. Paras 47 and 48 statement is made before SIT on 24.10.2008 paras 61, 63 and 66 about location of S/6 and S/7. Para-77 reveal power of imagination of this witness. Paras 83 to 89 about opening of door of S/6. It is submitted that in his testimonies as above major contradictions appear.

7 Volume-38 PW-237 Exh.1252 page-12845 Sikandar Mohammad Shaikh. He was a hawker at Railway Station in 2002. He was standing alone on a metal heap while Ajay Bariya he had not noticed Sikandar. This witness also failed to identify Razak Kurkur. His earlier statement was recorded on 21.09.2003 and paras 21 to 25 correct facts were not stated and one Maulvi Yakub Pinjabi was abroad, but his presence was shown. Paras 49 to 52 may be considered.

8 Volume-39 PW-246 Exh.1467 page-13307 R.K.Parmar, Chief Judicial Magistrate, Godhra, who recorded statement under

Section 164 of Jabir Behra on 05.02.2003. Paras 3, 4, 9 to 10 may be considered with regard to PSI S.B.Patel. In addition to above paras 11, 14, 24, 49, 50 may also be seen.

9 Volume-36 PW-207 Exh.1063 page-12323 Ambalal Ranchodlal Patel, Railway Judicial Magistrate, Godhra about recording statement of Ajay Bariya under Section 164 on 09.07.2002 while camping at Anand. On 26.07.2002 recording of statement of Anwar Kalandar while camping at Dakor and on 07.08.2002 statement of Ilyas Mulla was recorded while camping at Dahod. Paras 6 and 8 of testimonies be considered.

10 Volume-38 PW-235 page-12764 Exh.1225 Mehboobbaig Usmanbaig Mirza PI, Western Railway upon receiving message around 9:15 am on 27.02.2015 reached at Godhra around 11:15 am. Paras 2 and 3 in inquest panchnama 57 bodies were recovered. Timings 1:15 pm to 6:45 pm.

11 Volume 38 PW-241 Ex.1366 page-13029 Kantipuri Chhaganpuri Bawa Dy.S.P., who took over the investigation from B.R.Shimpi, Dy.S.P. on 01.03.2002. In paras 3, 4 and 5 reference is made to collect samples of earth and recovery of weapons used by Yusuf Kazi and 14 others Exh.1036. In para 7 it is stated that he obtained remand of 30 accused. Reference is made to Medical Officer of Civil Hospital, Godhra along with 47 PM notes. Paras 9 to 15 about recovery of muddamal including carboys Exh.1372. Para 16 about window rods. In para 17 reference is made to PW-202 Govindsinh Ratansinh Panda. page 13037 to 13041 is about proved contradictions. In paras 28 to 30 a mention is made about case papers and not case diary. In paras 29 and 30, it is admitted that in between 01.03.2002 to 30.04.2002, no FSL was

carried out and a joint decision was taken on 01.05.2002 to call for FSL. Para 30 he referred to handing over investigation. Paras 34, 36, 37, 39 and 39 certain question are answered about affidavit filed by investigating officer in High Court and noticing tempi GJ-6U-8074 used for alleged crime. Additional statements were recorded on 08.03.2002 but no mention was made about tempi. Para 39 is about two witnesses Ranjit and Prabhat of Kalabhai Petrol Pump employees. Para 44 - first charge sheet dated 22.05.2002 was filed. Para 47 is about FIR No.9/2002 against 30 accused and FIR No.10/2002 against 11 accused. In para 50 notes available up to 01.04.2002 with the above PW on 02.03.2002 statement of witnesses were recorded. Paras 76 to 88 contradictions are proved. In para 94 he states that on 01.03.2002 he visited scene of offence and Section 27 panchnama was drawn as stated in para 94. Para 98 is about burning of sliding doors of S/5 and S/7. However, video cassettes were not produced. In para 100, the above witnesses are not clear whether inflammable material was poured. In para 108 no statement about corridor between S/6 and S/7 that door was broken nor any inflammable liquid was poured.

12 Volume-38 PW-243 Exh.1393 page-13111 Suryakant B. Patel PSI. Paras 4 and 5, it is about gold ring and para 7 identification. Para 9 cross and relevant at page-13115 and 13116. Para 12 statement of Sikandar, aged about 19 years recorded on 21.09.2003 and 22.09.2003. A reference is made about charge sheet dated 22.05.2002 submitted by predecessor Investigating Officer against 54 accused. Para 15 is about statement recorded under Section 164 of Ranjit and Prabhat. No case dairy and answered as not remembered and not known. Para 16, 17 and 18 muddamal viz Rami was recovered. Confessional statement of Jabir, Sikandar, Ranjit and Parbhat and custody of accused to be obtained from jail authority in case of judicial

custody. No inquiry by CJM about custody of accused.

13 Volume-39 PW-244 Exh.1406 page-13129 Noel Parmar, Dy.S.P., Railway, on 27.05.2002 took over the investigation from K.C.Bawa and filed 17 supplementary charges. **Report under Section 169 was also filed against 11 accused**. In para 2 it is stated that subordinate police employees were directed to complete lacuna and/or defects. Paras 5 to 9 about PWs states about 36 accused, who were accused. On 07.02.2002 he visited S/6 with FSL and superior officials inquired about the nature of vestibule material and broken sliding door of S/6 and S/7 and scratches in middle were found. A reference is made to one Puja, daughter of Bahadur Kushwah and panchnama of tempi was drawn. On 22.07.2002 he recorded statement of Gangaram, Carriage & Wagon Department, Ahmedabad. On 03.08.2002 Ajay Baria identified tempi and panchnama was prepared. Para 12, demo panchnama was carried out on 18.09.2002, Exh.1014. Paras 16 to 25 – on 06.01.2003 Idrish Charkha was beaten by Salim Jarda and complaint was registered. Lie Detection test of Razak Kurkur was carried out on 16.02.2002. Jabir Behra was arrested on 22.01.2003 and remand was obtained. Judicial Magistrate, Dahod was approached for recording statement under Section 164 on 29.01.2003, but was directed to give again by a communication dated 03.02.2003 on 04.02.2003 at CJM, Godhra. On 05.02.2003 a statement under Section 164 was recorded of one Mehboob Chanda and Maulvi Umarji was arrested on 06.02.2003 and remand was obtained for 7 days. On 23.02.2003 employees of Kalabhai Patrol Pump viz. Ranjit and Prabhat made statement and their statements were recorded under Section 164 by CJM, Godhra. On 14.08.2003 Shaukat Patalia was arrested and statement of Sikandar was recorded by S.B.Patel, PSI on 29.02.2003. On 11.06.2004 Yusuf Sattar Zarda was arrested. Para 30, Bilal Badam was arrested on 02.11.2004.

Para 32 - on 02.03.2005 statement of Raju Bhargav, DSP, Panchmahal at Godhra was recorded. Paras 38 to 48 contradictions are proved. Para 49 is with regard to extension and promotion after retirement from 31.08.2004 to 31.03.2009. He continued in service for 4½ years beyond scheduled retirement. Paras 50, 51 and 52 onwards about visit of FSL and superior officer on 02.07.2002, about Ajay Baria, who was interrogated on 03.07.2002 and again made statement on 04.07.2002, 05.07.2002 and 03.08.2002. On 09.07.2002 statement of Ajay Baria was recorded under section 164 of the Code. On 04.09.2002 carboys were recovered from Razak Kurkur, but were not sent for FSL. In para 68 reference is made about Harun Abdul Hamid Dev and Harun Rahid Abdul Majid Dev. A mention is made about fax message dated 18.05.2002, but not produced. Bilal Hazi was arrested by transfer warrant and statement of Jabir Behra was recorded under Section 164 on 05.02.2003. Prayer to photography was done and Mr. S.B.Patel, PSI has taken over custody of Central Jail Vadodara to CJM, Godhra. Para 74 is about Maulvi Umarji was in-charge of Relief Camp at Godhra. It is important to note that Mr. R.K.Parmar, CJM, Godhra, who states that under Section 164 statement of Jabir was recorded and it was sent to learned Additional Sessions Judge in a sealed cover page-13313. Paras 74 and 75 about contradictory statements of Sikandar. That arrest based on statement of Jabir with only motive and object to record his statement and to arrest Maulvi Umarji. In paras 87 to 105 it is stated that no case diary is made available. Statements of Ajay Baria were recorded on 04.07.2002, 05.07.2002 and further statement was recorded on 03.03.2003 about seizure of tempi on 16.07.2002. With regard to question as to whether Ajay Baria was under police protection, it was answered that he never remembered that it is the case of the defence that Ajay Baria was under surveillance and statements of other 3 persons were recorded under section 174. In paras 101 to 105

questions were asked about instructions of Maulvi Umarji to attack coach S/6 only. Paras 107 to 147 pertaining to dummy persons. Seat Nos.70, 71 and 72 general questions and earlier conclusions of Mr. K.C.Bawa about setting S/6 on fire by sprinkling inflammable material.

14 Summary of submissions by Mr. A.D.Shah, learned counsel for the defence is the manner in which statement of Ajay Baria was recorded and conduct of investigating officer earlier on 2nd and 3rd July. That, first time theory was introduced of pouring 140 liters of petrol in 7 carboys. The statement of Jabir Behra was recorded on 05.02.2003, second statement of Ajay Baria was recorded. That Ajay Baria is not connected with the incident dated 26.02.2002 of purchasing petrol from Kalabhai Petrol Pump, but when incident of 27.02.2002 of carrying out carboy from Aman Guest House to A cabin, it is emerging that involvement of Maulvi Umarji after statement of Jabir Behra on 05.02.2003 and search and seizure was carried out at place of Maulvi Umarji.

[a] Page-12839 PW-236 Exh.1232 is statement of Ajay Baria under Section 164 recorded by JMFC [Railway at Anand] on 09.07.2002 by Railway Magistrate.

[b] on 07.08.2002 Iliyas Mulla PW-232 whose statement was recorded by Railway Magistrate, Dahod. PW-234 Anwar Abdul Sattar whose statement was recorded on 26.07.2002 by Railway Magistrate, Dakor.

[c] Accused Jabir Behra page-13334 on 05.02.2003 statement under Section 164 was recorded by CJM, Godhra.

[d] Statement of Ranjit and Prabhat were recorded on 11.03.2003 and 12.03.2003 by CJM, Godhra pursuant to order passed by learned Additional Sessions Judge, statement of Sikandar dated 22.09.2003 was recorded by CJM, Godhra under Section 164 which is not found in paper book to supply separately.

15 Confessional statement under Section 164 of Code by accused Jabir Behra is to be examined in the context of other material / evidence available including statement of eye witness viz. passengers and others under Section 164 of Ajay Baria about pouring of inflammable material.

16 In 2008 SIT was constituted.

17 Volume-39 PW-245 Exh.1457 page-13264 J.R.Mothliya, Dy. S.P., SIT carried out further investigation pursuant to order dated 12.05.2008 passed by DGP, Gandhinagar pursuant to direction of the Apex Court. In paras 1 and 2 the above witness referred to 103 accused, who were arrested and apart from first charge sheet, 17 other supplementary charge sheets were filed and 17 accused were absconding. SIT was constituted by the Apex Court including the Chairman and 3 other Senior Officers and 6 police personnel of subordinate level. The above SIT was to undertake independent investigation and free from recording statement of anyone connected with the crime or not. Paras 8 to 24 may be seen including CD of sting operation carried out by reporter was seen by him. Total 133 statements were recorded and 61 were new statements.

18 About Section 164 statements, it is submitted that police influence on accused is not ruled out. It was not free and voluntary

statements and clause 34 of Chapter-II of Criminal Manual was not followed. Fear of videography was in the mind of accused, who was under remand up to 30.01.2003. Narration about events of pouring kerosene, 6 carboys, getting out of S/6 coach from offside did not get any support from passengers of overcrowded train, including breaking open the door outside. Samples of floor did not reveal hydrocarbon. Scientific evidence did not support floor burning by pouring petrol.

19 Judgments reported in Bombay Blasts (2013)13 SCC 1 in the case of Yakub Abdulrazak Meman is relied with regard to section 120A and B of IPC of conspiracy. About Section 164, reliance is placed on (2011)2 SCC 490 in the case of Dara Singh. Paras 156 and 157 and pages 209 and 217 of the judgment.

Reliance is also placed on the decision in the case of State of Tamil Nadu through Superintendent of Police CBI/SIT, v. Nalini and Ors. [AIR 1999 SC 2640(1)].

Mohd. Ayub Dar vs. Jammu and Kashmir reported in (2010)9 SCC 312 and 1999 Crl. Law Journal 3976(1) Jogender Nath vs. State of Orissa and AIR 2001 SC 2503 and 1969(2) SCC 872 on Section 27 of the Evidence Act.

20 Volume-38 page-12841, 12843, reference is made to the conduct of Ajay Baria. That hawkers aged 19 and 20 years were picked up and investigation is not fair, impartial and transparent. None of the passengers of S/6 coach stated that door on onside was opened. Para 52 of Akshardham case was referred along with other decisions. AIR 1995 SC 980 Sivappa vs. State of Karnataka about duty of a Magistrate to rule out influence of police over accused or witnesses. That full compliance

not in the form, but in essence required to be followed and such statement has to be voluntary, true and trustworthy. That detailed and searching inquiry is to be made and not cryptic one. In para 29 after quoting earlier decision, certain principles were culled out. Reference is made to statutory provisions of Section 106(2)(3) about no police custody and requirement of Section 281 of Code. It is stated that initially CJM, Godhra was not willing to record statement of Ranjit and Prabhat, but after obtaining directions from learned Additional Sessions Judge such statements were recorded. A reference is made about the conduct of Noel Parmar and his decision to drop names of both Harun Abdul Dav and Harun Raashid Dav. Even while tempi was seized on 09.07.2002, no material emerged prior to that about use of tempi. Page-13198 Anwar Bhopa and Bhila Harman are made witnesses and not accused about second chain pulling. Discrepancies in name of accused Ismail Yusuf Changa and Ismail Abdul Majid Changi is admitted. That Ismail Yusuf Changa is acquitted. During TI parade dummies were hawkers at railway platform and known to those, who were to identify and, therefore, TI parade is farce. Even false implications of other accused is not ruled out. Pages-13211 and 13212 about conspiracy under Section 120A and reliance is placed on decision of Nalini [supra], Yakub Memon [supra] and Ajmeri [supra]. About charge framed Exh.29 page 318 Volume-1 nothing is specifically stated about criminal conspiracy. Apart from conspiracy, unlawful object is not emerging. Conspiracy has basis in confessional statement. First ACP and second ACP not established and, therefore, cannot form basis for conspiracy. That conspiracy was not dependent on incident which took place at Railway Platform it is clear that RPF intervened when train started before and after first chain pulling. That first chain pulling and stone pelting are not part of conspiracy. That no knowledge that coach S/6 would stop at A cabin and instructions by Maulvi Umarji to burn coach 6

and not S/6. That carrying carboy containing 160 liters of petrol in tempi and one carboy in moped towards A cabin, usage of weapon for assaulting passengers etc. are not established. PW-190, Vinod Chauhan states about presence of Razak Kuakur at his shop from whom he had purchased milk. That meeting of mind is the must in conspiracy as held in 2009(3) SCC (Cri.) 66 Baldev Singh vs. State of Punjab. Even by implications or inference conspiracy is not proved.

21 **JUDGMENTS RELIED ON BY MR.A.D.SHAH ON SECTION 164**

In the context of statutory provisions and language of Section 164, paras 33 and 34 of Criminal Manual provide procedure about recording such statement. It is submitted that PW-246 R.K.Parmar, CJM, Godhra clearly mention about improper conduct of Neol Parmar on 29.01.2003 and Jabir Behra was under police influence and during remand his video-graph was done. It cannot be said that the statement was voluntary, trustworthy and free from any influence. That without interpretation, story is unfolded and, therefore, unbelievable. That reliance is placed on the following judgments:

Section 281 of Code under Chapter XXXIII may also be seen.

PART III-G

BRIEF SUMMARY OF EVIDENCE GIVEN BY LEARNED COUNSEL MR.A.D.SHAH FOR THE DEFENCE

1 What transpires on 27.2.2002 at Godhra Railway Station

Page

PW.228/Exh.1189 Rajendrarao Raghunathrao Jadav 12612

-Engine Driver-Complainant

Exh.1190	F.I.R.	12624
PW.131/Exh.760	Mukesh Raghuvirprasad Panchori -Asst. Driver	11452
Exh. 761	Driver Book	11451
PW.135/Exh.777	Satyanarayan Panchuram Verma	11475
PW.126/Exh.742	Harimohan Fulsing Meena Dy. Asst. Station Master On duty at 'A' Cabin	11384
PW.127/Exh.744	Rajendraprasad Misrilal Meena Asst.Station Master at Godhra on duty at 'A' Cabin	11391
PW.1376/Exh.780	Sajjanlal Mohanlal Raneval -Sr. T.T.P.	11488
PW.111/Exh.712	Fatesinh Dhabsinh Solanki Point'sman at Railway Yard	11287
PW.1/Exh.84	Sureshbhai Dhanamal	9771
Exh. 85	Panchnama_Scene of offence	9785
Exh. 86	Panchnama of Coach No. S-6	9790
PW.18/Exh.182	Arvindbhai Kantibhai Vaghela	9964
Exh.183	Panchnama-Burnt remnance Seized from Coach S-6	9972

PW.27/Exh.219	**Bhupatbhai Motibhai Chauhan**	10035
Exh.220	Panchnama-Inspection of Coach No.S-6 by FSL. Officer in respect to Sliding Door dt. 11/7/2002-11.15 am. To 1.15pm	10040
PW.28/Exh.222	Babulal Lokumal Tolani	10043
Exh. 223	Panchnama-Inspection of Coach No. S-7 and Coach No.S-2 dt. 15.7.2002-6 pm. To 8.30 pm.	10046
PW.205/Exh.1047	Shardul Bhalchandra Gajjar	12305
PW.230/Exh.1196	Mohabbatsinh Javansinh Zala -P.S.I.	12643
PW.238/Exh.1262	Bhaskar Ramdas Simpi	12876
PW.242/Exh.1389	Raju Visankumar Bhargav -D.S.P.	13098

2 **Evidence of Witnesses as to abduction of Muslim Lady:**

PW.183/Exh.915 Safiyaben Suleman P.12018

0. The witness was resident of Vadodara had come to Godhra on 23.3.2002 on festival of Id and had come to Godhra Railway Station on 27.2.2002 for return journey to Vadodara.

PW.184/Exh.916	Jetunbibi Siraj Ahmed -Mother of Safiyaben	P. 12111

- She was also returning to Vadodara from Godhra and was at Godhra Railway Station platform No.1.

3 **Group of - Passengers of Coach Nos. S-6 and S-7 : Witnesses**

PW.76/Exh.613	Hariram Shriramdev Chauhan	P. 11053
PW.77/Exh.614	Rajendrasingh Rampersingh	P. 11059
PW.78/Exh.613	Raju Krupashankar Pande	P. 11066
PW.79/Exh.619	Amarkumar Jamnaprasad Tiwari	P. 11070
PW.80/Exh.621	Gyanprakash Lalanprasad Chorasia	P. 11078
PW.81/Exh.625	Pujaben Bahadursinh	P. 11084
PW.82/Exh.627	Virpaul Chhedilal Pal	P. 11092
PW.86/Exh.638	Hariprasad Maniram Joshi	P. 11030
PW.99/Exh.674	Prakash Harilal Taili	P. 11209
PW.102/Exh.680	Rampal Jigilal Gupta-Insured	P. 11224
PW.103/Exh.681	Somnath Sitaram Kahar	P. 11231
PW.119/Exh.729	Punamkumari Sunilkumar Tiwari	P. 11336

Note:- The evidence of these witnesses clearly indicate that Coach No. S-6 was occupied by more than 150 to 200 passengers and movement was very difficult. On commencement of pelting of stones, some of the passengers proceeded towards toilet area. Some of the passengers saw throwing of burnt rags and fire on seat and luggage in Coach No. S-6 and they noticed heavy smoke which resulted into burning sensation in eyes and breathing was difficult which drove some of them to come out from the right side door and thereafter they saw fire.

The evidence of some of the passengers also revealed that through they had reserved seats, they could not get their seats due to the same being occupied by Kar-Sevaks and they had to place their suitcases and food-grains bags near toilet area. They had closed the doors between Coach Nos. S-6 and S-7 due to cold wind.

4 Witnesses belonging to Vishwa Hindu Parishad who had come to serve tea and snacks to Kar-sevaks travelling from Ayodhya to Ahmedabad in Sabarmati Express Train.

These witnesses deposed to have seen the throwing of inflammable liquid from carboys by members of crowd on coaches of train.

[1] PW.149/Exh.810 Janakbhai Kantilal P. 11644

Some members of crowd running with carboys in their hand and throwing liquid on train claims to have identified two persons by name -

[i] names Yakub Sattar Sakla and identifies Moulvi Hussain Ibrahim Umarji.

[ii] names Idrish Ravan – identifies Idrish Yusuf Ismail. However, does not identify any person from the crowd carrying carboys and engaged in the act of throwing liquid on train.

[2] PW.151/Exh.818 Dipakkumar Nagindas P. 11665

Members of the crowed armed with weapons and carrying carboys with inflammable liquid-also saw members of crowed throwing

acid bulbs and throwing of liquid from the carboys on train.

First identified two persons and thereafter two more-

[i] names Habib Karim and identified Abid Hussain Abdul Karim;
[ii] names Mohammad Mushraf and identifies Saukat Mohammad Kalanda;
[iii] names Hussain Abdul Sattar and identifies Hussain Abdul Sattar;
[iv] names Mohammad Ibrahim and identifies Rafiq Ahmad Salam

Note :(Para-19) – This witness claims to have seen incident by standing near area of A-cabin- crowd came from back of A Cabin and proceeded 250 dt. towards Baroda – saw smoke from coach S-6.

[3] PW.154/Exh.823 Chandrashankar Nathuram P.11743

Crowd of 900 to 1000 persons rushing towards train with weapons and carboys containing inflammable liquid-also saw throwing liquid on train from carboys and igniting the same. Identifies two persons-

[i] names Ahmad Abdul Rahim and identifies Ahmad Abdul Rahim;
[ii] names Asif alias Babu and identifies Idrish Yusuf Mafat

[4] PW.155/Exh.825 Manoj Hiralal Advani P.11757

Members of crowd running with weapons and carboys containing inflammable liquid and had also seen throwing of liquid on train- identifies two persons-

[i] names Mohamad Abdul Samal and identifies Mohamad Abdul Salim;
[ii] names Anwar Hussain Ahmed but could not identify.

[5] PW.159/Exh.834 Rajeshbhai Vitthalbhai Darji P. 11813

Members of crowd running with weapons and pelting of stones and damaging windows and doors with pipes, sticks etc. Thereafter, saw 5-6 persons coming with liquid in carboys and throwing liquid on the train. Thereafter, saw throwing of burning rags inside the train and those persons put the coach on fire. Names of six persons and attributes act of pelting of stones and inciting crowd by shouting slogans -

[i] names Habib Bin Yamin Behra;
[ii] names Saukat Dagal and identifies Saukat Mohmad Kalandar;
[iii] Harun Dao;
[iv] names Siraj Abdul Jasma who died during proceeding;
[v] Rafiq Mohamad Kalandar and identifies Rafiq Abdul Majid;
[vi] names Mehboob Ahmad Hasan with knife.

Identifies three persons :

[i] Siddiq Abdul Rahim Bakkar;

[ii] Habib Bin Yamin Behra;

[iii] Mohamad Ansar Kutubuddin Ansari.

[6] PW.167/Exh.862 Harsukhlal Tejands Advani P.11934

Claims to be standing behind staircase of 'A' cabin and saw crowd pelting stones and assaulting passengers with weapons- also claims to have seen some persons climbing steps near door of coach and throwing liquid from carboys in coach- also saw persons standing on the ground attempting to ignite rags and throwing the same in coach whereby coach caught fire. Claims to identify three persons -

[i] names Abdulgani Shamad Shaikh and identifies Farukh Abdul Sattar Gaji;

[ii] names Abdul Rauf Ahmed Yamin and identifies Aayaman Abdul Rauf Ahmadi;

[iii] names Jabir Abdul Kala and identifies Sabirkhan Sultankhan.

[7] PW.172/Exh.878 Nitinkumar Hariprasad Pathak P.12026

Noticed crowd of 900 to 1000 persons armed with weapons and some carrying plastic carboys with liquid and putting train on fire. Claims to identify two persons -

[i] names Ibrahim Adam and identifies Ibrahim Adam Dhantiya;

[ii] names Kofiwala and identifies Umargani Mohammad

Ibrahim Kofiwala

[8] PW.203/Exh.1040 Dilip Ujamshi Dasadiya P.12284

He has been treated hostile

[9] PW.208/Exh.1067 Murlidhar Ruchiram Mulchandani P.12335

Noticed crowd of 900 to 1000 persons, but had started pelting of stones and also saw 5 to 6 persons having carboys in their hands throwing inflammable liquid on coach and putting coach on fire. - Claims to have seen Bilal Haji throwing liquid on coach from carboy.

Thus, some of the witnesses of Vishwa Hindu Parishad who had gone to Godhra Railway Platform to greet Kar-Sevaks and provide snacks and tea had also gone near 'A' Cabin when train had stopped second time. The coach S-6 appears to be very near to 'A' cabin and all these witnesses have been persons carrying carboys throwing liquid on train. However, except positive act attributed to Bilal Haji by Murlidhar Mulchandani about the act of throwing liquid on coach from carboys, no other witnesses have identified the persons carrying carboys and throwing liquid on train. The evidence of these witnesses also revealed that some members of the crowd threw burning rags in coach from the ground.

Note :- Thus, The eye-witness account of passengers and witnesses belonging to Vishwa Hindu Parishad about the role attributed to some of the members of the crowd carrying inflammable liquid in carboys and throwing the same on train

and also, as claimed by one witness, from door of the coach by pouring from carboys is not substantiated by witness from FSL Mr. Dahiya. Thus, the prosecution story appears to be taking turn after 17.5.2002 and investigation being directed on the basis of conclusion reached by Mr. Dahiya in his report on 17.5.2002 (Exh. 1350/P. 13004).

5 **Evidence of F.S.L. Witnesses :**

[1] PW.227/Exh.1161 Dipakkumar Bhagwatlal Talati P.12546

- This witness received forwarding letter (Exh. 1163/P.12554) in reference to two carboys. These two carboys were examined by this witness.
- The FSL report prepared by the witness (Exh.1166/P.12557) reveals presence of acid in one carboy and presence of kerosene in another carboy.
- This witness received different articles vide forwarding letter (Exh.1167/P.12559) the witness forwarded FSL report in respect to 37 articles vide Exh. 1173/P.12571. According to the report, article-Mark 15 white carboy, article Mark-16-black carboy-Both reveals presence of petrol.

- Article-Mark 18- Plastic bottle reveals presence of acid whereas the article Mark-17 empty carboy reveals presence of petroleum hydrocarbons. The other articles referred in the report (on page – 12577) did not reveal presence of petroleum hydrocarbons or acid.
- The witness thereafter further received forwarding letter

dated 11.4.2002 (Exh. 1174/P. 12578) whereby different samples of petrol, diesel obtained from petrol pump (Hakimmiya Automobiles Petrol Pump and (H.M.&A. Patel Petrol Pump). This letter also referred to the seizure of three carboys (purporting to have been produced by the accused), it contained kerosene.

- Exh. 1177 is the FSL report dated 23.4.2002 (P. 12586) and conclusion is recorded in the said report (P.12590).
- This witness also received articles vide forwarding letter dated 4.5.2002 (Exh. 1178/P.12591) which referred to 18 articles.
- The FSL report dated 17.5.2002 (Exh. 1181,. P. 12602) describes different articles and conclusion on analysis (P. 12605) rules-out the presence of petroleum hydrocarbons or remnants of plastic contained. However, one carboy (Article-Mark-N) revealed presence of petrol hydrocarbons.
- This witness also received two articles vide forwarding letter (Exh. 1182/P. 12606) recovered from injured Lalanprasad Kishorilal Chorasiya on 7.5.2002. The FSL report (Exh. 1185/P. 12609) revealed that both articles were not having presence of petroleum hydrocarbons.

[2] The prosecution also relied on the evidence of **PW.240/Exh.1347 Mohindersingh Jegeram Dahiya-P.12982**

However, the prosecution has also adduced evidence of Mohinder Singh J. Dahiya (PW.240/Exh.1347/P.12982). This witness inspected Coach S-6 on 1.5.2002 and submitted report on 17.05.2002. Exh. 1348-rough Notes prepared at the time of inspection on 1.5.2002, Exh. 1349/P.13002 is the Inspection

Report based on rough notes dated 17.05.2002.

This witness also carried-out demonstration by arranging Coach at a place of offence near 'A' cabin on 3.5.2002 and details report with Sketch (Exh. 1350/P. 13004) was submitted on 17.5.2002. Thus, Exh. 1350 totally rules-out the prosecution version about throwing of inflammable liquid from outside the coach as well as from the doors of the coach S-6. The conclusion reached by the witness Dr. M. J. Dahiya was suggesti8ve of pouring of inflammable liquid from the Eastern side of door of the Coach S-6 and in the passage near Seat No. 72 from the container having broad opening.

- This witness received communication dated 25th August, 2004, from the office of the Deputy Superintendent of Police (Exh. 1353/P.13008). This witness had also received communication of Railway dated 12.06.2002 along with Exh. 1353.
- The witness vide communication dated 2.9.2004 forwarded his answer to different queries to the Dy. S.P. (Exh.1354/P. 13012).
- Thereafter, this witness received further communication from the office of Special Investigation Team dated 24.10.2008 (Exh. 1355/P.13015).
- This witness vide para-wise queries answered the queries vide communication dated 7.11.2008 (Exh. 1356/P.13017) along with Exh. 1357/P.13018). This communication refers to answering of 22 queries.

- SIT vide Exh. 1355/P.13015 raised the Query No.6 which

reads-

"6. Whether the incident of fire in Coach was happened due to short-circuit ?"

The witness vide Exh. 1357 answered-P.13019- "No. FSL Team examined **this reason very thoroughly** but there was no evidence of short-circuit. Secondly, the train was stationery at the time of fire and when the train is stationery, it remains on battery only." The reference to para-20 in cross-examination (P.12991) it is clearly established that the witness had nothing in writing about Officers of FSL examining Coach-S-6 from this aspect and in none of the reports by any of the Officers of FSL it was revealed the non-consideration of short-circuit during their examination. Thus, the last report dated 2.9.2004 (Exh. 1354/P. 13012) there was no reference of short-circuit.

[3] The prosecution has also examined **PW.225/Exh.1150 Mukesh Nandkishor Joshi – P.12519**.

This witness had visited Godhra on 3.5.2002, 2.7.2002 and 11.7.2002. The witness had submitted report (Exh.1151/P/ 12526 and Exh. 1152/Exh. 12527).

- This witness had also produced report (Exh. 1154/P. 12530) in respect of 12 parcels received from the I.O..

[4] The prosecution has also examined **PW.226/Exh.1158 Satishchandra Ganpatram Khandelwal-P. 12535**.

- This witness had gone to Godhra in company of M.J.Dahiya on 11.7.2002.
- This witness has produced report of sliding door (Exh. 1159/P.12544) dated 20/7/2002.

PART III-H

THEORY OF CONSPIRACY

[1] **PW. 186/Exh.923 Mustaq Ahmed Hussain P.12122**
Mohammad Gobha-Hostile

- Statement on 22.2.2003 at Vadodara – Application dated 17.04.2008 to SIT (Exh.930) with affidavit in support.
- Statement before SIT on 26.6.2008.

[2] **PW.189/Exh.941 Firozbhai Ibrahim Posti-P.12148**
Hostile

- Statement on 18.2.2003. - He was panch witness to Panchnama about the search at Aman Guest House on 4.9.2002 (Exh.942).
- Recovery of 7 Black carboys (10 Ltrs.) and Carboys-6(2 Ltrs.)
- Application along with affidavit on 18.4.2002 to SIT (Exh.945-946).
- Statement before SIT on 26.6.2008.

[3] **PW.196/Exh.978 Irfan Yakub Mitha – Hostile P.12180**

- Statement recorded on 22.2.2003 about meeting on 26.2.2002 at

Aman Guest House.

- Application dated 18.04.2008 to Sit (Exh.979) along with affidavit (Exh. 980).
- Statement on 22.6.2008

[4] **PW.232/Exh.1214Lliyas Hussain Mulla-Hostile P.12709**

- Statement dt. 2.8.2002 and statement under Sec. 164 before JMFC, Railway Court on 7.8.2002.
- Affidavit before Benarjee Commission in the year 2004 (Exh. 1215).
- Mark-1063/5 – Statement U/s 164 Cr.PC – P. 12763 dated 7.8.2002.

[5] **PW.234/Exh.1220Anwar AbdulSattar Kalandar P.12743**

- Statement on 24.7.2002
- Statement under Sec. 164 of Cr. P.C. 26.7.2002 before JMFC, Railway, Godhra, Camp : Dakor)Exh. 1221/P.12755) (Exh. 1222 dated 26.7.2002)
- Preliminary questioning – P. 12759.
- PW-206/Exh.1060 Bhikhabhai Harmanbhai Bariya P.12308
- This witness is Hawker and supports the prosecution case.
- Statement recorded on 25.7.2002 and refers to the incident which took place on 27.2.022. Not connected with conspiracy theory on night of 26.02.2015.

PART III-I

WITNESSES RELATING TO CONFESSIONAL STATEMENT OF JABIRBIN YAMIN BEHRA AND STATEMENTS OF WITNESSES RECORDED UNDER SEC.164 CR.P.C.

[1] **PW.207/Exh.1063 Ambalabhai Ranchhodbhai Patel-JMFC (Railway) Godhra** **p.12323**

1. From June, 2002 to June 2004 recorded statements under Sec.164 of Cr.P.C.

   [i] 9/7/2002-recorded statement of Ajay Kanubhai Bariya

   [ii] 26/7/2002-recorded statement of Anwar Abdul Sattar Kalandar

   [iii] 7/8/2002-recorded statement of Iliyas Hussain Mullla.

   This witness recorded these statements under Sec.164 of Cr.P.C., without verifying the aspect about their status in the investigation of crime and had not inquired about their position from I.O. However, the witness admitted that after the charge-sheet, committal order came to be passed and in the that first charge-sheet all three were not shown as witnesses and all the three witnesses had not gone to Godhra Railway Police Station for giving statements. However, after first charge-sheet and during investigation their statements came to be recorded before the Court Camping at Dahod, Anand and Dakor towns at a distance of 50 to 70 kms. after statements before the police.

[2] **PW.246/Exh.1467 Rajnikant Khodidas Parmar Chief Judicial Magistrate, Godhra** **p.13307**

[I] Confessional Statement of accused Jabirabin Yamin Behra

22/1/2003-Accused Jabirabin Behra arrested.

23/1/2003 to 30/1/2003-accused remanded to police custody

28.02.2003-During custodial interrogation confessional statement, videography was also done. (Evidence of PW.244/Eh.1406-Noel Waller Parmar-P. 13129 and the aspect of videography-P.13180) Sec.161 came to be amended by Act 5 of 2009 and the provision for videography, statement came to be introduced w.e.f. 31./12.2009. Thus, on 28/01/2003 statutory provisions did not provide for statement being recorded under videography.

29.01.2003-Accused Jabir was taken to JMFC (Railway) for recording confession and accused was handed over to judicial custody. However, JMFC (Railway) refused to request for recording confession on the legal ground that he had no jurisdiction. Mr. Noel Parmar on same day submitted application to CJM Parmar for recording confessional statement of Jabir Bin Yamin Behra, which was fixed for order. The learned CJM had inquired about the names of other Police Officers accompanying I.O. Noel Parmar through his Court staff and name of PSI S.B. Patel came to his knowledge.

03.02.2003-the learned CJM, Parmar wrote yadi to Central Prison, Vadodara to produce accused Jabir Bin Yamin Behra on 4/2/2003 at 11 AM before his Court at Godhra. This yadi contained direction to hand-over custody to PSI S.B.Patel for producing before Court of CJM.

04.02.2003-PSI S.B. Patel obtained custody of accused Jabir Bin

Yamin Behra from Central Prison, Vadodara and produced him before the Court of CJM, Godhra. Preliminary interrogation was conducted and time of 24 hours for reflection was given after recording preliminary questions and answers. A Yadi was written to Central Prison, Vadodara for producing accused before the Court of CJM, Godhra. (Report Exh.1468/P.13334).

[i] This preliminary inquiry does not reflect the compliance of Form No.35 under Rule-34 of Criminal Manual. There is no recording about Chief Judicial Magistrate informing accused Jabirabin Yamin Behra that he was CJM and he was recording his confession in that capacity.

[ii] There is no searching inquiry of his Police custody before putting accused in judicial custody. There is no inquiry about his custody from Central Prison, Vadodara to his production before this Court by PSI, S.B. Patel-Member of Investigation Team.

> This inquiry was necessitated to verify whether the accused was having any police influence during this custody.
>
> Similarly, there is direction to send accused to Central Prison, Vadodara with the custody of PSI S.B. Patel.
> Note:-Thus, the accused Jabirabin Yamin Behra though coming to Court from Central Prison, Vadodara from Judicial custody, he was in police custody of PSI S.B. Patel who was Team Member of the Investigating Team.

[iii] Similarly, on 5/2/2003 this accused was brought from Central Prison, Vadodara before the Court of CJM, Godhra, after

24 hours time of reflection. Here again custody was obtained from Central Prison, Vadodara by PSI S.B.Patel. Thus, the accused was in custody of PSI Patel-Member of Investigating Team and no questioning about this custody of Police before recording statement. Preliminary noting of examination on 4/2/2005 and 5/2/2005 does not reveal searching inquiry about influence of police during this period.

[iv] Furthermore, there is no inquiry as to the purpose and object of making confession on 4/2/2005 or 5/2/2005. Thus, the non-compliance of Form No.35 and provisions of Sec.164 of Cr.P.C. Clearly revealed that there is no sincere effort by CJM in searching inquiry about the determination of voluntary nature of the confessional statements. Thus, prima facie voluntary nature of the confession is not established from the evidence of CJM.

[v] According to charge (Para-12) accused Salim Haji Ibrahim Badam alias Salim Panwala and the accused Abdul Razak Mohammad Kurkur made three hawkers to board the running train with instruction to stop the train by chain-pooling near 'A' cabin and thereafter the accused Salim Panwala and the accused Abdul Razzak Kurkur went on red colour M80 Moped with one carboy containing petrol towards 'A' cabin.

> However, according to confessional statement, after stone pelting on train, the accused Saukat Lalu came and told to follow him. Hasan Lalu, Mehboob Latika and accused Jabirbin Yamin went behind Saukat Lalu and Saukat Lalu entered the lane of Aman Guest House. There he saw Razak, Iliyas Hussain and Mulla and Saukat Lalu had talked

with them. Razak had given signal to them and Ajay Bariya who was standing there was taken by Saukat by catching hold of his hand to join and then they reached near the place. At that time Razak Kurkur and Salim Panwala came out from the room on back portion and at that time Imran Sheru, Irfan Bhola and Saukat Lalu took-out carboys from room of Razak and placed in tempi. Razak instructed to take tempi behind 'A' cabin. Saukat Lalu abused Ajay Bariya and took him in the tempi. When tempi was proceeding towards Ali Masjid he saw on backside and notice that Salim Panwala was driving M80 and Razak Kurkur was sitting with carboy having face on opposite side.

Thus, according to confessional statement, Salim Panwala and Razak Kurkur were at back portion of Aman Guest House at the room of Razak Kurkur till loading of 7 carboys in Tempi and Tempi being driven towards 'A' cabin in pursuance to instruction of Razak Kurkur.

The charge (Page-13) reveals that 9 persons ran from the Platform and reached the lane behind Aman Guest House in signal falia and they loaded 8 carboys of 20 Ltrs. Capacity of petrol and after loading the same in tempi rickshaw No.GJ-6U-8074 went via Ali Masjid near 'A' cabin.

The charge further reveals that those persons reached the Sabarmati Express Train Coach No.S-2 in furtherance of common object carrying weapons and stated to break windows glasses and tried to set fire to the coach from outside. Thus, according to charge the accused Abdul Razak

Kurkur and Salim Panwala thereafter reached Coach No.6 and poured the petrol from the carboy by climbing stairs of the door of S-6 towards Engine side in broken window on the side of toilet and the accused Salim Panwala had helped pouring of the petrol from the carboy by giving lift at the bottom of the carboy. (Para-15 of charge). However, though the accused Jabirabin Yamin Behra has followed the members of the alleged conspiracy and proceeded from the side of S-2 to S-6 did not refer about this role played by accused Salim Panwala and Razak Kurkur.

[vi] Similarly, the details of part played by different accused near Coach no.S-6 as emerging from confessional statement, it is clearly emerging that after reaching near Coach S-6, the carboys were placed on the ground and the accused Mehboob Latika had created holes by knife on carboys and thereafter cut the canvass vestibules and had entered the place between Coach S-6 and S-7. It is further claimed that sliding door between Coach S-6 and S-7 was closed and by kicks they broke open the door and thereafter Saukat Lalu handed-over two carboys. At that time the accused Jabir was having knife in his hand which he threw on the ground and took two carboys handed-over by Saukat Lalu. Thereafter Saukat Lalu also entered Coach S-6 from the side of vestibules area. Saukat Lalu opened the door of Coach S-6 towards 'A' cabin and from there the accused Imram Sheru, Rafiq Bhatuk and Saukat Lalu came inside with petrol carboys.

It is further revealed in confessional statement that the accused Hasan Lalu and the accused Irfan Pataliya were throwing (sprinkling) petrol from the broken window from

outside. At that time they got down from off-side and thereafter fire took place in the Coach S-6. This is the part of confession as to coach S-6 being put in flame. However, the confession does not reveal that place as to how S-6 was put fire. It is revealed further in the confessional statement that on next day he learnt that the accused Hasan Lalu had thrown burning rag in the compartment and thereafter they had started running here and there.

26/02/2003 - Additional Sessions Judge Mr. K.C.Kella by order (Exh.1475) directed to CJM to record statements of witnesses Ranjitsinh Jodhabhai Patel and Prabhatsinh Gulabsinh Patel under Sec.164.

11/3/2003- The learned CJM, Godhra recorded statement of Ranjitsinh Jodhabhai Patel (Exh.1470/P.13342).

12/3/2003-The learned CJM recorded statement of Prabhatsinh Gulabbhai Patel (Exh.1471/P.13345).

[3] **PW.244/exh.1406 Noel Waller Parmar P.13129**

-Refers to arrest of Jabirbin Yamin Behra-Para 16&17/Page13136;

-Para-63 & 64/Page 13173 Statements of Ajay and Sikandar

-Para-65/Page 13174-Statement of Sikandar

-Paras-72&73/Page 13178- Cross examination on aspects of

confessional statement of accused Jabirbin Yahim Behra.

-Para-131/Page 13220-Letter (Exh.995) admittedly written by Dy.S.P. Parmar to all Moulvis to produce persons involved and the first name is that of Moulvi Hussain Umreji.

-Para-153/Page 13231-Moulvi Yakub Punjabi of Ali Masjid and his direction involvement by witness Sikandar Shaikh Dy.S.P. Parmar during investigation convicted about wrong involvement of Moulvi Yakub Punjabi in view of his absence in India on or about 27/2/2002. Yet, no further statement of Sikandar and no T.I. Parade.

-Para-184/Page 13225-No attempt to remove sliding door of corridor and obtaining opinion of FSL.

Salient features emerging from cross-examination of Dy.S.P. Noel Waller Parmar in respect of investigation:

[i] Para-81/Page-13184-Involevment of Harun Ahmed Hamid Dao upto supplementary charge-sheet in col.2. Thereafter in 12 supplementary charge-sheet name of Harun Rashid Abdul Majid Dao and then report to drop names of both persons.

[ii] Para-(83) 91/Page-13190-Learnt about use of Tempi and instructed to seize Tempi for the first time on 9/7/2002.

[iii] Para-102/Page-13198-Statement of Ranjitsinh and Prabhatsinh on 22/2/2003 and U/s.164 of Cr.P.C. Thereafter.

[iv] Para-105/Page-13199-Anwar Bhobha and Bhikha's name

revealed in chain pooling and not taken as accused.

[v] Para-107/Page 13200- Dummy persons in majority T.I. Parade were from hawkers working at Railway Platform.

[vi] Para-110/Page-13202-Ismail Yusuf Changa or Ismail Abdulmajid Chungi-no further steps.

[vii] Para-127/Page-13212-Constitution of SIT (Special Investigation Team) by Supreme Court pendency of Special Criminal Application No.1706/2005 by Sharifabibi w/o Moulvi Abdul Sattar Bhagaliya for wrongful confinement of Moulvi Bhagaliya.

PART III-J

COUNTER BY THE LEARNED DEFENCE COUNSEL ON THEORY OF CONSPIRACY AS EMPHASIZED BY PROSECUTION BASED ON CIRCUMSTANTIAL EVIDENCE:

Conspiracy

[1] **Prosecution emphasis on circumstantial evidence to infer conspiracy**.

[i] Huge crowd of 1000 to 1500 persons collected near Signal Falia duly armed with dangerous weapons like swords, spears, pipes, etc.

[ii] The evidence of passengers also discloses use of inflammable material and acid by members of the crowd.

[iii] Exh.85-Panchnama of Scene of offence corroborates the use of inflammable material [Muddamal Articles-1 to 21]. Some of the articles revealed presence of petroleum hydrocarbons. Thus, the articles-1 to 21 supports evidence of victims – passengers.

[iv] The panchnama of S/6 [Exh.86] also referred to seizure of Article-22 to 34 and two more articles found on 03.03.2002. Articles-22 to 34 are forming part of debris collected from nine compartments of S/6.

Thus, these circumstances established that from the very beginning the investigation was on line of the use of inflammable liquid. FSL report substantiates the claim of passengers and other witnesses.

[v] Similarly, discovery panchnama of carboy on 17.04.2002, sealing of two petrol pumps on 27.02.2002, statements of Ranjit Jodha Patel and Prabhatsinh Patel revealed sale of huge quantity of petrol on 26.02.2002 in 7 carboys of 20 liters capacity.

[vi] Heavy damage in compartments 5 to 9 of S/6 reflect the huge quantity of petrol.

[vii] Evidence of Ajay Kanubhai Baria reveals carrying carboys of petrol in tempi from Aman Guest House to the back of `A' cabin near Masjid and removal of carboys from tempi to the place near `A' cabin where train has stopped.

[viii] His evidence coupled with evidence of Sikander reveals cutting of vestibules of S/7 and forceful opening of sliding door of

S/6 and thereafter three accused entering coach S/6 from the area near toilet after seat No.72 and opening the on-side door.

[ix] His evidence further reveals entry of two other accused persons with carboys and pouring of huge quantity of petrol in the coach S/6.

[x] His evidence further discloses one accused pouring petrol from the window and thereafter throwing of burning rags inside the coach.

From these circumstances the prosecution wants to infer conspiracy hatched by the accused.

[2] The prosecution evidence about meeting of some of the accused on the night of 26.02.2002 and purchase of petrol of huge quantity is based on confessional statement of accused Jabir [Exh.1469 page-13335] and two accused persons viz. Ranjitsinh Jodhabhai Patel [Exh.1470 – statement u/s. 164 recorded on 11.03.2003] and Prabhatsing Gulabsing Patel [Exh.1471 statement u/s.164 recorded on 12.03.2003]. Both these witnesses in their earlier statements recorded on 10.04.2002 did not accept the prosecution case of selling loose petrol on the night of 26.02.2002.

Thus, the confessional statement of accused Jabir Bin Yamin Behra [Exh.1469 recorded on 05.02.2003] is the only evidence of the meeting alleged to have been held on night of 26.02.2002 at Aman Guest House.

[3] Thus, except retracted confessional statement of accused Jabir Biryamin Behra, which prima facie does not appear to be voluntary and

hence inadmissible, then there is no evidence of meeting of minds prior to the arrival of Sabarmati Express Train at Godhra Railway Station at about 7:43 am.

[i] No prosecution evidence to show that any of the conspirators, as alleged, to be present on night of 26.02.2002 were at Railway Station, at the time of arrival of train at Godhra Railway Station.

[ii] Similarly, no movement till departure of train at 7:48 am from Godhra Railway Station, when chain pulling took place in 3 or 4 coaches in view of some passengers could not board the train.

[iii] An event of misbehaviour with hawker at railway station as well as misconduct with Muslim lady, pelting of stone began and after police action, the persons dispersed and the train started again.

[4] The prosecution evidence as to stoppage of train near `A' cabin and cause for such stoppage is not consistent and conclusive. However, droppage of pressure is clearly reported and no evidence about resetting is forthcoming.

Thus, the prosecution claim about second chain pulling in view of conspiracy is not substantiated from the evidence. If the second stoppage was not due to chain pulling then no action by members of unlawful assembly after train left railway station on resetting of chain pulling in three compartments improbabilized the theory of conspiracy.

[5] The evidence of Ajay Kanubhai Bariya and retracted confessional

statement of Jabir Binyamin Behra, the members of conspiracy proceeding towards back portion of Aman Guest House after first chain pulling and restarting of the train render the version of witnesses highly unnatural and improbable.

[6] There is no reliable material emerging from the prosecution evidence about such conduct of accused of going on backside of Aman Guest House lifting 7 carboys and placing them in tempi and thereafter leaving the place with 7 to 8 persons, reveal improbability of the prosecution case.

[7] The charge of conspiracy clearly contemplates meeting of minds and reaching an agreement to do an illegal act. This presupposes that even if act is not committed, the agreement itself would be an independent offence. Such formation of agreement is absolutely essential before act is put into action. For entering such agreement there is no other evidence expect the retracted confessional involuntary statement of Jabir Binyamin Behra. If that evidence is inadmissible as submitted by defence, then there is no evidence about meeting of minds and reaching to an agreement to do an illegal act, viz. to put coaches of Sabarmati Express train on fire.

[8] The evidence which have taken place after stoppage of train on second time can also be the outcome of acts perpetrated by members of unlawful assembly. Thus, the subsequent events which can be attributable to the acts of members of unlawful assembly then, it does not necessarily reveal the act being committed in pursuance to any agreement between the conspirators. Thus, the subsequent events cannot be pressed into service for inferring the acts being done by members of the crowd as part of any conspiracy previously hatched.

Documents admitted under Section 294 of Cr.P.C.

The prosecution has heavily relied on Exh.990 and Exh.1008. The provisions of Section 294 of Cr.P.C. clearly show that "no formal proof of certain documents". Thus, it dispenses with proving of documents as required by the provisions of Indian Evidence Act.

However, this provision does not exclude the operation of the provisions of Indian Evidence Act and the Code of Criminal Procedure. Exh.1008 [Page-12230] is a document dated 19.09.2005 in response to the communication from the Investigating Officer to the Railway authority about ACP. This document itself reflects that it was an answer to the queries forwarded by the Investigating Officer seeking details. Thus, it is document coming into existence in answer to queries of I.O. during the course of Investigation. This would clearly reflect that had the Investigating Officer contacted the concerned person and recorded his statement on those aspects, it would have been a statement under Section 161 of Cr.P.C. Merely because it is a correspondence in pursuance to query of the I.O., during the course of investigation will not change the nature of that document. That document being received by the I.O. during the course of investigation would be amounting to a statement U/s.162 of Cr.P.C. When such document is produced for consideration before the Court it does not become the substantive evidence. The provisions of the Evidence Act or any other corresponding provision as to admissibility in evidence will definitely be attracted. The provisions of sections 135 and 136 of the Evidence Act clearly contemplates that the Court has to decide

as to admissibility of evidence tendered by the party. Thus, relevance and admissibility would be governed by the provisions of section 136 of the Evidence Act and if document is inadmissible in evidence will not be taken into consideration even if it is admitted document U/s.294 of Code.

Similarly, if the document contains material which can be considered as hearsay, then the same being not direct evidence will not have evidentiary value. Thus, the reliance on Exh.990 and Exh.1008 as well as other admitted documents under section 294 of Code would be governed by the rule of evidence and mere admission of such documents which are not admissible cannot be used for the same purpose.

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0. In Paras-46, 47 and 49, Their Lordships of the Hon'ble Supreme Court of India took the view-

> "49. The document which is otherwise inadmissible cannot be taken in evidence only because no objection to the admissibility thereof was taken. In a criminal case, subject of course, to the shifting of burden depending upon the statutes and/or the decisions of the superior courts, the right of an accused is protected in terms of Article-21 of the Constitution of India."

Exh.1008 being in answer to communication from Police Officer the same would be hit by the provisions of section 162 of the Code and such statements are not admissible in evidence. Their Lordships of the Hon'ble Supreme Court in the matter of Kali Ram

Vs. State of H.P. (AIR 1973 SC -2273) clearly held -

> "The prohibition contained in the section relates to all statements made during the course of an investigation. In the instant case the letter which was addressed by the constable to the Station House Officer was in the nature of narration of what he had been told by the accused. Such a letter would constitute statement for the purpose of section 162 of the Code of Criminal Procedure. The prohibition relating to the use of a statement made to a Police Officer during the course of an investigation cannot be set at naught by the Police Officer not himself recording the statement of a person but having it in the form of a communication addressed by the person concerned to the Police Officer. If a statement made by a person to police officer in the course of an investigation is inadmissible, except for the purpose mentioned in Sec. 162, the same would be true and a letter containing narration of facts addressed by a person to a police officer during the course of an investigation. **It is not permissible to circumvent the prohibition contained in Sec. 162 by the Investigating Officer obtaining a written statement of a person instead of the Investigating Officer himself recording that statement.**"

Constitution of Special Investigation Team under the orders of the Hon'ble Supreme Court:

PW.245/Exh.1457 Jasvantkumar Ramjibhai Mothaliva P.1326

[i] 12-5-2008 - Took over investigation from Dy.S.P., H.C. Pathak with Case Diaries from 1 to 924.

[ii] Studied papers of investigation carried out till May, 2008.

[iii] Recorded statements of 88 witnesses on different dates and

got the same verified by Supervising Officer.

[iv] 24-10-2008 - Wrote letter to the Director, FSL, Gandhinagar seeking clarification on 21 issues/points.

[v] After 5 to 6 days of letter dated 24.10.2008 telephoned Mr.Dahiya, Deputy Director, FSL on Query No.22.

[vi] On 7-11-2008 - Mr.Dahiya replied to a letter dated 24/10/2008. (Page. 13267 / Para-11).

[vii] Did not interrogate any employee of Fire-brigade to ascertain the cause of fire in Coach S/6 as it was not considered to be necessary. Similarly, did not interrogate Electrical Engineer of Railway department.

[viii] Had examined Mr.Ashish Khaitan of Tahelka Magazine in respect of sting operation relating to witness (i) Mr. Kakul Pathak, (2) Mr. Murlidhar Mulchandani, (3) Mr. Ranjit Jodha (Page-12368/Paras.14 and 15). The videos of sting operation was seen by him and the same was seized, clearly admitted that he did not record statements of (1) Mr. Kakul Pathak and (2) Mr. Ranjit Jodha in respect to sting operation though claims to have recorded statement of Murlidhar Mulchandani, but does not recollect the date.

Did not obtain any legal opinion about the sting operation carried-out by Ashish Khaitan.

[ix] 11.02.2009 - Mr. Raghavan, Chairman of SIT had

submitted joint report in respect to cases before the Supreme Court.

[x] 01.05.2009 - Supreme Court had issued further direction. The report was not submitted before the concerned POTA Court before 11.02.2009, but had produced list of 88 witnesses examined by SIT.

[xi] 10.11.2008 - Recorded statement of Sikandar Mamad Siddiq Shaikh and got clarification about his earlier statements before police as well as before Magistrate in respect: to Moulvi Yakub Punjabi, but did not inquire further about the person who was referred by Sikander. (Page-12374/Para-24).

[xii] Paqe-13275/Para-26: Inquired about the accused Firozkhan Zafarkhan Pathan and verified his claim about his presence on duty in M/s.Kothi Steel Ltd., by recording statement of Managing Director Firdausbhai Kothi. But no further action qua accused Firozkhan Zafarkhan Pathan.

[xiii] Page 13277/para 30: Investigation in respect to accused Abdul Rehman Yusuf Dhantiya.

[xiv] Page-13278/Para-32 : Recording of statements U/s.164 by threatening and pressure and witness lliyas Mulla and Anwar Kalander were interrogated on this aspect by witness. Their statements were not produced before the Court as the same were in respect to the application received by SIT.

Thus, the investigation by SIT clearly reflects perfunctory nature of investigation and there is no attempt to find-out the truth, more particularly in respect to statements Under Sec. 164 Code and Sting Operation. The detailed investigation in respect to sting operation if established the same to be genuine, then obviously it casts reflection on the nature of investigation carried-out by Noel Parmar.

9. That Mr. A.D. Shah, the learned senior counsel for the defence and appellants convicts in the context of charge of conspiracy relied on relevant prosecution witnesses and exhibits. As the charge framed by the learned trial Judge is already produced in earlier part of this judgment, it is not reproduced here to avoid repetition.

[II] **Evidence of Relevant Witnesses:**

[1] Evidence as to hatching of conspiracy on 26/2/2002 -

Confessional statement of accused Jabir Bin Yamin–Exh. 1469–original confessional statement (5/2/2003) proved by Rajnikant Khodihad Parmar, Chief Judicial Magistrate, Godhra (PW.246/Exh.1467).

PW.224/Exh.1139	Ranjitsinh Jodhabhai Patel
Exh. 1470	- Statement U/s. 164 of Ranjitsinh.

PW.231/Exh.1306	Prabhatsinh Gulabsinh Patel
Exh.1471	Statement U/s. 164 of Prabhatsinh

PW.192/Exh. 960 Riyasuddin Amiruddin Pthan - Hostile.

PW.232/Exh. 1214 Iliyas Hussain Mulla – Hostile

PW.234/Exh.1046 Noel Volar Parmar -

[i] Accd. Jabir Bin Yamin Behra arrested on 22/1/2003 and on remand in Police Custody upto 30/1/2003.

[ii] 28/1/2003 the accused Jabir Bin Yamin expressed is willingness to confess the crime after custodial interrogation of 5 days. His police statement was recorded on 28/1/2003 and the same video-graphed by Police Officer and the accused was thereafter forwarded to JMFC on 29/1/2003.

[iii] The accused was sent to judicial custody and was at Central Prison, Vadodara.

[iv] Chief Judicial Magistrate, Godhra by intimation to the Jailor, Vadodara (Exh.1468). Summoned the accused on 4/2/2003 and his custody was obtained by PSI S.P. Patel who was associated with the investigation. Similarly, after preliminary statement on 4/2/2003 accused was sent to central prison, Baroda with PSI S.P. Patel.

PW.236/Exh. 1231 Ajaykumar Kanubhai Bariya-
PW.237/Exh.1252 Sikandar Md. Siddiki Shaikh
PW.186/Exh.923 Mustaq Ahmedhussain Mohammad – Hostile.

[2] **<u>What transpired on 27th at Godhra Railway Station -</u>**

First version as mentioned in the FIR :

[A] PW. 228/Exh.1189 Rajendrarao Raghunathrao Jadav - Engine Driver – Complainant.

[i] His evidence and FIR disclosed, Sabarmati Express Train reached Godhra Railway Station at about 7.43 a.m. at the platform no.1.

[ii] At 7.45 a.m. on signal being given, the train had started for Vadodara and 4/5 coaches crossed from the platform.

[iii] At 7.47 a.m. there was chain-pulling and it revealed that the Coach No.83101, 5343, 51263 and 88238 reported chain-pulling and the same was reported to the Station Master. Coach no.S-6 was having No.93498 and thus there was no chain-pulling from that coach. After arranging chain-pulling even train started. When the train reached and engine crossed 'A'; Cabin, there was stoppage of train (suspected to be chain-pulling, but subsequently revealed that it was due to droppage of pressure and not due to pulling of chain.)

[iv] Near 'A' cabin from the platform side, a crowd of about 900 to 1000 started stones and Coach no.S-6 was put on fire by the crowd and S.S. had contacted Godhra Police and Fire Brigade. The police arrive and resorted to disperse the crowd by use of Teargas Cell and Lathi charge, but the crowd did not disperse and hence police resorted to firing. After initial stoppage fire-brigade reached

the place and extinguished the fire. However, the entire Coach S-6 was burnt and dead bodies were lying in the coach. Similarly, some of the passengers had sustained injuries due to pelting of stones and fire while escaping from the coach.

[B]	PW.131/Exh.760	Mukesh Raghuvirprasad Pancholi Asst. Driver.
[C]	PW.111/Exh.712	Fatehsinh Dhabsinh Solanki. - Points made at Railway Yard.
[D]	PW.126/Exh.742	Harimohan Fulsinh Meena - Dy. Asst. Station Master.
[E]	PW.127/Exh.744	Rajendraparasad Misrilal Meena - Asst. Station Master on duty at 'A' Cabin.
[F]	PW.135/Exh.777	Satyanarayan Panchuram Verma - Railway Guard.

Submissions on most important aspects of the case

[i] The so-called conspirators did not go to back of Aman Guest House, where 7 plastic carboys filled with petrol had been unloaded in the room of Abdul Razak Kurkur till starting of the train after first chain-pulling.

[ii] Sabarmati Express all coaches were occupied by majority of Kar Sevaks, over and above passengers having their reservations. Though the Kar Sevaks were not having reservations from Ayodhya to Ahmedabad and onward journey, had occupied seats and passages in different coaches including reserves seats.

[iii] The Coaches S-6 and S-7 were over-crowded and though each coach had capacity of 72 seats for passengers, there were more than 150 occupants in these coaches. Thus, presence of Kar Sevaks in all the coaches negatives the aspect of conspiracy to burn Coach S-6. The evidence revealed that Coach S-6 was having 200 to 250 passengers and even toilet area of Coach S-7 and Coach S-6 were occupied by the passengers as well as placing of food-grains packages near the sliding door.

[iv] The fact that the conspiring accused went to back portion of Aman Guest House and loaded 7 carboys in a loading rickshaw after the train started second time after first chain-pulling and stoppage of train which was not due to pulling of chain but due to droppage of pressure, renders theory of conspiracy to burn S-6 highly unnatural and improbable.

[v] Similarly, sale of 140 ltrs. of petrol came to surface for the first time on 23/2/2003 and substantiated in the statement U/s. Cr.P.C. on 11/3/2003. The earliest version in April, 2002 did not substantiate the theory of sale of 140 ltrs. of petrol on 26/2/2002.

[i] The evidence of prosecution witnesses clearly reveal that Coach No.S/6 was having more than 150 to 200 passengers and even movement was very difficult in view of congestion. Some of passengers started proceeding towards toilet on commencement of pelting of stones on Coach S/6. They noticed smoke in the coach and when they came from right side of the coach they saw fire.

Evidence of :

(1) PW.81/Exh.625 Poojaben Bahadursinh – P.11084
(2) PW.88/Exh.625 Shantibhai Shankerbhai – P.11143

[ii] Some of the passengers were using their luggage for covering windows of S/6 to protect them from pelting of stones. They saw throwing of burning rags and fire on seat and luggage in coach S/6 and **they first witnessed heavy smoke resulting into burning sensation in eyes and difficulty in breathing which forced them to come-out from right side door and thereafter fire was seen**.

[1]	PW.77/Exh.614	Rajendrasingh Ramfersinh	- P.11059
[2]	PW.78/Exh.615	Raju Krupashanker Pandey	- P.11066
[3]	PW.80/Exh.621	Gyanprakash Lalanprasad Chorasia –	- P.11078
[4]	PW.84/Exh.634	Hetalben Babubhai Patel	- P.11108
[5]	PW.87/Exh.641	Maheshbhai Jayantibhai Patel	- P.11136
[6]	PW.95/Exh.663	Vandanaben Rajendra Ramfersinh	- P.11176
[7]	PW.96/Exh.666	Satishkumar Ravindra Mishra	- P.11183
[8]	PW.107/Exh.609	Purshottam Gordhan Patel	- P.11253
[9]	PW.113/Exh.715	Radheshyam Ramchandra	- P.11297
[10]	PW.114/Exh.719	Subhashchandra Ramchandra Mishra	- P.11304
[11]	PW.119/Exh.729	Punamkumari Sunilkumar Tiwari	- P.11336

Note: The evidence of these witnesses rules-out prosecution theory propounded through the confessional statement of accused Jabir Bin Yamin Behra, PW.236 Ajay Kanubhai Bariya and PW.232

Sikandar Mohammad Siddiq Shaikh as to some of the accused entered Coach S/6 by forcible opening of sliding door after cutting canvass vestibules between Coach-S/6 and S/7 and thereafter pouring petrol from plastic carboys.

[ii] The evidence of prosecution witnesses also clearly establishes that the door between Coach S/6 and S/7 were closed by them due to cold wind. Their evidence also discloses that though they had reservations, they could not get their Seats due to presence Kar Sevaks and they had to place their suit-cases and food-grains bags near toilet area.

[1] PW.99/Exh.676	Prakash Harilal Taili	- P.11209
[2] PW.102/Exh.680	Rampal Jigilal Gupta	- P.11224
[3] PW.103/Exh.681	Somnath Sitaram Kahar	- P.11231
[4] PW.79/Exh.619	Amarkumar Jamnaprasad Tiwari	-P.11070
[5] PW.82/Exh.627	Virpal Chhedilal Pal	- P.11092
[6] PW.86/Exh.638	Hariprasad Maniram Joshi	- P.11130

Confessional Statement of accused Jabir Bin Yamin Behra:

Relevant Dates:

22/1/2003 The accused Jabir Bin Yamin Behra was arrested.

23/1/2003
to
30/1/2003 The accused Jabir was remanded to Police Custody.

28/1/2003 Accd. Jabir expressed his willingness to confess the crime.

The I.O. Noel Parmar (PW.244/Exh.1406-P.13129) recorded confessional statement under videography.

29/1/2003 The accused was produced before JMFC, Godhra with report for recording statement U/s. 164 Cr.P.C. However, ld. JMFC expressed his inability to record such confessional statement, having no jurisdiction, CJM was required to be contacted. Thus the accused was required to be sent to judicial custody.

04/02/2003 Report / letter (Exh.1468 / P.13334) was submitted to Chief Judicial Magistrate, Godhra for recording confessional statement of accused Jabir CJM directed the Jail Authorities to produce accused Jabir for recording confessional statement on 5/2/2003.

04/02/2003 PSI, S.B. Patel (PW.243/Exh.1393/P. 13111) had gone to Central Prison, Vadodara and obtained custody to produce the accused Jabir before the ld. CJM, Godhra who recorded preliminary statement of accused Jabir and sent back to Central Prison, Vadodara, with PSI, S.B. Patel.

05/02/2003 Accd. Jabir was obtained in custody by PSI Patel from Central Prison, Vadodara and produced before ld. CJM Mr. R.K. Parmar (PW.246 / Exh.1467 / P.13307) for recording confessional statement. Thus confessional statement (Exh.1469) came to be recorded on 5/2/2003.

<u>POINTS:</u>

[1] The recording of confessional statement by the I.O. U/s. 161 under Videography was contrary to the provisions of Sec. 161.

[2] The aspect of Video recording of confession by Police

Officer Noel Parmar was kept secret and not brought to the notice of the chief Judicial Magistrate.

[3] The Chief Judicial Magistrate handed-over report-letter (Exh.1468) to the PSI S.B. Patel who was associated with the investigation of the case. Thus, the accused who was in judicial custody was for temporary period before recording of confession was in police custody. Even after preliminary statement, the accused Jabir was not kept in judicial custody at Godhra Sub-Jail, but was sent back to Central Prison, Vadodara in custody of PSI S.B. Patel. Same procedure was followed on 5/2/2003 and thus the custody of Accd. Jabir before recording of confessional Statement (Exh.1469) on 5/2/2003 was soon after the police custody.

[4] The evidence of Chief Judicial Magistrate R.K. Parmar (PW.246/Exh.1467/P.13307) clearly revealed that the CJM was not aware about the provisions of guidelines as to recording of confessional statement as mentioned in Criminal Manual and thus, the confessional statement was not recorded in compliance with the provisions of the guidelines mentioned in Criminal Manual. The evidence of CJM further discloses that this was first recording of confessional statement and he had no idea of the safeguards to be observed for recording of confessional statement. The non-compliance of some of the provisions on consideration of cross-examination of CJM, it clearly establishes that the statement cannot be considered to be voluntary.

The accused Jabir was hardly aged about 20 years and after custodial interrogation of 5 days, his confessional statement came

to be recorded by the I.O. Noel Parmar under videography and though the accused was in police custody upto 30/1/2003, he was forwarded to JMFC, Godhra, Camping at Dahod on 29/1/2003 for recording confessional statement U/s. 164. The Chief Judicial Magistrate was duty bound to see that the accused was in judicial custody was not directly or indirectly placed in Police Custody and yet by letter dated 4/2/2003 (Exh.1467) directed the Jail Authorities to hand-over the custody of accused Jabir to PSI S.B. Patel who was associated with the investigation.

[5] Thus, evidence of Investigating Officer Noel Parmar (relevant Paragraphs-16, 17 and 72) clearly established flagrant violation of the provisions of Sec. 161 and 163 of Cr.P.C. Recording of statement under videography was not permissible and he was not aware about the provisions of recording of confessional statement as emerging in Criminal Manual. Mr. Noel Parmar categorically admitted that from the time of joining service in 1966 to 28/1/2003 he had no occasion to read Criminal Manual (last six lines of Para-72). Further, Mr. Noel Parmar had instructed Railway PSI S.B. Patel to take accused Jabir Bin Yamin Behra on the relevant dates before the Magistrate.

[6] Similarly, the evidence of Chief Judicial Magistrate Rajnikant Khodidas Parmar, clearly establishes that he had never an occasion to refer to the Criminal Manual guidelines, more particularly Para-34(ii) and (iii) as well as (ix). Similarly, not being aware of Form No.35 provided under Criminal Manual also reflect the violation of necessary precautions.

Furthermore, the evidence of Chief Judicial Magistrate

clearly discloses that after recording confessional statement, the same was placed in a cover and the said cover was sealed in his presence immediately thereafter. It was also clearly admitted by Chief Judicial Magistrate that no Xerox copy of the said confessional statement was taken-out before placing it in a cover and sealing the same. Similarly, neither Noel Parmar nor PSI S.B. Patel were in the Court room, and no Yadi was given for getting the copy of the Statement. Similarly, no copy of confessional statement was handed-over to Mr. Noel Parmar. The sealed cover was forwarded to JMFC, Railway and not to the Court6 of Sessions. Further admission reveals non-compliance of Clauses-7 and 9 of second part of Form No.35 on 5/2/2003.

Shocking and surprising, is the revelation by the I.O. Noel Parmar (para-73) about his obtaining copy of confessional statement from the Court during 5 p.m. to 6 p.m. on 5/2/2003 and discussion about the same amongst Superior Officers on that day. This factual background emerging from the evidence of investigating agency and Chief Judicial Magistrate makes the confessional statement to be of suspicious nature and at least not free and true one.

[7] The contents of the confessional statement run counter to the main prosecution evidence of passengers occupying Coach-S/6 and Coach-S/7. When the direct evidence of passengers falsifies the contents of confessional statement on touch stone of probabilities, the same cannot be considered as trustworthy and true one. Thus, the confessional statement is not only involuntary, but also untruthful and cannot inspire any confidence. The same cannot be pressed into service by prosecution to substantiate the

charges against the accused.

Scientific Evidence – Reports of Forensic Science Laboratory:

[1] The evidence of Investigating agency, more particularly, evidence of PSI Mohbatsinh Jawansinh Zala (PW.230/Exh.1196/P.12634) and Dy. S.P. Bhasker Ramdas Simpi (PW.238/Exh.1262/P.12876) clearly revealed that on 27/2/2002 or 28/2/2002 no Officer from Forensic Science Laboratory was summoned to examine Coaches -S/2, S/4, S/6 and S/7. The prosecution evidence clearly reveals that the Officers of FSL were summoned for the first time on 1/5/2002. Thereafter, Officers of FSL were summoned on 3/5/2002, 2/7/2002, 11/7/2002 and 15/7/2002.

[2] The prosecution examined two photographers to prove photos taken at the place of incident. The Photographer Jitendrakumar Chimanlal Patel (PW.245/Exh.794/P.11598) is examined to prove photos taken on 11-7-2003 under guidance of FSL Officer, Khandelwal. Similarly, Photographer Shardul Bhalchandra Gajjar (PW.205 / Exh.1047 / P.122305) clearly establishes about his taking photographs on 27/2/2002 at the scene of offence when Coach No.S-6 was in flame. 12 photographs (Exh. 1048 to 1059) surprisingly and shockingly were not forwarded to FSL by the Investigating agency.

The investigating agency has drawn Panchnama (Exh.85) on 27/2/2002. Another Panchnama (Exh.86) was drawn on 28/2/2002 to collect samples from Coach S/6. Surprisingly both the Panchnama are silent about presence of smell of petrol.

The Scientific Officer Mukesh Nandshanker Joshi

(PW.225/Exh.1150/ P.12519) visited Godhra on 3/5/200, 27/2/2002 and 11/7/2002 to inspect Coach-S/6. This witness also visited Ahmedabad Railway Station on 15/7/2002 to examine coaches S/2 and S/7.

The evidence of **Assistant Director of FSL, namely, Satishchandra Ganpatram Khandelwal** (PW-226 / Exh.1158 / P.12535) refers to his visit to Godhra on 11/7/2002 and photographer Jitendrakumar Patel taking 15 photographs (Black & White) and examination was in respect of sliding door of Coach No.S/6 and S/5.

The prosecution also examined **Mohindersingh J. Dahiya** (PW.240/ Exh.1347/P.12982) in respect to examination of Coach No.S/6 on 1/5/2002. This witness claims to have prepared rough notes about the detailed inspection of coaches on 1/5/2002 1/5/2002 and on the basis of which report came to be submitted on 17/5/2002. Rough notes (Exh.1348) and Inspection Report (Exh.1349). This witness also carried-out demonstration by arranging Coach at the place of Offence near 'A' Cabin on 3/5/2002 and the detailed report with sketch (Exh. 1350) was submitted on 17/5/2002.

Thus, after 15/7/2002 no further Scientific examination came to be conducted, but the I.O. Noel Parmar raised certain questions on 25/8/2004 by letter (Exh.1353). The witness had forwarded clarification in respect to the queries by letter dated 2/9/2004 (Exh.1354). The Report (Exh.1349) clearly reveals:

[i] All windows of Coach were closed at the time when fire took place.

[ii] No symptoms or signs of use of highly corrosive substance like acid.

[iii] The windows situate on Southern side of the Coach having stone broken iron bar did not appear to be damaged by force from outside and no instrument for bending the iron bar appears to have been used. The attempt to break iron bar appears to have been by use of force from inside and damage to other iron bars was result of heat effecting welded portion.

[iv] The glass windows of Southern side were damaged due to pelting of stones whereas glass windows on **Northern side** [S/7 side] were damaged due to heat generated from fire.

Similarly, demonstration done on 3/5/2007 and Report (Exh. 1350) deals with the possibility of throwing of inflammable liquid from buckets or carboys inside the coach being not feasible and possible. Similarly, attempting of throwing of inflammable liquid from a block of grid having 3ft height at a distance of 14 ft. did not reveal the feasibility of such attempt. Furthermore, this attempt revealed that majority of liquid fell outside near the railway track. This report clearly revealed that no inflammable material came to be thrown inside the coach, either from windows or door from outside.

This report further revealed about the pouring of water from bucket type wide opening container from **Eastern side** [plotform side] door and passage required 60 ltrs. of water for covering the majority portion of the coach. However, the water poured in this fashion went towards Western side and did not come out from opened doors and did not travel upto latrine area. This demonstration of requirement of 60 ltrs

of water is devoid of merits, more particularly when the ground reality of Coach S-6 being overcrowded by 150 to 200 persons with their luggage has not been taken into consideration. Considering the presence of passengers and their luggage, it is too much t believe that 140 liters of petrol, as claimed by the prosecution could have been poured.

[3] The oral evidence of passengers of Coach S/6 and S/7 clearly revealed that numbers of persons were occupying the open place between two toilets and passage near two doors on Eastern side of Coach S/6. These witnesses also claimed that the sliding door on Eastern side of S/6 was closed and they had seen smoke and fire in Coach S/6. Thus, the claim of prosecution by placing reliance on the confessional statement of accused Jabir Bin Yamin Behra and Ajay Kanubhai Baria as well as Sikandar as to tearing of canvass vestibules by use of knife and opening the sliding door of Coach S/6 by use of force and thereafter pouring petrol from plastic carboys could not have been permitted or tolerated by Kar Sevaks and other passengers occupying Coach S/6.

The Inspection of Coach S/6 on 11/7/2002 clearly establishes the first attempted step to substantiate the prosecution version about tearing of canvass vestibules and opening of sliding door on Eastern side of S/6 after recording statement of Ajay Kanubhai Bariya. Surprisingly upto 2/7/2002 the Officers of FSL Team did not consider of examination of sliding door. It is only after statement of Ajay Kanubhai Bariya recorded on 4/7/2002 and 5/7/2002 and volunteered statement U/s. 164 Cr.P.C. being given by Ajay Kanubahi Bariya before Judicial magistrate on 9/7/2002 that Noel Parmar calls upon Officers of FSL by Fax message to examine Coach S/6 on 10/7/2002. Thus, the damage to sliding door came to be noticed on 11/7/2002 after recording of Statements of Ajay Kanubhai Bariya on 4th, 5th and 9th July, 2002.

However, this forcible opening of sliding door of S/6 on Eastern side is not substantiated at all by any of the passengers including Kar Sevaks occupying Coach S/6.

Evidence – Lie Detection Test:

1 The prosecution is also relying on the evidence of PW.239/Exh.1263. Amita Dipeshkumar Shukla – Page.12882. It is the case of the prosecution that this witness is Officer of FSL and Investigating Officer had forwarded names of 5 accused for conducting lie detection test. The names of 5 accused -

[i] Abdul Razak Dhantiya
[ii] Haji Bilal
[iii] Kasim Abdul Sattar alias Kasim Biriyani
[iv] Irfan Siraz Pada
[v] Anwar Ahmed Menda.

The accused Abdul Razak Dhantiya and accused Haji Bilal had undergone lie detection test on 21st May, 2002 whereas the accused Kasim Abdul Sattar alias Kasim Biriyani, Irfan Siraz Pada and Anwar Menda had undergone lie detection test on 22/5/2002.

2 The prosecution has produced Exh. 1270 to 1282 – Pages 12903 to 12924 in respect to questionnaire, consent letters and answers.

As regards reports about affirmative test and controlled Question Test of Abdul Razak, prosecution has produced documents at Exh.1283 to 1288 – Page 12925 to 12928.

Similarly, prosecution has also produced similar documents in respect to accused Bilal Haji at Exhs. 1289 to 1294 – Page 12929 to 12932.

Similarly, prosecution is also relying on the same set of documents in respect to accused Kasim Abdul Sattar alias Kasim Biriyani and the same documents are produced at Exhs. 1295 to 1300 – pages 12933 to 12936.

Similarly the prosecution has produced similar documents in respect to accused Irfan Siraz Pada at Exh. 1301 to 1306 – pages 12937 to 12940.

Similarly, the prosecution is relying on similar documents in respect to the accused Anwar Mohammad and the said documents are produced at Exh. 1307 to 1312 – pages 12941 to 12944.

The prosecution has produced report of Polygraph Test (Final) at Exh. 1322 – Page 12951.

3 The prosecution, during course of investigation, in December, 2002, called upon the Officer of FSL to conduct Lie Detection Test on the accused Abdul Razak Mohammad Kurkur. It appears that this test was conducted by FSL on 30/31-12-2002. the prosecution has produced similar types of documents of conducting lie detection test at Exh. 1323 to 1339 – Pages 12957 to 12976.

The prosecution has also produced final report of test at Exhs. 1344 and 1345 at Pages 12977 and 12978.

It appears that the accused Abdul Razak Kurkur was first produced on 2/12/2002 when he was observing Fast of Ramzan and as he was having vomiting sensation the test could not be conducted on that day. This accused was called on 3rd December as well as on 4th December and it is claimed by the prosecution that the accused had not given written information in pursuance to questions put to him but he had given writing on his own. The said evidence of the witness when looked into documentary evidence Exh.1235 – page 12962 it clearly transpires that the same was in reference to questions put to the accused by another Officer Dr. Wilkhoo. Thus, witness when confronted with Exh.1325 clearly admitted that the said document Exh.1325 was in reference to questions put to the accused and no test was carried-out during these three days.

The evidence of this witness clearly revealed that the accused Abdul Razak Kurkur did not show any willingness to give any writing on 30/12/2002 and no signature was obtained on consent terms. The document Exh.1323 – Page 12957 clearly reflect how the endorsements came to be made. Similarly, the Lie Detection Test report - Exh.1345 – P.12978 does not mention about the conducting of affirmative test. Thus, the prosecution has adduced evidence of lie detection test in respect to 6 accused.

The cross-examination of these witnesses clearly revealed that there are 6 methods for conducting lie detection test and during this test conducted on 6 accused, only two methods were resorted. The cross-examination further revealed that the produce followed in conduct of such test is not in conformity with different tactics. The reliance by the prosecution on graphs produced by the witness in view of the fact that there is no separate specific note is reflected about the changes on the

graph. This witness further admitted that details have been mentioned in the form but a layman cannot appreciate the difference reflected in the form by referring to graph. The categorical admission by the witness that the graph produced by him cannot be understood directly by a layman. Thus, when the evidence of this witness is appreciated in light of the cross-examination, one thing clearly emerges that the opinion expressed by the witness about the lie detection test in respect to the accused is based on subjective satisfaction and the Court cannot objectively ascertain from the graph and the report about the satisfaction of the Expert. Thus, when the evidence of an Expert witness is based on subjective satisfaction and the same cannot be demonstrated before the court objectively, then the same ceases to be expert evidence relevant under the provisions of Sec. 45 of the Evidence Act.

The following points clearly emerge from the evidence on record which makes this Scientific Evidence without any credence. It clearly emerges that -

i] Study of material supplied by the I.O.

ii] No written permission of JMFC from whose custody they came to be produced.

iii] Questions framed without any material available from record clearly reflecting intervention from the Investigating Agency.

iv] Out of recognized 6 methods, only two methods applied during test.

v] Polygraphs cannot be explained or understood by a layman.

Vi] Subjective satisfaction of officer which cannot be objectively assessed from graphs;

and considering the observations of Their Lordships of the Apex Court in matter of Selvi & others Vs. State of Karnataka [JT 2010(5) page.11 – Para-23] where the Hon'ble Apex Court considered the observations about the National Human Rights Commission's Publication "Guidelines for the Demonstration of Polygraph test (lie detection test) on accused, it clearly transpires that the evidence of witness Amita Dipeshkumar Shukla is not in conformity with these guidelines.

<u>Next Group Witnesses</u> assumes importance in respect of Collection of Evidence soon after the incident. This would clearly reflect the role attributable to the Investigating machinery and Railway Authorities.

The prosecution has examined witnesses from Fire-brigade:

PW.129/Exh.755/P.11408 – Kanubhai Chhaganbhai Bariya.
PW.130/Exh.757/P.11425 – Vijaykumar Ramchandra Sharma
PW.133/Exh.766/P.11458 – Rupsinh Chhaganbhai Bariya.
PW.165/Exh.855/P.11903 – Sureshgiri Mohangiri Gosai.

The evidence of this Fire Brigade Officers would have assumed more importance, had there been immediate action of Coach No.S-6 being examined by expert witnesses of Railway Authorities and/or Scientific Officers of FSL. No doubt the evidence of these witnesses establishes that the Coach No.S/6 was in flames and they had extinguished the fire. However, their evidence about the condition and site situation of coach S/6 is not clearly emerging.

Similarly, two Police Officers, namely, PW.230/Exh.1196 Mohabbatsinh Jawansinh Zala -PSI (Page 126234) and

PW.238/Exh.1262 Bhaskar Ramdas Simpi, Dy. S.P., (Page 12876), would have assumed great importance if they had taken steps to ascertain the circumstances by which Coach No.S/6 caught fire. However, nothing is emerging from their evidence revealing facts of post-fire circumstances noticed by them. The Investigating Officer who had recorded the FIR and thereafter the Investigation was taken over by K.C. Bava, no steps were taken to summon the concerned Officers from Railways and/or from F.S.L. soon after the fire was extinguished on 27/2/2002. This being serious lapse by the Investigating Agency – I.O., the important circumstantial evidence has not come on record.

The Investigating Agency, for the first time summoned Officers of FSL on 1/5/2002 by which time Coach S-6 was visited by number of persons. The prosecution has thus sought services of Scientific Officers from FSL during different stages of investigation as and when needed to substantiate the claim of witnesses. The prosecution has thus sought to rely upon such examinations and reports presented before the Court on 1/5/2002, 3/5/2002, 2/7/2002, 11/7/2002 and 15/7/2002.

4 The prosecution has also placed reliance on Panchnamas drawn on 27/2/2002 (Exh.85/P.9785) and the panchnama drawn on 28/2/2002 (Exh.86/P.9790). However, both these Panchnamas would not justify the different versions emerging from the evidence on record adduced by the prosecution.

The prosecution did examine PW.205/Exh.1047 Shardulsinh Bhalchandra Gajjar (Page 12305) who had taken photographs at the time when Coach S/6 was in flames. The said photographs came to be produced at Exh.1048 to 1059. The photographs clearly reflect certain important aspects and had the prosecution sent the said photographs to

FSL for its scientific study, it would have been of great importance to appreciate different versions emerging from the evidence of passengers and the so-called belated confessional statements. Thus, inaction on the part of the investigating agency for collecting scientific evidence and circumstances soon after the incident, has deprived the Hon'ble Court from reaching the right conclusion as to the circumstances and manner in which the incident took place.

PART III-K

LIST OF CITATIONS RELIED ON BY MR AD SHAH, LEARNED COUNSEL FOR THE DEFENCE ARE AS UNDER:

Sr. No.	Parties	Citation	Issue
1	State of Gujarat v. Kishanbhai	2014 AIR SCW 557 paras 11 & 12]	Lapses in investigation and prosecution – Procedure to prevent and check laid down – necessary directions are issued.
2	Adambhai Sulemanbhai Ajmeri & Ors. vs. State of Gujarat	(2014)7 SCC 716 Para 52	Illegal framing of innocent persons – Concurrent convictions and sentences of all accused, set aside and attempt at their false implication by State, stringently deprecated.
3	Yakub Abdulrazak Memon	(2013)13 SCC 1	With regard to section 120A and B of IPC of conspiracy [para-125]
4	Rabindra Kumar Pal Alias Dara Singh vs. Republic of India	AIR 2011 SC 1436(1)	About Section 164 of Code, 1973.
5	Malay Kumar	AIR 2010 SC 1162	Section 45 of the

	Ganguli Vs. Sukumar Mukherjee & ors.	[Para-43]	Evidence Act.
6	Mohd. Ayub Dar vs. Jammu and Kashmir	(2010)9 SCC 312	Section 120B – Conspiracy and Section 15 of TADA, 1987
7	State of Andhra Pradesh v. S.Swarnalatha	(2009)8 SCC 383	Value of confessional statements.
8	Akbar Sheikh v. State of West Bengal	(2009)7 SCC 415	Unlawful Assembly
9	Rama & Ors. v. State of Rajasthan	AIR 2002 SC 1814	Appeal against conviction – Disposal of by simply saying that "there is no error apparent in finding of trial Court", without re-appraising evidence – Not a proper method – A duty is enjoined upon appellate court to reappraise evidence itself.
10	Mahabir Singh v. State of Haryana	AIR 2001 SC 2503	Sec.164 regarding Confessional statement
11	Jogender Nath vs. State of Orissa	(2000)1 SC 272	*Locus standi* to get one's statement recorded u/S. 164.
12	State of Tamil Nadu through Superintendent of Police CBI/SIT, v. Nalini and Ors.	AIR 1999 SC 2640(1)	Sections 164 and 463
13	State of Gujarat v. Mohammed Atik	AIR 1998 SC 1686	Scope – Confessional statement usable u/S. 15 – Does not become unusable merely because case is different or crime is different.

14	Sivappa vs. State of Karnataka	AIR 1995 SC 980 Paras 5, 6 and 7	Confession of accused recorded u/s.164 cannot be acted upon unless court satisfies that it is voluntary in nature.
15	Dilavar Hussain s/o. Mohammadbhai Laliwala v. State of Gujarat	AIR 1991 SC 56(1)	Unlawful assembly – Identification of accused from out of mob highly doubtful, – Failure to lodge complaint to police – Evidence establishing possibility / probability of witnesses seeing the occurrence not brought on record – Accused entitled to acquittal.
16	Lilamoy Ghosh v. State of W.B.	1986(3) Crimes 145	Section 294 of Cr.P.C.
17	Dagdu vs. State of Maharashtra	AIR 1977 SC 1579 paras 48 to 51	Value of confessional statements.
18	Balak Ram v. State of Uttar Pradesh	AIR 1974 SC 2165	The evidence of witnesses cannot be discarded merely because their statements were recorded u/S. 164 of the Evidence Act. But their evidence must be approached with caution.
19	Kali Ram Vs. State of H.P	AIR 1973 SC -2273 [paras 25 to 27]	Section 162 – scope and applicability – Statement to a police officer.
20	Laxmipat Choraria v. State of Maharashtra	AIR 1968 SC 938	Confessional statement.
21	Sarwan Singh v. State of Punjab	AIR 1957 SC 637	Value of confessional statements.

22	Muthuswami v. State of Madras	AIR 1954 SC 4 [paras 6 & 8]	A confession should not be accepted merely because it contains a wealth of details which could not have been invented. Unless the main features of the story are shown to be true, it is unsafe to regard mere wealth of uncorroborated detail as a safeguard of truth.
23	Hanuman Govind Nargundkar v. State of M.P.	AIR 1952 SC 343(1) [para 10]	Circumstantial evidence and duty of court

PART IV-A

SUBMISSIONS OF MR. I.H.SYED, LEARNED COUNSEL FOR THE DEFENCE

1 Mr. I.H.Syed, learned counsel for the defence referred to certain events which took place and relied on by the prosecution and evidence in this regard surfaced on record vis-a-vis statements of witnesses, their testimonies and official record of railway authorities and FSL and submitted that such evidence do not establish any case against accused much less charges are proved in the court of law.

2 Reference is made to timings and date of arrival of train on 27.02.2002 and incident of harassment and molestation of two Muslim ladies by Kar Sevaks, shouting of slogans provoking religious sentiments and overloaded bogies of Sabarmati Train by authorised and

unauthorized passengers, who were returning from Ayodhya after performing Kar Seva. That Rajendrarao Jadav, Driver, PW-228, deposed that, he was informed by the C & W Assistant, Railway Yard, Godhra, the hose pipe got burst and two hose pipes were replaced. As against the above, the Assistant Driver, Mr. Mukesh Pachori, PW 131 has deposed that, vacuum pressure had a significant drop on a second occasion and that was not due to chain pulling and he has also stated that, if the hose pipes open up accidentally then also vacuum drop is possible. The Assistant Station Master, A" Cabin Mr. Rajendraprasad Meena, PW-127, deposed that if there is an ACP, the disc of ACP is required to re-set and then only the train can re-start and travel forward and according to Mr. Syed, learned counsel for the defence, there is no evidence of second occasion that the disc was re-set. That even the Guard, Satnarayan Verma, PW 135, deposed that, the vacuum pressure had come to zero. It is submitted that even the evidence with regard to physical verification of coach S5, S6 & S7 carried before the shunting operation could start, the Senior Section Engineer at Godhra Yard had given the approximate damage caused to 3 coaches and vestibule tube to S5 and S7 was noticed but no damage to any other part of the said vestibule tube was examined by him. Even Fatehsinh Dabsinh Solanki, PW-111, who carried out the shunting process and later on Gangaram Javanram Rathod, Senior Section Engineer, PW-162, deposed about carrying out minor repairing in the remaining 15 coaches and major repairs for 2 coaches viz. S2 & S7.

3 About seizure of 27 articles from scene of offence vide seizure panchnama Exh.85 in presence of PW-1 Exh.84 which include 2 carboys and another seizure panchnama Exh.93 in presence of PW-2 Exh.92 categorically stated that both the vestibule tubes of S6 coach were closed. On 20.02.2002, bodies were identified and shifted to Sola

Hospital, Ahmedabad. A reference was made to seizure panchnama as above and recovery of 15 articles from S6 vide seizure panchnama Exh.86 by PW-220, Supervising I.O. Thus, Exh.85 reveal seizure of 27 articles from scene of offence and Exh.86, 15 articles seized from coach S6. The above articles were dispatched vide forwarding letter Exh.1167 on 02.03.2002 on 04.03.2002 vide Exh.1172 communication questionnaire for investigation was sent to FSL to determine any inflammable substance residue, if found, in the burn remains.

4 Even doubt is raised about panchnama Exh.23 dated 15.07.2002 and repairing of S7 coach and nature of damage to vestibule canvas. About common report Exh.1173 dated 20.03.2002 presence of hydrocarbon residue of petrol and forensic examination carried out by PW-227 Mr. Talati and various reports reveal absence of any specific substance and chemical process was followed by him. That admission of the above witness was that diesel and petrol have different kinds of hydrocarbons and not following separate procedure for each of such hydrocarbon. Though PW-227 followed Thin Layer Chromatography Test and Gas Chromatography Test, he had not adopted the process of Pyrolysis. Mr. Syed, learned counsel also canvassed submissions on experiment and demo panchnamas drawn and report submitted by Mohindersingh Daheran Dahiya, Deputy Director FSL, PW-240. That contention raised on testimonies of FSL experts and procedure to be followed for analysis and report to be submitted, we are inclined to advert to the same at later stage since such submissions are made in detail by Ms. Nitya Ramkrishnan, learned senior counsel so as to avoid the repetition. Likewise, testimonies of Ranjit Jodha, PW-224, Prabhatsinh Patel, PW-231 were also read over along with Noel Parmar, I.O., PW-244 about preparing rough notes while vising scene of offence.

5 Learned counsel for the defence highlighted version of Ajay Baria, PW-236 and his improvement with regard to inflammable material viz. kerosene stated in statement recorded under Section 164 to petrol in the court. About Exh.1151 certain features came to be noted are about material used for vestibule of S6 thick black sheet of rubber and signs of effect of fire and that it was not easy to cut thick vestibule cover of S6 and about anomalies and contradictions in the testimonies of Mukesh Nandshankar Joshi, PW-225 and Mohindersingh Daheran Dahiya, Deputy Director of FSL, PW 240 and only person who was technically qualified to depose was Sr. Section Engineer C&W, Godhra, PW-132. Further emphasis was laid on report submitted by Satishchand Ganpatrao Khandelwal, Deputy Director of F.S.L, PW-226 and comments of analysis and conclusion on the slide door of S6 and scratch marks over there and measurement noted, damage to lower part of the stopper and use of force. M.N.Joshi, PW 225 at Exh.1151 suggest a sharp edged weapon was used for entering into vestibule by way of making a cut into it and the above suggestion is of no help to prosecution in view of admitted fact about presence of J.K.Bhatt, S.P. Western Railway, at the time of visual inspection by Mr. Sarvayya.

6 In detail a reference is made to a letter addressed to the Investigating Agency by Gangaram Jawanram Rathod PW-162 about repairs carried out for 15 coaches and coach numbers were also examined which reveal that coach No.87206 – S7 and coach No.91229 S-2 were not part of list of 15 coaches at Exh.846. In his deposition, PW-162 stated about effect of fire of S7 vestibule door.

7 Mr. Syed, learned Counsel for the defence referred to various other witnesses for which submissions are made by Mr.A.D.Shah, learned counsel and Ms. Nitya Ramkrishnan, learned

counsel for the defence, for other convicts to which reference is made in other part of the judgment.

8 According to Mr. I.H.Syed, learned counsel for the defence, **Comparative chart of versions given by Mr. Ajay Kanu Bariya, Jabirbin Yamin Bahera and Sikandar Mohmmad Siddiq Shaikh in their statement of Section 164 and evidence in the court, is as under:**

Event No. 1

Names of persons alleged to be involved in 1st incident of stone pelting from Signal Faliya

Ajay Kanu Bariya (PW 236)		Jabirbin Yamin	Sikandar Siddiq Shaikh (PW 237)	
Version in Sec. 164 statement dated 9-7-2002	Version in the court	Version in Sec. 164 statement dated 5-2-2003	Version in Sec. 164 statement dated 22-9-2003	Version in the court
1.Mehboob Latika 2. Irfan Popa 3. Anwar Kalandar 4. Yunus Ghadiyali 5. Irfan Pataliya 6. Yakub Pataliya 7. Ibrahim Bhana 8. Shaukat Bibina 9. Shoeb Kalandar 10. Hussain Lalu 11. Mustaq 12. Raji Bhuriyo 13. Mehboob Popo 14. Mehboob Chanda	1. Not named 2. Not named 3. Not named 4. Not named 5. Not named 6. Yakub Pataliya 7. Not named 8. Not named 9. Not named 10. Not named 11. Mustaq 12. Raji Bhuriyo 13. Mehboob Popo 14. Not named Additional names 1. Iliyas Mulla 2. Rafiq Bhatuk 4 (names as in 164) + 2 new names (in evidence) = 6 names	1. Irfan Pataliya 2. Yakub Pataliya 3. Hasan lalu 4. Yunus Ghadiyali	Not relevant for this witness	Not relevant for this witness

Event No. 2

It is alleged in both Section 164 statement (Pg. 12842) as well as in the evidence before the court (Para 5, Pg. 12784) that, at the time when the stone pelting was going on, about 10 to 12 rickshaws filled with Ghanchi

community persons came from the station side and immediately started pelting stones. However, this fact is omitted in the confessional statement of Jabir.

Event No. 3

Going towards Aman Guest House at which time Shaukat Lalu shouts at him to accompany him because of which he accompanied him.

Ajay Kanu Bariya (PW 236)		Jabirbin Yamin	Sikandar Siddiq Shaikh (PW 237)	
Version in Sec. 164 statement dated 9-7-2002	Version in the court	Version in Sec. 164 statement dated 5-2-2003	Version in Sec. 164 statement dated 22-9-2003	Version in the court
Not stated	1. Shaukat Lalu 2. Mehboob Latiko 3. Ramzani 4. Rafiq Bhatuk 5. irfan Bhobha 6. Irfan Pataliya 7. Hasan Lalu 8. Jabir	1. Hasan lalu 2. Maheboob Latika	Not relevant for this witness	Not relevant for this witness

Event No. 4

People going towards/inside the house of Razak Kurkur.

Ajay Kanu Bariya (PW 236)		Jabirbin Yamin	Sikandar Siddiq Shaikh (PW 237)	
Version in Sec. 164 statement dated 9-7-2002	Version in the court	Version in Sec. 164 statement dated 5-2-2003	Version in Sec. 164 statement dated 22-9-2003	Version in the court
1. Shaukat Lalu 2. Irfan Popa 3. Rafiq Bhatuk 4. Jabir 5. Sheru 6. Ramzani 7. Hasan Lalu 8. Irfan Pataliya 9. Mehboob Latika	1. Shaukat Lalu 2. Imran Sheru 3. Rafiq Bhatuk (following persons remained outside the house of Razak Kurkur)(Para 5/ Pg. 12785) 1. Jabir 2. Ramzani 3. Hasan Lalu 4. Mehboob Latika 5. Irfan Bhopa 6. Irfan Pataliya	1. Ajay Bariya 2. Shaukat Lalu 3. Razak 4. Iliyas Hussain Mulla 5. Hasan Lalu 6. Maheboob Latika	Not relevant for this witness	Not relevant for this witness

Event No. 5

People going inside Razak Kurkur's house.

Ajay Kanu Bariya (PW 236)		Jabirbin Yamin	Sikandar Siddiq Shaikh (PW 237)	
Version in Sec. 164 statement dated 9-7-2002	Version in the court	Version in Sec. 164 statement dated 5-2-2003	Version in Sec. 164 statement dated 22-9-2003	Version in the court
1. Shaukat Lalu 2. Rafiq Bhatuk	1. Shaukat Lalu 2. Imran Sheru 3. Rafiq Bhatuk	1. Imran Sheru 2. Irfan Bhola 3. Shaukat lalu	Not relevant for this witness	Not relevant for this witness

Event No. 6

No. Of carboys coming out of Razak Kurkur's house.

Ajay Kanu Bariya (PW 236)		Jabirbin Yamin	Sikandar Siddiq Shaikh (PW 237)	
Version in Sec.164 statement dated 9-7-2002	Version in the court	Version in Sec. 164 statement dated 5-2-2003	Version in Sec. 164 statement dated 22-9-2003	Version in the court
Total of 3 Carboys brought out by Shaukat Lalu and Rafiq Bhatuk at the time when the remaining persons were outside Razak Kurkur's house.	One carboy brought out by Irfan Bhobho. Six carboys brought out by all those persons who were standing outside the house of Razak Kurkur including Jabir, Ramzani, Hasan Lalu, Mehboob latiko, Irfan Bhopa and Irfan Pataliya. 1+6=7 carboys	Total of 3 carboys brought out by Imran Sheru, Irfan Bhola and Shaukat Lalu	Not relevant for this witness	Not relevant for this witness

Comment

[1] Experiment of 3-5-2002 by FSL showed 60. Ltrs. Inflammable used in S6.

[2] On 9-7-2002, in 164 Ajay showed 3 carboys

[3] On 24-7-2002, PW 232 Anwar Kalandar has stated 9 carboys.

[4] Jabir in his confessional statement dated 5-2-2002, stated 3 carboys initially but at S6 he has stated 5 carboys.

[5] Prabhat Sinh and Ranjit Jodha in March 2002, in 164 statement stated 7 carboys 20 Ltrs. each

[6] Ajay has further improved in the court stating that there were total 9 carboys out of which 2 carboys were of 5 to 10 Ltrs. and others were of 20 ltrs.

Event No. 7

Loading of tempy with carboys and persons.

Ajay Kanu Bariya (PW 236)		Jabirbin Yamin	Sikandar Siddiq Shaikh (PW 237)	
Version in Sec.164 statement dated 9-7-2002	Version in the court	Version in Sec. 164 statement dated 5-2-2003	Version in Sec. 164 statement dated 22-9-2003	Version in the court
1. Ramzani [Driving Seat] 2. Mehboob Latika [Left front seat] 3. Shaukat Lalu [Right front seat] 4. Jabir [Back Side] 5. Hasan Lalu [Back side] 6. Sheru [Back side] 7. Irfan Bhobha [Back side] 8. Rafik Batuk [Back side]	1. Ramzani (Driving Seat) 2. Mehboob Latika (Left front seat) 3. Shaukat Lalu (Right front seat) 4. Jabir (Back Side) 5. Hasan Lalu (Back side) 6. Sheru (Back side) 7. Irfan Bhobha (Back side) 8. Rafik Batuk (Back side) 9. Irfan Pataliya (Back Side) (Improvement)	1. Ramzani (Driving Seat) 2. Mehboob Latika 3. Shaukat Lalu 4. Imran Sheru 5. Rafik Bhatuk 6. Yunus Ghadiyali 7. Irfan Bhobha 8. Ajay Bariya	Not relevant for this witness	Not relevant for this witness

Comment

In 164 statement Ajay stated that, Rafiq Bhatuk brought a carboy gave it to Irfan Bhobha who gave it to Ajay and Ajay put that in tempy. In (para 76, pg. 12830) Ajay materially improved by saying Irfan Bhobha gave a carboy to Ajay and he omits the role of Rafiq Bhatuk. Also stated in the same para that on the back of the tempy 7 persons were standing. In the same para he identifies petrol through smell as it smells differently from kerosene.

In 164 statement Jabir gave 8 persons name including Yunus Ghadiyali's

name which is contradictory from the statement given by Ajay.

[i] Description as to the identity of the tempy

Ajay Kanu Bariya (PW 236)		Jabirbin Yamin	Sikandar Siddiq Shaikh (PW 237)	
Version in Sec. 164 statement dated 9-7-2002	Version in the court	Version in Sec. 164 statement dated 5-2-2003	Version in Sec. 164 statement dated 22-9-2003	Version in the court
He does not remember the number of the rickshaw but it's colour was light green / "dudhi" . This rickshaw was like a goods carrier tempa. In the front of this rickshaw tempy below the glass there was a mosque like symbol and on the back side there was "nani nani" jali.	At that time one "aakhi popati colour" tempy was lying there.	-----	when Sikandar was going towards "Talavdi" through "Kachha Road" at that time he saw a train standing near "A cabin" and thereafter, when he was going ahead from "Kachha Road" he saw a "Popti colour" tempo standing there.	Saw one tempi vehicle of parrot colour parked on the "Kaccha road" and many persons were doing stone pelting and damaging the train.

Comment

The identity of the tempy by way of mosque like symbol in the front below the glass and on the back side there was a "nani jali" is missing in the evidence. **While Ajay says that, this tempy was parked near Ali Masjid whereas, Sikandar states that, he had seen this tempy near Fakir ni chali and that to at the time when he had come out his house. Ajay has further stated that, the Fakir ni chali comes between Ali Masjid and the Railway Track. Therefore, the place where this tempy is parked is shown at different places by the prosecution witnesses and this is an additional circumstance which goes on to suggest varied versions put forth by the prosecution coupled with the circumstance of not showing the place of parking in the scene of offence map Exh. 918, prepared by Janak Popat PW. 185.**

[ii] Identity of inflammable liquid in the carboys

Ajay Kanu Bariya (PW 236)		Jabirbin Yamin	Sikandar Siddiq Shaikh (PW 237)	
Version in Sec. 164 statement dated 9-7-2002	Version in the court	Version in Sec. 164 statement dated 5-2-2003	Version in Sec. 164 statement dated 22-9-2003	Version in the court
The carboy which was given to Ajay by Irfan Bhopa was giving kerosene like smell.	The carboy which was given to Ajay by Irfan Bhopa was giving petrol like smell.	-----	Not relevant for this witness	Not relevant for this witness

Comment

Ajay has admitted that, he knows the difference between petrol and kerosene. Para 35 pg, 12802. However, in the cross examination he has stated that all carboys were smelling same liquid and was same (pg. 12836) and he further stated that, the smell which was coming out from carboys was that of petrol. He has denied the fact that, he had stated before the magistrate in his sec. 164 statement dated 9-7-2002, that, the carboys were filled up with kerosene (para 76, pg. 12830).

[iii] Nature, Number of weapons carried in the tempy

Ajay Kanu Bariya (PW 236)		Jabirbin Yamin	Sikandar Siddiq Shaikh (PW 237)	
Version in Sec. 164 statement dated 9-7-2002	Version in the court	Version in Sec. 164 statement dated 5-2-2003	Version in Sec. 164 statement dated 22-9-2003	Version in the court
Out of the persons sitting in the front side of the tempy, Mehboob Latika had a long knife and Shaukat Lalu had a pipe.	Shaukat Lalu and Imran Sheru had one pipe each, Mehboob Latika and Jabir had one long knife each.	-----	Not relevant for this witness	Not relevant for this witness

Comment

As per Sec. 164 statement of Cr.P.C., people sitting in the back side of the tempy are not shown to be carrying any weapon. However, in the

evidence it is shown that, Imran Sheru and Jabir are travelling in the back side of the tempy and for the first time it is appearing that, both are carrying some kind of weapon. This has been deliberately done so as to achieve consistency with the confessional statement dated 5-2-2003 of Jabir where Jabir is shown to have been carried a long knife at the time he has got onto the vestibule passage after Mehboob Latika has allegedly made a cut in the vestibule cover. Further, as it will be shown subsequently the role attributed to this Imran Sheru in Sec. 164 Cr.P.C. statement was of using a pipe to break the windows from S2 to S6. However, this version was improved in the evidence to suggest that, Imran sheru was using the pipe to break open hose pipes from S2 to S6. But in either of the circumstances, prosecution faces the challenge to attribute possession of one pipe before Imran Sheru has reached S2 coach. In the sequence of event as manufactured by the prosecution, it was not possible for Imran Sheru to obtain a pipe any time prior to the departure of the tempy from near Aman Guest House. In view of this fact the prosecution, in order to achieve flawless consistency has chosen to attribute a pipe at the time when Imran Sheru is to have boarded the tempy which in itself an improvement over his Sec. 164 Cr.P.C. statement.

Event No. 8

Knowledge of the place where the tempy was going

Ajay Kanu Bariya (PW 236)		Jabirbin Yamin	Sikandar Siddiq Shaikh (PW 237)	
Version in Sec. 164 statement dated 9-7-2002	Version in the court	Version in Sec. 164 statement dated 5-2-2003	Version in Sec. 164 statement dated 22-9-2003	Version in the court
Ajay did not know as to where was the tempy being taken to.	Ajay did not know as to where was the tempy being taken to.	Jabir knew that, the tempy was being taken to behind “A Cabin”	Not relevant for this witness	Not relevant for this witness

Comment

It is the specific case of Ajay that, he had no knowledge of the place where the tempy was being taken to. However, it is stated by Jabir in his confession dated 5-2-2003 that at the time when Imran Sheru, Irfan Bhola and Shaukat Lalu had taken out the carboy from Razak Kurkur's house and loaded the same on the tempy then Razak Kurkur had told that, "take this tempy to behind A Cabin". In this view of the fact, if Ajay and Jabir are both present near the tempy, then it is unlikely that, Ajay is going to miss this significant instruction even by Razak Kurkur. In fact, Ajay has not even stated about the fact that, whether at the time of loading of the carboys as allegedly brought out by the accused persons, whether Razak Kurkur had come out of his house even once.

Ajay admitted that, he has stated role of Razak Kurkur in his deposition in the court for the first time and not in any earlier statement.

Event No. 9

Travelling and stoppage of tempy with carboys and persons.

Ajay Kanu Bariya (PW 236)		Jabirbin Yamin	Sikandar Siddiq Shaikh (PW 237)	
Version in Sec.164 statement dated 9-7-2002	Version in the court	Version in Sec.164 statement dated 5-2-2003	Version in Sec. 164 statement dated 22-9-2003	Version in the court
At the time when the rickshaw came from the alley to the road, the Sabarmati Express Train had restarted and the last coach of Sabarmati Express was leaving the platform end and at that time the people were running helter skelter. At the time when the rickshaw reached near the "nala", Sabarmati Express Train had stopped. This rickshaw was taken	At the time when the rickshaw came from the Aman Guest House on to the road, the Sabarmati Express Train was leaving and the last coach of Sabarmati Express was leaving the platform end. At that time a mob was running with the train. The tempy after passing besides Bhamaiya nala, was taken near the houses of fakir ni chali from A Cabin	When the tempy was headed towards Ali Masjid side at that time Salim Panwala and Razak were coming on M.A.T. Razak was sitting behind (on one side) holding a carboy. The tempy was taken from "Ali Masjid" and reached behind "A cabin"	when Sikandar was going towards "Talavdi" through "Kachha Road" at that time he saw a train standing near "A cabin" and thereafter, when he was going ahead from "Kachha Road" he saw a "Popti colour" tempo standing there.	Saw one tempo vehicle of parrot colour halted on rough road

from A Cabin to near Ali Hussain Masjid and it was parked there.	side.			

Submissions

[i] Ajay has been cross examined as to the location of this tempy at the time when it was parked near Ali Masjid. According to him if one is facing towards the track from the place where the tempy was parked then Ali Masjid would be on the left hand side. Fakir ni chal would be somewhere in the middle while proceeding from Ali Masjid towards the railway track and while proceedings from the place where tempy was parked to the railway track, Ajay admits that he had crossed Fakir ni chal. (Para 76, Pg. 12830) In view of this fact, if the version of Sikandar is seen then it becomes clear that, it would be highly unnatural for Sikandar to have noticed a tempy lying towards the Ali Masjid and therefore, Sikandar shifts location of this tempy to some closer to Fakir Ni Chal and it is because of this reason that, the scene of offence map being Exh. 918 drawn on 30-4-2004.

[ii] Ajay has made significant improvement in respect of the movement of the persons on the signal faliya road at the time when the tempy is allegedly taken from Aman Guest House. Even as in the 164 Cr.P.C. statement, Ajay has talked about random movement of the persons on the road whereas, in his evidence, Ajay has attempted to show a purposeful movement of the persons as following the train which is in the process of leaving the Godhra railway Platform. Ajay's description of these persons present on the signal faliya road "as a mob" also is a significant improvement over his 164 Cr.P.C. statement which is nothing but an attempt to achieve consistency in the version of prosecution case. This contradiction in respect of the mob running with

the train has been proved through the recording officer Mr. Noel Parmar (PW. 244/ Exh. 1406/ Vol. 39/ Para 159/ Pg. 13234).

[iii] Ajay's description in reaching near the houses of "fakir ni chali" is also a material improvement which is deliberately made to land credence to the version of Sikandar which was brought on record only on 21-9-2003. It is significant to note that, Sikandar (PW. 237) has specifically spoken about the presence of one "Popti colour tempy" on the mud road near his house. (PW. 237/ Exh. 1252/ Vol. 38/ Para 4/ Pg. 12846) it is in this context that, absence of the location of both the place where the tempy had stopped behind "A cabin" as well as the place of location of "fakir ni chali" in the map of scene of offence prepared on 30-4-2004 (Exh. 918/ Vol. --/ Pg. --) by Janakbhai Popat (PW. 185/ Exh. 917/ Vol. 36/ Pg. 12114-12121)

[iv] The prosecution has also deliberately not brought on record the location where the tempy is set to have been parked behind "A cabin" even though there is a specific case of the prosecution that, large number of police personnel were present in an around "A cabin" and that, there is a specific allegation that, some of the police personnel had fired live rounds in the air towards Ali Masjid side as well as had carried out tear gas in the direction of Ali Masjid. Despite such intensive police action, none of those police personnel speak about the presence of any tempy or even a vehicle, much less a popti colour tempy in that direction. Further, it is the specific case of the prosecution that, the curfew came to be imposed in Godhra Town at 11:00 Hrs. on 27-2-2002 and in that view of the fact as well it would have been impossible for any person to have taken out the tempy from near Ali Masjid if any tempy would have been parked there as the same would have been completely against the human conduct. Further, it is emerging from the original prosecution

case in the police statement dated 24-7-2002 of Anwar Kalandar (PW. 234) that, he had seen a tempy near the "garnala" and he had heard that, this tempy was used for transportation of petrol. But in view of categorical deposition of the members of Godhra Town Police Station who had parked their mobile vehicles near "garnala", prosecution was faced with no other alternative but to jettison this version of Anwar Kalandar and go with the version of Ajay Bariya of taking the tempy near Ali Masjid. However, as it has been shown in the preceding paragraph that, location of Ali Masjid was unsuitable for implanting Sikandar as a credible witness as well as in view of other circumstances and therefore, Ajay has attempted to align his version to the version of Sikandar and has shifted the place of parking of this tempy from near Ali Masjid to near the house of "fakir ni chali".

[v] The prosecution can very well say that, the tempy which was used in the transportation of the carboys to behind "A cabin" would have been removed by the accused persons well in time. However, this fact has to be averred by the prosecution after carrying out diligent and honest investigation in to this aspect which is not the case. It would be against human conduct for the person who is driving this tempy not to carry the ignition key with him unless leaving the ignition key in the tempy was part of the original conspiracy. However, investigation is woefully silent on this aspect as well.

Event No. 10

No. of carboys unloaded from the tempy near "A Cabin" house.

Ajay Kanu Bariya (PW 236)		Jabirbin Yamin	Sikandar Siddiq Shaikh (PW 237)	
Version in Sec. 164 statement dated 9-7-2002	Version in the court	Version in Sec. 164 statement dated 5-2-2003	Version in Sec. 164 statement dated 22-9-2003	Version in the court
1. Shaukat Lalu – 1	1. Shaukat Lalu (Right	Shaukat lalu ran	Not relevant for	Not

carboy All persons sitting in the back side came out with one carboy each: 2.Jabir (Back Side) 3.Hasan Lalu (Back side) 4.Sheru (Back side) 5.Irfan Bhobha (Back side) 6.Rafik Batuk (Back side) Total 6 carboys	front seat) 2. Ramzani (Driving Seat) 3. Mehboob Latika (Left front seat) 4. Jabir (Back Side) 5. Hasan Lalu (Back side) 6. Sheru (Back side) 7. Irfan Bhobha (Back side) 8. Rafik Batuk (Back side) 9. Irfan Pataliya (Back Side)	towards the train with a carboy and shouted that all should take the carboy and follow him. Then Jabir, Anwar Kalandar, Anwar Bala, Yunus Ghadiyali, Irfan Pataliya having stick, pipe and Dhariya in their hands followed Shaukat to S2.	this witness	relevant for this witness

Comments:-

When this evidence of Ajay even in Sec. 164 statement is considered in so far as 3 carboys loaded in the tempy from the house of Razak Kurkur, there is an unexplained phenomenon of 6 carboys emerging near the “A cabin”. Even otherwise, when the total number of carboys unloaded near “A cabin” is considered, the same comes out as 9 in number and the prosecution has failed to explained this circumstance. Further, in view of this discrepancy in the number of carboys loaded and unloaded from the tempy, it is not a case where the number of carboys loaded into the tempy near Aman Guest House and the number of carboys unloaded near the “A Cabin” can be said to be proved by cogent and reliable evidence. Further, in this context it is relevant to point out that, Jabir has stated that, 3 carboys came to be loaded in the tempy (Exh. 1469/Vol. 39/ Pg.13338) and he has omitted to say as to the number of carboys that came to be unloaded near “A Cabin”. However, Jabir is categorical that, 5 carboys went inside the coach, 2 from the vestibule side and 3 from the S-E door side. In view of this discrepancy as well, the prosecution has failed to cogently establish this charge as well.

Event No. 11

Attack on S2 coach.

Ajay Kanu Bbariya (PW 236)		Jabirbin Yamin	Sikandar Siddiq Shaikh (PW 237)	
Version in Sec. 164 statement dated 9-7-2002	Version in the court	Version in Sec. 164 statement dated 5-2-2003	Version in Sec. 164 statement dated 22-9-2003	Version in the court
Ajay accompanied Shaukat Lalu because of fear. Accused persons who were pelting stones on the train and breaking the S2 coach windows: 1. Mehboob Chanda 2.Mehboob Popa 3. Irfan Patadiya 4. Kadar Patadiya 5. Shoeb kalandar 6. Anwar Bala 7. Anwar Kalandar 8. Yunus Ghadiyali 9. Mustaq 10. Bhuriyo Raji 11. shaukat Bibina 12. Babu Katariya	Ajay accompanied Shaukat because of fear due to the foul language used by shaukat. At the time when these persons reached near S2 coach, then heavy stone pelting was going on. At that time following persons were breaking the windows with sticks, pipes and Dhariya. 1. Mehboob Popa 2. Mehboob Chanda 3. Shoeb Kalandar 4. Yunus Ghadiyali 5. Kadar patadiya 6. Ayub Patadiya 7. Sikandar	Anwar Kalandar, Anwar Bala, Yunus Ghadiyali and Irfan Pataliya were breaking the closed doors and windows with sticks, pipes and dhariya.	Comments offered herein below.	Comments offered herein below.

Comments

[i] There is contradictory evidence emerging from the prosecution evidence in respect of the factum of stone pelting on S2 coach. Ajay in his 164 Cr.P.C. statement as reiterated in his evidence (Para 6/ Pg. 12785) talks about there being heavy stone pelting on S2 coach whereas the version given by a passenger of S2 coach (PW. 216/ Exh. 1115/ Vol. 37/ Para 3/ Pg. 12429) does not speak of any stone pelting.

[ii] Even though there is no mention of Sikandar or role of any other person apart from the 12 persons named in the Sec. 164 Cr.P.C. statement, Ajay in his evidence for the first time has specifically introduced Sikandar to be present near S2 coach. This is in furtherance of the mischief perpetuated by Ajay in naming Sikandar for the first time

in his police statement dated 3-8-2002, whereas, he admits in the cross examination that, he does not know any person by the name of Sikandar (Para 15/ Pg. 12793). Further, after the investigation and the prosecution agency were able to achieve their desired result from Sikandar by keeping a sword of implication hanging over his head, the investigation and the prosecution have shown the presence of this got up witness Sikandar (PW. 237) to be near S6 coach and not near S2 coach. This was done specifically to retain the veracity of Ajay in so far as him naming Sikandar as an accused is concerned and also achieving the goal of dissociating the witness Sikandar (PW. 237) from Ajay. Further, the investigation reveals that, this Sikandar as an accused came to be introduced right from the first supplementary charge sheet dated 20-9-2002 and even after the so called discovery of this witness Sikandar on 21-9-2003, the investigation agency took no steps to have this Sikandar identified at the instance of Ajay till 9-4-2004. Even this TIP proceeding is not brought on record of the trial or forwarded along with the charge sheet. The TIP proceedings would have reflected the nature of details available with the investigation agency in respect of this Sikandar who was forwarded for the TIP which was done in the presence of Ajay. Further, this Ajay who otherwise has such exceptional memory does not remember the date and year in which the TIP of Sikandar was held. (Para 17/ Pg. 12794) Further, Ajay has also admitted that, he had stated in his police statement that, he had seen Sikandar at the time of the incident who was about 18 years in age, thin body and was of dark complexion (Para 61, Pg. 12821)

[iii] Despite Ajay definitely naming the presence of Sikandar near S2 for the first time in his evidence, it is hardly surprising that, Sikandar omits to state about his presence either in Sec. 164 Cr.P.C. statement or in his evidence before the court. This suspicious conduct of the

prosecution in making an improvement by Ajay to show the presence of the accused Sikandar near S2 so as to exonerate the witness Sikandar whose presence is shown near S6 coach ought to be viewed with grave suspicion.

Event No. 12

Exchange of carboys between the accused persons

Ajay Kanu Bariya (PW 236)		Jabirbin Yamin	Sikandar Siddiq Shaikh (PW 237)	
Version in Sec. 164 statement dated 9-7-2002	Version in the court	Version in Sec. 164 statement dated 5-2-2003	Version in Sec. 164 statement dated 22-9-2003	Version in the court
1. Mehboob Chanda taking carboy from Ajay 2. Hasan Lalu gave his carboy to Irfan Bhobha 3. Mehboob Latika gave his carboy to Shaukat Lalu	1. Mehboob Chanda taking carboy from Ajay and gave his pipe to Ajay 2. Hasan Lalu gave his carboy to Irfan Bhobha 3. Mehboob Latika gave his carboy to Shaukat Lalu		Comments offered herein below.	Comments offered herein below.

Event No. 13

Throwing of articles inside the S2 coach

Ajay Kanu Bariya (PW 236)		Jabirbin Yamin	Sikandar Siddiq Shaikh (PW 237)	
Version in Sec. 164 statement dated 9-7-2002	Version in the court	Version in Sec. 164 statement dated 5-2-2003	Version in Sec. 164 statement dated 22-9-2003	Version in the court
Mehboob Chanda threw one burning "lugda" like article inside the S2 coach from the broken window and this burning "lugda" was thrown back outside by the passengers.	Mehboob Chanda after dousing "godadi and lugda" with the liquid from the carboy and after setting it on fire, had thrown it inside S2 coach with the help of the pipe which was thrown back by some passenger.		Comments offered herein below.	Comments offered herein below.

Comments

This fact of the burning article having been thrown back by the

passenger of S2 coach is contradicted by a passenger of S2 coach (PW. 216/ Exh. 1115/ Vol. 37/ Para 3/ Pg. 12429) who says that though a burning rag had come inside but the passengers of S2 coach had got together and doused it with the help of water. In view of this version there is no question of any article having been thrown back outside by the passengers of S2 coach and even this sequence of event, even though appearing in the investigation as early as 29-4-2002 in the police statement of (PW. 216) suggests that, the investigation agency had recorded the police statement of Ajay after carefully taking into account various aspects as revealed by other passengers and circumstances which were incrementally built up by the investigation agency.

Event No. 14

Movement towards S6

Ajay Kanu Bbariya (PW 236)		Jabirbin Yamin	Sikandar Siddiq Shaikh (PW 237)	
Version in Sec. 164 statement dated 9-7-2002	Version in the court	Version in Sec. 164 statement dated 5-2-2003	Version in Sec. 164 statement dated 22-9-2003	Version in the court
These persons went towards S6 and at that time the stone pelting was on and sheru was hitting windows of any of the coach between S2 to S6 and attempting to break it by way of a pipe.	These persons went towards S6 and during that time sheru who had a pipe, he was trying to break the hose pipe between S2 to S6 coaches.	They also were breaking closed doors and windows of the train and at that time a mob of 250 to 300 people came and from there they went between S6 & S7 coach.	When Sikandar reached "A cabin" through "Kachha Road" at that time he saw Razak Kurkur, Bilal Badam, Honey Badam, Siddiq Badam, Yaqub Patadiya, Ayub Patadiya, Kadir Patadiya, Faruq, Rahub kamli and Salim Panwala were causing damage to the train.	Sikandar climbed the metal heap and saw that, Razak Kurkur, Bilal Badam, Honey Badam, Siddiq Badam, Aiyub Pataliya, Kadir Pataliya, Yakub Pataliya, Irfan Pataliya, Rauf Kamli, Farukh were damaging the train with the iron rods.

Comments

[i] In the 164 Cr.P.C. statement Ajay is referring to some damage

being cause on the window of one coach between S2 to S6 whereas, in the evidence Ajay has improved it to suggest that, Imran Sheru was hitting on the hose pipes between S2 to S6 coaches. This is a significant improvement made at the instance of the prosecution so as to align Ajay's version with the factum of replacement of two hose pipes which had come out in the evidence of the driver Mr. Rajendra Jadav (PW. 228) that he had learnt about the replacement of two hose pipes from one Ravindra Khushwaha of the carriage and wagon department Godhra Railway Station (PW. 228/ Exh. 1189/ Vol. 37/ Para 6/ Pg. 12615)

[ii] This version of Ajay also becomes extremely improbable for the simple reason that, Ajay who otherwise has given meticulous details about his having viewed the entire incident with specific role and has described the exact nature of weapons and articles carried as well as the place of different incident, however, he has failed to give his own location at the time when he is describing this particular incident of Imran Sheru trying to break the hose pipes. Further, even without this location, it is hard to imagine that, when Ajay is giving descriptions of movements of a group of accused persons then how has Ajay kept track of the movement of Imran Sheru specifically that to threw the entire duration from S2 to S6.

Event No. 15

Role attributed to Razak Kurkur near S6

Ajay Kanu Bariya (PW 236)		Jabirbin Yamin	Sikandar Siddiq Shaikh (PW 237)	
Version in Sec. 164 statement dated 9-7-2002	Version in the court	Version in Sec. 164 statement dated 5-2-2003	Version in Sec. 164 statement dated 22-9-2003	Version in the court
Nothing is stated	When Ajay reached near S6 coach then towards the	Nothing is stated about	Razak Kurkur and Karim Panwala	Thereafter, Razak Kurkur climbed the

about this	engine side door of S6 coach, Razak Kurkur was standing on top of the footsteps, and was holding a carboy and was pouring the petrol in the S6 coach and all this while, Salim Panwala was supporting the carboy from below.	this	climbed the coach and Razak Kurkur and Salim Panwala were gave support and Razak Kurkur emptied the carboy in the window near the door where passengers are sitting.	stair of S6 coach and was seen pouring petrol like liquid from carboy inside the coach from open window, Salim Panwala was supporting the carboy upward.

Comment

[1] Ajay does not speak of any role in respect of Razak Kurkur both in his 1st and 2nd police statement as well as in his 164 Cr.P.C. statement dated 9-7-2002. However, after the police recorded a police statement of one Poojaben PW. 81 dated 11-7-2002 describing pouring of some inflammable material in the S-W side toilet of S6 coach. Thereafter, the police recorded the 161 Cr.P.C. statement of one Iliyas Mullah who even though has turned hostile in the court, however, the prosecution has put the original version in the Cross-Examination which reveals that, this Razak Kurkur was pouring inflammable liquid in the 1st compartment and was aided by Salim Panwala. Immediately thereafter, Ajay's 3rd police statement was recorded on 3-8-2002, wherein, role of standing on the S-W side door steps and pouring of inflammable liquid into a broken window is attributed to Razak Kurkur and Salim Panwala for the first time. This story was also spoken by the investigation agency through Jabir in the confessional statement dated 5-2-2003 and also through Sikandar in his police version dated 21-9-2003 recorded belatedly and before the Magistrate on 22-9-2003. However, before all this the investigation agency had also recorded the police statement of many passengers travelling in the first compartment who did not utter a single word in respect of this sequence of event as belatedly inserted in the investigation only with a view to implicate a particular persons.

[2] Sikandar has not specified about the window in his Sec. 164 Cr.P.C. statement dated 22-9-2003 however, the prosecution has attempted to fill in this lacunae in the prosecution case by trying to specify the place which in turn has not been corroborated by the passengers travelling in the first compartment.

Event No. 16

Cutting of vestibule cover, climbing and entering coach S6.

Ajay Kanu Bariya (PW 236)		Jabirbin Yamin	Sikandar Siddiq Shaikh (PW 237)	
Version in Sec. 164 statement dated 9-7-2002	Version in the court	Version in Sec. 164 statement dated 5-2-2003	Version in Sec. 164 statement dated 22-9-2003	Version in the court
1. Reached near S6 and cut the curtain between the S6 and S7 with knife and they climbed and Jabir also climbed and was trying to break door of S6 and made holes on the top of the carboy with knife. 2. Mehboob Latika gave one carboy to Jabir and Shaukat Lalu also climbed the coach and at that time Shaukat Lalu opened the main door of S6 towards "A cabin" and Rafik Bhatuk gave carboy after making holes and Rafik Bhatuk climbed	1.After reaching S6, Mehboob Latika made holes in the carboy with his knife and cut the cloth curtain between S6 and S7 with knife and Mehboob Latika entered and after him Jabir also went inside. Both of them kicked the vestibule door and broken the stopper and opened the door. At that time Shaukat Lalu gave one carboy to Mehboob Latika and one carboy to Jabir and from the same route Shaukat also went inside and Rafit Bhatuk gave Shaukat one carboy. 2. After going inside Shaukat Lalu opened the Godhra side main door and from	Irfan Patadiya, Yunus Ghadiyali, Anwar kalandar, Anwar Bala, Mehboob Popa all of them came near S6 following them. And placed the carboys there and Mehboob Latika made holes in the carboy and then went between S6 and S7 and cut the canvas. From there Mehboob Latika entered first followed by Jabir. And then by kicking broke the vestibule door. Shaukat lalu gave two carboys to each persons and Jabir threw his knife on the ground and caught the carboy and shaukat lalu also came inside and open the door towards A cabin and from there Imran Sheru, Rafik Bhatuk and Shaukat Lalu came inside with petrol carboy. From out side Hasan Lalu, Irfan Patadiya were pouring petrol from	Maheboob Latika cut the curtain between two coaches with knife and thereafter, Maheboob Latika, Jabir Behra and Shaukat Lalu carrying a carboy each entered into the coach. At that time Rafiq Bhatuk, Irfan Bhopa, Imran Sheru, Hasan Lalu, Rauf Kamli, Irfan Patadiya, Ayub Patadiya were standing on the ground near the coach and in the meantime the door was opened from inside then Rafik Bhatuk, Irfan Bhopa, Imran Sheru carrying one carboy each entered the coach from the open door. Faruq Bhana and Bilal Haji also came.	At that time Mehboob Latika had cut the curtain between two coaches by a knife. Before that, Mehboob Latika had made holes with knife like tool in the carboy which was kept on ground. After tearing the curtain Mehboob Latika entered the coach and then Jabir Bahera had also gone inside. At that time Shaukat Lalu had supplied one carboy each to both of them. Thereafter, Shaukat Lalu also went inside. At that time Rafiq Batuk gave one carboy to Shaukat Lalu and thereafter, Rafiq Bhatuk, Irfan Bhobha and Imran Sheru went inside

and went into the door and Sheru and Irfan Bhobha also climbed and went inside.	there Rafik Bhatuk, Irfan Bhobha and Imran Sheru entered with one carboy each.	broken window. That time the all got down from off side and immediately the coach caught fire and the passengers started running. They caught passenger and Jabir shaukat Bibino and shaukat Bhano and Ashiq Hhussain looted gold rings and gold chains from the passengers and also hit him.		the S6 coach and the S6 Godhra side door was opened and from there Rafiq Bhatuk, Irfan Bhobha and Imran Sheru entered the coach with a carboy each.

Comment

[i] The incident of S6 described by Ajay in his 164 Cr.P.C. statement is factually contrary to what he has stated in his deposition in the court. Further, Ajay has specifically admitted that, in his version given before the magistrate on 9-7-2002 he has failed to give name of any person as being responsible for cutting the cover between the S6 and S7 coach. (Para 77/ Pg. 12831) Ajay has specifically admitted that, a total of 6 persons had gone inside the coach. (Para 77/ Pg. 12831)

[ii] Ajay in his statement says total 6 persons with 1 carboy each entered into the S6 coach while Jabir in his confessional statement says total 5 persons with 1 carboy each entered into the S6 coach and Sikandar in his statements says total 6 persons with 1 carboy each entered into the S6 coach.

[iii] As per the version of PW. 232 Iliyas Mulla he along with Shaukat Bibino and Shaukat Bhano went home before the coach caught fire therefore there is no question of them remaining on off side for the alleged loot.

[iv] It is stated by Ajay in the cross examination that, he was standing alone on the metal heap near the A cabin at the time of witnessing the incident. However, the place of witnessing the incident as shown by Sikandar is also the same metal heap and it is clear that, these two facts cannot coexist.

[v] Sikandar has clearly continued the story of Ajay in terms of the total number of people who got inside the S6 coach and the total number of carboy carried by them which fact is unsupported by the version given by Jabir.

[vi] Sikandar had for the first time introduced the presence of Bilal Haji and Faruq Bhana at the scene of the offence in his 164 statement dated 22-9-2003. However, the prosecution after realizing this material improvement in the prosecution story in respect of the presence of Bilal Haji and Faruq Bhana which was not spoken to by any of it's other witnesses, as chosen to exercise it's influence and drop these two names in the evidence of Sikandar.

Event No. 17

Throwing of the burning rag and S6 setting on fire

Ajay Kanu Bariya (PW 236)		Jabirbin Yamin	Sikandar Siddiq Shaikh (PW 237)	
Version in Sec. 164 statement dated 9-7-2002	Version in the court	Version in Sec. 164 statement dated 5-2-2003	Version in Sec. 164 statement dated 22-9-2003	Version in the court
1. At that time Hasan lalu had thrown a burning rag from a broking window and after some time there was smoke and there was lot of commotion/chaos. 2. He doesn't knew	1. At that time Hasan Lalu, Irfan Pataliya and Ramzani were sprinkling petrol from outside from broken window inside the coach and Hasan Lalu burnt a rag and threw inside the S6 coach from the broken	Not stated	When Sikandar was standing on the stone heap at that time Faruq Bhana and Bilal Haji reached there. At that time Hasan lalu, Ramzani and Irfan Patadiya were pouring petrol like substance on the broken window of	Hasan Lalu, Ramzani and Irfan Patadiya were pouring petrol like substance in the broken window.

how and when the persons of S6 coach got down and the coach had started catching fire slowly and slowly.	window. Immediately there was a "????" and there were shouts in the coach.		the coach. He saw Hasan Lalu throwing burning cloth inside the coach from the broken window.	

Comment

[i] Sikandar has merely spoken about the role of one person in throwing the "Lugda" in to the coach in his 164 Cr.P.C. statement whereas, in order to achieve consistency with the prosecution version of both Ajay as well as Jabir, this witness has improved and has also introduced the names of Irfan patadiya and Ramzani as being present with Hasan Lalu at the time throwing of "Lugda" into the coach.

Event 18

Incident of Fire in S6.

Ajay Kanu Bariya (PW 236)		Jabirbin Yamin	Sikandar Siddiq Shaikh (PW 237)		Bhikhabhai Harmanbhai Bbariya
Version in Sec. 164 statement dated 9-7-2002	Version in the court	Version in Sec. 164 statement dated 5-2-2003	Version in Sec. 164 statement dated 22-9-2003	Version in the court	version in the court
1. At that time Ajay was standing in front of S6 and he came to the door to see what they are doing? He saw that, these people were sprinkling kerosene in the coach from carboy and Hasan Lalu and Ramzani were sprinkling kerosene from outside the coach.	1. At that time Ajay was standing on the metal heap. With a view to see that what these persons are doing inside, went to the open door of S6 but nobody was seen. Neither the persons who went inside nor the passengers were seen but he saw the petrol which was sprinkled. 2. The second	1. From outside Hasan Lalu and Irfan Patadiya were sprinkling petrol from the broken windows at that time Jabir and others descended on the off side and immediately there was fire in the coach and from there passengers were running. 2. One of the passenger was held and was assaulted. Jabir, Shaukatbibi and her nephew			At the time when he was standing near "A cabin" he had seen the mob set the coach on fire. Following persons were near the coach. Hasan Lalu, Shaukat Lalu, Mahommad lalu, Kadir Pataliya, Babu Pataliya, Soeb Kalandar, Yunus Ghadiyali, Maheboob Popa, Salim Panwala, Shaukat Bibino, Shaukat Bhano, Salim Panwala and

2. At that time Anwar Popa, Yunus Kalandar and Yakub Pataliya were breaking windows and doors of S6	event of breaking window is not in the deposition.	Ashik Hussain had looted the gold rings and chains from the passengers.			Ramzan Bibino. (no specific role assigned to anybody though the witness claims to know the accused)

Comment

[1] In the statement of 164 of Cr.P.C. Ajay has stated that, he was standing in front of S6 coach and saw from the door that, the persons named by him are sprinkling kerosene in the coach and Hasan lalu and Ramzani were sprinkling kerosene from a broken window outside the coach. Also Ajay has stated that, the named persons were pelting stones on S6 coach. Whereas, in the evidence, Ajay has stated that, he was standing on the metal heap and he went to see what the persons inside the coach were doing from the door but he saw nobody in the coach and saw petrol which was sprinkled. Also Ajay has not stated the incident of stone pelting on S6 in his deposition as he has stated in statement of 164 of Cr.P.C.

[2] Bhikha Harman claims to have seen the incident from near the "A cabin". The VHP witnesses who have claimed to be near the "A cabin" neither noticed presence of Bhikha nor Bhikha noticed presence of the other VHP witnesses. He has stated that, a mob has set the coach on fire. He has further stated that, 13 persons mentioned in the table were present near the coach. He has not specified any role played by any of these 13 persons in the commission of offence. Bhikha has not stated anything in respect of the way offence was alleged to have been committed as propounded by the prosecution through it's witnesses. The version of Bhikha Harman destroys the case of prosecution and in the process also destroys his own evidence.

Event 19

Incident stopping of fire engine

Ajay Kanu Bariya (PW 236)		Jabirbin Yamin	Sikandar Siddiq Shaikh (PW 237)	
Version in Sec. 164 statement dated 9-7-2002	Version in the court	Version in Sec. 164 statement dated 5-2-2003	Version in Sec. 164 statement dated 22-9-2003	Version in the court
He started running towards signal faliya and saw there that Rafik Bhatuk and mob were stopping fire engine and pelting stones on it.	Outside also people were shouting "bhago bhago" and Ajay went home from "A Cabin".	Not stated about the same	Not stated about the same	Not stated about the same

Comment

[1] In order to achieve consistency in the prosecution version more particularly in respect of role belatedly attributed to Bilal Haji in clear contradiction to the contents of the fire brigade "occurrence book", the prosecution has been able to achieve consistency by getting Ajay to improve upon it's version and omit the entire event of him having witnessed the stoppage of the fire brigade.

PART IV-B

LIST OF CITATIONS RELIED ON BY MR IH SYED, LEARNED COUNSEL FOR THE DEFENCE ARE AS UNDER:

Sr. No.	Parties	Citation	Issue
1	Noushad @Noushad Pasha v. State of Karnataka	2015(1) Crimes 32 [SC]	

2	Adambhai Sulemanbhai Ajmeri v. State of Gujarati	(2014)7 SCC 716 Para 225	SC expressed anguish about the incompetence with which the Investigating Agency conducted the Investigation of the case of such a grievous nature, involving the integrity and security of the nation. Instead of booking the real culprits responsible for taking so many precious lives, the police caught innocent people and got imposed the grievous charges against them, which resulted in their conviction and subsequent sentencing – law on conspiracy and confession.
3	State of M.P. v. Dharkole alias Govind Singh & Ors.	2014(13) SCC 308 paras 9, 12	Principles of beyond reasonable doubt.
4	Karan Singh V. State of Haryana	(2013)12 SCC 529 Paras 16 & 19	On fair investigation
5	Sujit Biswas v. State of Assam	2013(12) SCC 406 [paras 13 to 17]	Suspicion cannot take place of proof – graver the crime greater should be the standard of proof.
6	Sunil Kundu v. State of Jharkhand	(2013)4 SCC 422 Para 29	Defects in investigation can be ignored if other evidence is of sterling quality – lapse and irregularities in investigation cannot be ignored if it goes to the root of the matter and if they dislodge the sub

			stratum of the prosecution case – improvements made in the court to support prosecution case – evidence of eye witnesses does not inspire confidence.
7	Narendrakumar v. State of NCT of Delhi	2012(7) SCC 171	Prosecution has to stand on his own legs and cannot take support of weaknesses of defence.
8	Sunilkumar Shambhu Dayal Gupta	2010(13) SCC 657	Law in respect of witnesses making material improvements in comparison to their earlier statements or other evidence with a view to support the case of prosecution to make it consistent.
9	Aloke Nath Dutta & Ors. vs. State of West Bengal	(2007)12 SCC 230 Paras 87 to 90, 100 & 106	3 tests of confessional statement [i] voluntariness [ii] truthfulness and [iii] corroboration / inter se contradiction with other evidence.
10	Mousam Singha Roy v. State of West Bengal	2003(12) SCC 377 [paras 27, 29, 31]	Graver the offence stricter should be the degree of prove – moral conviction.
11	Krishnan & Ors. v. State represented by Inspector of Police	2003(7) SCC 56 paras 21-24	Witnesses are the eyes and ears of justice.
12	Jogindra Nahak & Ors. v. State of Orissa	(2000)1 SCC 272 Paras 22-24	Sec.164 statements not sponsored by the investigation agency effect on prosecution case / malice in law of investigation agency

			not following the law.
13	Kantilal Kalidasbhai & Ors. v. State of Gujarat	(1999)1 GLH 964 paras 1 to 6	Submission of case diary is mandatory along with the charge sheet otherwise contempt.
14	Rampal Pithwa Rahidas & Ors. v. State of Maharashtra	1994 Suppl. (2) SCC 73 Para 37	Duty of the I.O. is to act fairly and honestly and shall not re3sort to fabricating false evidence to secure conviction otherwise it will shake the confidence of a common man in criminal justice system.
15	Dilavar Hussain v. State of Gujarat	(1991)1 SCC 253 Paras 3, 4, 18 & 19	Although, guilty should not escape but on reliable evidence, truthful witnesses and honest and fair investigation. No free man should be amerced by framing or to assuage feelings as it is fatal to human dignity and de3structive of social, ethical and legal norm. Heinousness of crime or cruelty in its execution however abhorrent and hateful cannot reflect in deciding the guilt.
16	Surajmal v. State of Delhi [Admn.]	1979(4) SCC 725	Witnesses making two inconsistent statements in their evidence either at one stage or at two stages, the testimony of such witnesses becomes unreliable

			and unworthy of credence – no conviction can be based on that.
17	State of U.P. v. Jagoo alias Jagdish	1971(2) SCC 42	Non-examination of material witnesses by a prosecution who were essential for unfolding the narrative – truth will seriously affect the trial.
18	State of Maharashtra v. Sindhi alias Raman	(1975)1 SCC 647	
19	State of U.P. v. Jagoo alias Jagdish	1971(2) SCC 42	Non-examination of material witnesses by a prosecution who were essential for unfolding the narrative – truth will seriously affect the trial.
20	Haricharan Kurmi & Anr. v. State of Bihar	AIR 1964 SC 1184 Paras 76	Confessional statement can be only used by the court if on the basis of other evidence the court concludes to convict a person and at that point of time the court can use the confessional statement only to lend assurance to the decision.
21	State of U.P. v. Bhagwant Kishore Joshi	AIR 1964 SC 221	Prosecution manipulated or shaped up by reason of irregularity to throw / cast a reasonable doubt about the prosecution story or seriously prejudice the defense – effect of.
22	Tahsildar Singh &	AIR 1959 SC 1012	Section 162 statements

	Ors. v. State of U.P.		can be only used to contradict and to impeach upon the credibility of a witnesses.
23	B. Sarwan Singh Ratan Singh v. State of Punjab	AIR 1957 SC 637	Mandatory to follow circulars of the high courts by the recording magistrate.
24	Tomaso Bruno v. State of U.P.	Criminal Appeal No.142 of 2015	Non-production of CCTV footage, non-collection of called call records can be said to be with holding the best evidence – prosecution tried to establish a case against the accused by making improvements by various stages – para 33 – adverse inference u/s. 114(g) of the Evidence Act.

PART V-A

SUBMISSIONS MADE BY MS. NITHYA RAMKRISHNAN, LEARNED COUNSEL FOR DEFENCE APPEARING WITH MR SOMNATH VATSA, ON BEHALF OF RESPONDENT – CONVICT - SALIM YUSUF ZARDA

I **Main proposition**

The accused/appellants cannot be imputed any object or act of causing the unfortunate death of the 59 persons in the Sabarmati Express fire on 27/2/2002.

There is no credible evidence to conclude that petrol was poured on the floor of the coach to set the coach aflame. Quite the contrary, for passenger silence as to this dispels the notion

consummately.

There is also no basis to conclude that any member / bystander standing outside the train at A Cabin caused the fire either by throwing burning objects into the coach or in any other manner at all. Indeed. Even the case of the State at the trial was that it was impossible to cause the fire by throwing burning objects from outside.

It must particularly be noted that as far as Salim Zarda is concerned, even the State does not allege that he was present at A-Cabin on that fateful day.

II. **Ancillary propositions**

i] The most that could be attributed to any of the accused/appellants, *assuming that there is reliable identification of presence in the mob,* would be an offence U/s 148 of the Indian Penal Code (IPC). No act done towards a common object beyond stone pelting is proved against any of the appellants/accused, if their presence can at all be established by reliable identification.

ii] There is *no basis for concluding beyond reasonable doubt that all the accused/appellants had the common object of causing death.*

iii] No passenger identifies any accused as a person who used any inflammable object. Passenger identifications for the first time during the trial if any, are made 7-8 years after the incident, without a TIP preceding the same. Further, none of the passengers even claimed in contemporaneous statements that they could

identify anyone at all.

It must be noticed at the outset that:

No means / attempt / act of causing death other than by fire is attributed to any one by the state. Thus if, and only if, the fire is attributable to anyone of the appellant / accused or respondent accused either by pouring petrol near seat 72 as alleged or by inflammable rags or materials thrown from outside, can the charge of causing death be sustained.

Pouring of petrol near seat72 is rendered impossible by the fact that not one passenger present at thatvery spot speaks of this. Though inflammable objects were undoubtedly thrown into the train as passengers do speak of this, the same could not have caused the fire, for the reasons presently stated.

If death by the act of anyone present at A-Cabin is established, then the next question would be, which of them can be, in law, attributed with responsibility for the either the act or the object of causing death. As *res gestae*, it should be noticed that if the mob had the common object of causing death, persons leaving the coach would have been chased and fatally attacked. No escaping passenger (and about 150-190 escaped the fire) claims any attempt on their life or any violence by the mob as such after they alighted from the coach.

Only three speak of any harassment at all. (A) **PW-170** - Pravinbhai Amthabhai Patel, (B) **PW-202** - Govindsinh Ratansinh Panda, (both on the off-side)- and (C) **PW-175**- Gayatriben Panchal (on the on-side), who refer to attacks by a group of 6 or 7 persons only, and the

nature of harassment rules out murderous intent. Pravinbhhai was hit and his leg fractured. True, Gayatriben escaped the harassment by moving under the train, but there is nothing to suggest that the attack had initially been murderous or that it would have turned so later.

III Grounds on which above propositions rest

A. Time of notice of fire makes it impossible for anyone outside the train to have caused the fire. The following established facts prove that the fire was co-terminus with the stoppage at A-Cabin which shows that the prosecution story is false:

- The fire was noticed within 3-5 minutes of the train leaving after ACP at the platform or just outside it. More importantly, fire was noticed simultaneously with the second stop. As the fire must necessarily have originated before the point in time it was first noticed, it must have originated before the train stopped at A Cabin.

- GRP Wardhy book (**Exh. 990/ Vol. 1/ Pg. 134**) mentions an entry at 7.55 am, which s*imultaneously mentions stoppage at A Cabin, stone pelting and fire*. The information was given by the Station Master. This is an admitted document.

- ASP Fulsingh Meena deposed that the first ACP (Chain-pulling) right after the platform, was rectified and the train started at 7.55 am. *Within 3 minutes of this, he was informed by walkie-talkie on the fire, simultaneously with the stoppage at A cabin and stone pelting.* He told the Station Master, who as we see, recorded a complaint at the GRP post, as

evidenced by the Wardhy book. (**See -PW. 126/ Exh. 742/ Vol. 33/ Para 3/ Pg. 11385; Para 7/ Pg. 11387 & Exh. 743** – not part of the paper book)

- The Guard's book mentions *fire in Coach S-6, within 5 minutes or re-start upon rectification of ACP and simultaneously with the stoppage of the train at A Cabin and stone pelting*. (Note of 'restart' upon ACP correction: 8 am and note of fire in *S-6: 8.05 am.*) (**See – Exh. 778/ Vol. 34/ Pg. 11487)**. The Guard **(PW-135)** notes the time of re start as 8 and time of fire as 8-05, the ASM notes time of re-start as 7.55 and hears of the fire report as within 3 minutes thereof. Thus, both accounts are consistent as the event of the fire is noted with reference to the re-start after the ACP. The Guard's book is also a document produced by the prosecution and not denied by them.

- TTE Raniwal who descended from the guards coach as soon as train stooped at A Cabin and sensed stone pelting, saw a smoking coach as he walked ahead, and came back to mention this to the Guard. **(See- PW. 136/ Exh. 780/ Vol. 34/ Para 3/Pg. 11489)**

- The Engine driver senses the train stopping, blows the whistle. He turns backward and immediately sees the fire in the coach S-6. **(See-PW. 228 / Exh. 1189 / Vol. 37/ Para 4 / Pg. 12613)** (Driver's first complaint made at 9.30 an on the same day). **(See- Exh. 1190/ Vol. 37/Pg. 12624 - 12625)**

- ASM A-Cabin- R.P. Meena hears the Driver's whistle of imminent stop near A-Cabin, descends from his office, sees an approaching mob, warns passengers to shut doors and windows, As soon as he climbs up to his post, he notices the fire. **(See - PW. 127 / Exh. 744 / Vol. 33 / Para 2 / Pg. 11392)**

Thus, *notice of fire* is simultaneous with the stoppage at A-Cabin or within moments thereof. Therefore the conclusion is inescapable that the cause of fire had been activated before the actual point of stoppage at A-Cabin, which point of stoppage may be between 8. or 8.05. am.

The petrol pouring theory or the Ajay Baria story is ruled out as impossible, because the State's case is that the alleged 'core group' started to move from Aman Guest house towards 'A' Cabin well after the restart upon rectification of the ACP. **(See-PW. 236 / Exh. 1231 / Vol. 38 / Para 5 / Pg. 12785)**. In fact the case is that this group started only after the train had reached Garnala.

The State has bound itself to the position that just the trip from Aman Guest House to Ali Masjid itself takes 4 minutes. **(See-Exh. 1014 / Vol. 36 / Pg. 12239 - 12240)** But within 3-5 minutes of the train's re-start, the fire had already occurred. *The 4 minutes ride from Aman to Ali Masjid is co-terminus with, if not slower than, the train's re-start and stop at A- Cabin*. Thus, the fire had occurred and had been noticed even before the tempi could have reached Ali Masjid as alleged. There is no question of the fire waiting for the additional activities of the conspirators as alleged, such as off-loading at Ali Masjid and reaching the train, and more.

Likewise, the stone pelting mob could only have accessed the train from the outside after it stopped at A-Cabin. But the fire had been ignited earlier, so, no member of the mob could have caused the fire from outside A-Cabin.

The State has not disputed this position at all. The only submission on this point is that the contemporaneous record also notes "setting the coach S-6" on fire. The submission is misplaced. These words are no legal proof of how the fire occurred. The makers of that record were examined and they gave no oral direct evidence of who set the train on fire and how. It is not the case of these witnesses that they saw the acts of incendiarism. The words "S-6 *Ko Jala diya*" or "*aag laga di*" or such things in the Guard's book or Driver's complaint, at best signify their impression, which is neither oral nor documentary evidence of the cause of the fire. The record is only e*vidence of the factum of fire, and the time of its sighting. Of the cause of fire, the records are not even hearsay.*

B. There is no forensic support of the prosecution case of arson by use of petrol or any other flammable liquid or accelerant.

To this end, the defence argued that the finding of 'petrol' residue, repeatedly confused with "petroleum hydrocarbon residue" (which is a completely different thing) is untenable because:

- **PWs 227 and 240,** though FSL officers, cannot be considered 'experts' in fire forensics at all, in terms of S.45 Evidence Act. They claim no specialize knowledge.

- No proper test or proper procedure to establish any finding was followed. The tests referred to by **PW 227**, thin layer chromatography ("TLC") and gas chromatography ("GC") are incapable of confirming the presence or absence of petrol. **(See- PW-227/Exh. 1161/ Vol. 37/ Para 12/ Pg. 12550).**

- The precondition for accepting opinion evidence, laid down by settled judicial precedent, has been flouted by the **PW 227's** failure to place before the court, the procedure, reasons, readings, comparisons and results upon which FSL finding of petro-petroleum hydrocarbon residue are based. Under S.51 of the Evidence Act, the reasons of opinion led are relevant. Absence of reasons would, therefore, also be relevant.

- The finding of petrol/petroleum hydrocarbon residue even taken as its face value does not signify an ' accelerant' / flammable liquid / poured to set the coach on fire. The coach itself, as also passengers' luggage would be full of matter containing petroleum derivatives.

- **PW 240's** conjectures had no rational or scientific basis and are ruled out by the very authority he cites which is *"Practical Fire and Arson Investigation"* by Redsicker and O'Connor as well as NFPA 921 Protocols, both of which are, according to him standard books. **(See-Exh. 1347 / Vol. 38 / Para 16 / Pg. 12989)**

[To amplify the aforesaid points, a summary of the position in the relevant books is separately extracted for the ease of reference.]

IV. **Who is an expert?**

Now, who is an expert, has been explained by judicial precedent with complete clarity:

[i] the expert must be within a recognized and specialized field of expertise (S 45 Evidence Act)

[ii] the evidence must be based on reliable principles, and

[iii] that the expert must be qualified in that discipline.

[Ramesh Chandra Agrawal V. Regency Hospital Ltd (2009 (9) SCC 709)]

An expert is only an expert if he follows the well accepted guidelines to arrive at a conclusion and supports the same with logical reasoning which is a requirement of law as laid down in the Indian Evidence Act was an argument accepted in **Sidhartha Vashisht @Manu Sharma Vs. State (NCT of Delhi) (**2010) 6 SCC 1)**]**

In order to bring the evidence of a witness as that of an expert, it has to be shown that he has made a special study of the subject or has acquired a special experience therein or, in other words, that he is skilled and has adequate knowledge of the subject. [**State of Himachal Pradesh v. Jai Lal** (1999) 7 SCC 280; **Mahmood v. State of Uttar Pradesh** (1976) 1 SCC 542)]

V. **What is required for expert/opinion evidence to be read by the court ?**

This too is clearly settled:

Ramesh Chandra Agrawal v. Regency Hospital Ltd. (2009 9 SCC 709;

The importance of an opinion is decided on the basis of the credibility of the expert and the relevant facts supporting the opinion so that its accuracy can be cross checked. Therefore, the emphasis has been on the data on basis of which opinion is formed. The same is clear from following inference: Mere assertion without mentioning the data or basis is not evidence, even if it comes from expert. Where the experts give no real data in support of their opinion, the evidence even though admissible, may be excluded from consideration as affording no assistance in arriving at the correct value."

Dayal Singh v State of Uttaranchal, *(2012) 8 SCC 263;*

"The essential principle governing expert evidence is that the expert is not only to provide reasons to support his opinion but the result should be directly demonstrable."....." If the report of an expert is slipshod, inadequate or cryptic and the information of similarities or dissimilarities is not available in his report and his evidence in the case, then his opinion is of no use."..... "In other words the value of expert evidence depends largely on the cogency of reasons on which it is based."

Mahmood v. State of Uttar Pradesh *(1976) 1 SCC 542*;

Para 19"*The expert has not given any reasons in support of his opinion. Nor has it been shown that he has acquired special skill,*

knowledge and experience in the science of identification of finger-prints. It would be highly unsafe to convict one on a capital charge without any independent corroboration, solely on the bald and dogmatic opinion of such a person, even if such opinion is assumed to be admissible under Section 45, Evidence Act."

The "Daubert Principles" resulting from a landmark US Supreme Court Judgement, **Daubert v. Merrell Dow Pharmaceutical Inc.** (509 US 579 (1993) has been quoted with approval by a Constitution Bench of the Supreme Court in **Smt. Selvi and Ors. v. State of Karnataka**- (2010) 7 SCC 263. The said Principle is based on Rule 702 of the Federal Rules of Evidence of 1975 governing the admissibility of expert opinion testimony based on scientific findings. The majority opinion (Blackmun, J.) in the above-mentioned US Supreme Court case following Rule 702 of the Federal Rules noted that-

> "*The trial judge's first step should be a preliminary assessment of whether the testimony's underlying reasoning or methodology is scientifically valid and whether it can be properly applied to the facts in issue."*
>
> *"Several other considerations will be applicable, such as: whether the theory or technique in question can be and has been tested .whether it has been subjected to peer review and publication:*

- *its known or potential error rate*

- *the existence and maintenance of standards controlling its operation*

- *whether it has attracted widespread acceptance within the scientific community"*

The Constitution Bench also noted that Daubert ruling in this regard that trial judge is expected to perform a 'gate-keeping' role to decide on the admission of expert testimony based on scientific techniques.

By the above standards, neither **PW 227** nor **PW 240** are experts nor is their testimony of any value.

A scientific opinion tendered in the witness box is to be assessed like any other evidence, and admissions will bind such a witness.

PW 227 Mr. Talati, admits he has no experience of such cases **(Para-9 / Pg.-12549)**. He admits that he does not know such a basic fire forensics concept as 'flashover'. (**Para-9 / Pg.-12549)**. He is unable to say what material the coach is made of and he did not ask for samples **(Para-10 / Pg.-12549)**. He is unable to say whether petrol found according to him on un-burnt cloth is burnt or un-burnt **(Para-12/Pg.-12550)**. He is unable to say the time period for retention of petrol in a substance though retention time is a result that a GC will reveal **(Para-12/Pg.-12550)**. He admits that he did no pyrolysis test, nor a multiplier analysis **(Para - 12/Pg. -12550)**. He does not even assert that the only tests he performed are sufficient to conclude anything. He

does not himself quote any text or principle.

It is not even clear whether he means to say residue of petrol or of petroleum hydrocarbons and whether he knows that difference. His testimony throughout speaks of residue of petroleum hydrocarbon. His failure to find any petroleum hydrocarbon residue in rexin (a brand name for PVC or like polymer) which by its very raw material and manufacture abounds in petroleum hydrocarbons indicates that he is quite clueless about the properties of petroleum hydrocarbons **(Para-15/Pg.-12551-12552)**. Similar is his failure to be able to detect petroleum or other hydrocarbons in oil soaked material. His report and examination in chief, are both bereft of the slightest reference to methods, readings, similarities, differences or standards. He has furnished the court with no basis to assess his evidence or rely upon it. Such evidence is ruled out at the threshold.

PW 240 does not fit the bill either, for he claims no specialised knowledge of fire forensics. He does not even know whether heat release rates can be measured. **(Para-17/Pg.-12990)**. This was his first experience of fire in a train **(Para-7/Pg.-12985)**. Neither **PW 227**, nor **PW 240** has any claim to special knowledge of the subject. Their answers to queries confirm a fundamental ignorance, and in **PW 240's** case, an obdurate refusal to even apply the principles that he claims to have read.

Judicial notice under S.57 and power to inquire under S.165 Evidence Act

The Court is entitled to take judicial notice of authoritative

texts on science. This power is unhampered by any procedure. The State cannot possibly object to this Court reading the texts submitted by the defence on Fire Forensics particularly when the FSL witnesses shed no light on the matter and even the State, at this appellate stage, has abandoned reliance on parts of the same without giving any alternative authority in support.

In sum, the defence argument was, not to seek a particular forensic finding from the Court on the fire, but merely to assess the completely unreasoned, cryptic, reports in the light of established, reliable principles, which assessment is both the duty and the privilege of the Court, and for which it is endowed with statutory powers.

State's arguments regarding expert testimony

[a] The State has, chiefly, argued that a proposition or text not put to the expert witness cannot be relied upon.

[b] **PW 240** has taken some photographs show a demarcation between 75 percent of intense burning in the coach on the east side and 25 percent of reduced burning on the west side. This was argued as countering the defence case that no demarcation has been shown. (This is a severe misunderstanding of the defence argument.)

[c] The State has also argued that expert evidence is only opinion evidence and that it shall rely upon the **PWs 227 and 240** only to the extent that they corroborate Ajay Kanubhai Baria and Jabir's confession and shall

eschew **PW 240's** opinion that burning objects thrown from outside will not cause such a fire.

[d] Some judgments are cited by the State, do not dent the defence points, and may, ironically even support the defence.

Defence Rebuttal of States arguments on Forensics

The Court is neither absolved of the duty nor robbed of the privilege of assessing opinion testimony.

There is no quarrel, as there cannot be, with the proposition that a counter-view must be put to an opinion expert before it can be relied upon. However, for this proposition to be pressed, the witness must satisfy the definition of an 'expert'. And further satisfy, the requirement of showing the court, the basis his testimony or opinion. These requirements do not rest on the nature of cross examination at all, but are instead, the *sine qua non* of scientific testimony. It is a precondition for the receipt of opinion evidence in court, which cannot be waived, even if the defence does not ask a single question of the expert. The forensic evidence led by the State in this case fails at the threshold for want of specialised knowledge, compliance with due procedure and lack of cogency. **PW 227** is also completely cryptic.

In other words, an incoherent, un-reasoned and unsubstantiated opinion is not binding upon the Court merely because questions or passages were not put to a person lead as an expert, even when the opinion witness satisfies none of the pre-

conditions for acceptability.

Cases in re expert evidence cited by the State

The State has cited Bhagwan Das v State of Rajasthan **AIR 1957 SC 589**. This was a case where a conclusion adverse to the accused was drawn by the High Court to reverse the acquittal. The Supreme Court held that this was unfair to the accused, for the High Court had negated a factual assessment of 'unconsciousness' and read medical texts to opine on whether the person could have been unconscious at all. In that context, it was held that the texts read by the High Court may not have been in the same circumstances as that examined by the expert. By contrast, in the present case, principles universally applicable regardless of circumstances have been ignored. Tests that will reveal the identity of a flammable liquid and the tests that will not are known and they remain so regardless of the fact situation. Likewise, the need to analyze comparison samples, and to eliminate the effect of interferences applies in all fire investigations, regardless of circumstances. It is not as though a correct procedure is adopted but a different reading is urged by the defence. The defence is merely trying to bring to the Court's attention what the established scientific procedures are.

As far as **PW 240** goes, the very text he speaks of and quotes verbatim, though without due acknowledgment, shows that his inaccuracies are far worse than mere ignorance. Anyway, since he has quoted from that text, there can be no complaint that the text was not put to him. The Redsicker text warns against concluding that fire was caused by pouring an accelerant merely

from an alligatoring pattern. However, his first conjecture of a deliberate pouring of petrol is drawn from just such a pattern.

The next case relied upon by the state is State of MP v. Sanjay Rai **(2004) 10 SCC 570**. Here the Supreme Court upheld the High Courts order of acquittal and held that the Trial Court was *wrong in recording a finding adverse to the accused* by concluding on its own that there was strangulation, when there was no evidence to that effect.

In yet another case relied upon by the prosecution, namely, Santosh Kumar Singh v State through CBI **(2010) 9 SCC 747**, the experts were pioneers in the field of DNA testing and also those whose set procedures had gained universal acceptance. DNA testing being, a one to one match, their findings were accepted after the Court's own expert witness had also been examined. Can it be said that either **PW 227** or **PW 240** are witnesses of such a stature of expertise? **PW 240** does not even return a scientific answer to a question whether fire could have started before the train stopped. On the contrary, he reiterates the prosecution's untenable case of an entry into the train by arsonists, for an answer, without testing its feasibility.

Most importantly, in the case of Santosh Kumar [supra], the requisite tests were carried out and their results produced before the Court. This is far from the case in the Godhra Fire Investigation, and 'fire debris analysis' is nowhere as straightforward as a DNA matching. The scientific evidence brought to the attention of the Court by the prosecution is unfortunately not supported by any science whatsoever. These are

the opinions of a man who is admittedly not an expert and whose opinions are further contradicted by the very text that he cites as an authority.

Just as a court cannot be asked to conclude the presence of acid when it is admitted that no litmus test was carried out or to conclude that a person was running a temperature of 104 degrees when it is admitted that no thermometer was used, a court cannot be asked to believe that there was petrol, when no spectrometry or other detector was used, and interferences were not eliminated.

VI. **Defence alternative of smouldering fire.**

The defence has placed on record, a case of **probability, more consistent with passenger versions of a thick toxic smoke preceding the bursting into flames.** It is to this end that the scientific studies on the nature of a smouldering fire transiting to flaming have been placed before the Court. The purport of the defence submission in this regard is that despite a clear possibility, if not probability, of a smouldering fire, the investigation has not even examined this. As a consequence, the trial court has been mislead into a large number of convictions and life terms and death sentences, in this capital case, on the assumption that this train fire could only have been caused by a large quantity of petrol being poured onto the coal floor. Now, before the appellate court when the State is claiming that fire was caused by burning rags, without leading any opinion evidence on the point, the defence is entitled to rely on basic scientific principles of a smouldering fire.

It is reiterated, that the Court is not being asked to return a

forensic finding by way of a new theory. Only to note that possible alternatives were irrationally rejected at the time of investigation and are not sought to be introduced when the story of fire by pouring petrol is floundering. However, if the State, categorically ruling it out at the trial, seeks that its new version be entertained, then the scientific logic of this new explanation cannot be overlooked.

State's misunderstanding on technical argument in re lines of demarcation

The Defence had shown a passage from Redsicker (Chapter 4) that a line of demarcation *around the point of origin,* of the fire can map the speed of burning. As **Lentini** notes, even this is a debunked method now). **PW 240** speaks of a fast spreading fire even though no such line is noted by him around the point which he claims, is the point of origin. (“Lines of demarcation” is a 'term of art' in fire forensics, a technical point. The demarcation between burnt and less burnt parts of a whole compartment has nothing to do with the issue. To be fair to **PW 240**, he does not refer to this as a line of demarcation in the aforesaid 'term of art' sense.

VII. **Passenger accounts rule out both conspiracy and common intention**

a) **Conspiracy under S.120 (B) IPC read with 302 IPC to a core group acquiring and pouring petrol on flooring of S-6**

The case of conspiracy is ruled out because not one passenger speaks of its execution as alleged. It is also ruled out because of the time of notice of fire and forensics alike fail to support it.

Jabir's confession cannot be the basis of the concluding any such conspiracy, as it is legally impermissible to do so.

A confession of a co-accused is not substantive evidence. It can only be looked at under S.30 Evidence Act, if there is other *reliable* evidence. As the only other material on the execution of the conspiracy by entering through S-6/S-7 vestibule is Ajay Kanubhai Baria's statement fraught with contradictions, and far from reliable, Jabir's confession is ruled out as a piece of evidence against any of the co accused as well as in support of conspiracy. [Haricharan Kurmi v State of Bihar **AIR 1964 SC 1184;** Para-17]

It is also ruled out under S. 10 of the Evidence Act as a post arrest confession, made on a date one year after the period of the alleged conspiracy ended cannot be used under S.10. [Mohammed Khalid v State of West Bengal (**2002) 7 SCC 334;** Para-33].

The statements of Ranjit Jodhabhai (**PW-224),** and Prabhat (**PW-231)** who work at the Kalabhai petrol station alleging purchase of petrol the previous evening cannot be believed. Firstly, their statements are contrary to their own very statements made nearly a year earlier in April 2002 **(09-10/04/2002 written by pencil)**, soon after the incident, when they positively asserted that no loose petrol was ever sold by them. A complete *volte face* in February 2003 has no credibility by any principle of appreciation of evidence. Their conduct shows them to be liars and hence unworthy of credit.

Ranjit (**PW-224)** has been also shown to be a liar several times

over, who is constantly admitting to taking money from one party or another. The sting operation showing him as saying so, and his later explanation of having taken money for the sting operation itself, was not permitted to be brought into evidence, and every single person indicted by these witnesses has been convicted and sentence to death. This is a gross failure of due process.

Prabhatsingh (**PW-224)** in his statement of April 2002 states that his seat at work was inside the station from there is no question of seeing customers outside. In February 2003, he improves his statement by providing an explanation that he came outside his office towards **PW-224** that several persons came to buy loose petrol. This crafted improvement is certainly indicative of a malicious falsehood.

Although Prabhat did not feature in the sting operation, the evidence of the journalist who conducted it would have impugned both the petrol vendors as well as the malice of the investigating agency and further discredited the entire story of the purchase of petrol on the previous day of the fatal fire. This evidence was not permitted.

On the count of failure of due process itself, this evidence of the petrol vendors employees of Kalabhyai petrol station should fail, besides the same being severely compromised in truth.

[b] **State's Case on Common Object**

Common intention to commit murder by arson S.149 read with S.302 IPC) is urged by the State on 4 counts:

[1] The State's case is that one group entered from the vestibule between S7 and S-6 to pour petrol on the floor to set the train ablaze and the rest of the mob aided this by throwing burning objects from the outside of the train.

[2] The violent slogans of the mob and the fact that the mob did not disperse until the firing by law enforcement agencies. The entire train was attacked by pelting stones, indicating the violent intent of the mob.

[3] Passenger accounts and other accounts of burning objects being thrown and sprinkling of inflammable fluid on the train by members of the mob from outside the train. Windows rods were bent to enable the throwing of inflammable objects.

[4] Finding petrol in carboys around the track and finding of petrol remnants on window rods.

[5] Contemporaneous records (GRP Wardhy book etc) note that the “coach was set on fire”.

[c] **Defence Rebuttal on Common Object to commit murder by setting the coach on fire.(S.149 read with 302 IPC)**

Chapter VIII, Sections 141 to 149 of the IPC deal with the offences of rioting, and offences committed pursuant to the common object of a riotous assembly. It is a scheme of graded criminality.

Joint or continuing in an unlawful assembly armed with deadly weapons is by itself an offence (S.142) and continuing in an

unlawful assembly after it is ordered to be dispersed is also an offence (S.145). When force or intimidation is used by an assembly, it is rioting, and rioting armed with deadly weapons is a separate offence (S.148).

Armed, even with deadly weapons, members of an unlawful assembly or rioters, do not *ipso facto* become persons with the object of causing death. There is no presumption as to the object of an unlawful assembly. It is only when there is proved, the *mens rea* of a common object to kill or the knowledge that killing is likely, that a murderous intent can be assigned to every member of the assembly.

Proof of presence in the assembly with either the shared objective to cause death or the knowledge that death will be caused, is essential. If and only if such an object or knowledge is first established, then, overt acts are not required to be separately proved against each member of the assembly.

Judicial precedent requires that, the common object of an assembly be identified by such indices as conduct before or at the occurrence. Cogent proof must be given of the knowledge of the entire assembly of the likelihood of killing. Last but not least, the identification of each member must be entirely reliable.

In Chikkeranga Gowda v State of Mysore, **AIR 1956 SC 731,** it was recognized that "*Section 149 did not ascribe every offence which might be committed by one member of an unlawful assembly while the assembly was existing, to every other member. The section describes the offence which is to be so attributed under two alternative forms:*

(1) it must be either an offence committed by a member of the unlawful assembly in prosecution of the common object of that assembly; or (2) an offence such as the members of that assembly knew to be likely to be committed in prosecution of that object."

In Santosh v. State of Madhya Pradesh **(1975) 3 SCC 727**, it was held *that "likelihood of causing of death by the nature of the actions of the members of the assembly must be shown to be within the knowledge of a member who is to be made vicariously liable for a death. Such knowledge may be inferred from the nature of the actions committed by others in an unlawful assembly which the member held vicariously liable continues to associate himself with despite these actions seen by him or known to him."*

In State of UP. V Dan Singh (**1997 3 SCC 747)**, the Supreme Court actually reversed concurrent acquittals finding a caste attack upon a marriage party, where some persons were burnt and others beaten to death. Since violence was inflicted in every possible form, and the deaths could not have resulted from just attacks by stones and sticks, expect by many participating in the assault, the Supreme Court found it difficult to rule out murder as the common object of the assembly. Yet, as a caution, for recording a conviction it applied a test of identification of an accused by at least four witnesses.

In this case, the appellant/accused have spent 10-13 years in jail several times the maximum penalty for rioting with deadly weapons, which is 3 years. This issue now is academic, although adequate proof of presence may be wanting in most of their cases.

The main if not the only question is, whether it can be said that the common object of the assembly was murder. It must be noted that there is alleged no act towards causing death other than by fire.

RP Meena the ASM A Cabin speaks of a crowd of about 200-300 approaching the train before it stopped. By the time he climbed up to his office above A Cabin, he had noticed the fire. It is obvious that the mob that he claims to have seen could have neither caused the fire nor known of it beforehand.

There were persons gathered outside the train near A Cabin. Which of them came first, which came later, and which of them knew what any section of them intended to throw at the train, is difficult to say. No evidence has been led on this.

The fire had been noticed and the RPF and the police approaching the mob fired at it and made it disperse. There is no indication of the time gap, between the notice of fire and the dispersal of the mob. However, the passengers who alighted upon sighting smoke or hearing of fire inside the train, were allowed to do so without impediment. In these circumstances, what each member of the mob knew or could infer by the time it dispersed is unclear.

By itself, a burning rag is not a weapon of death though it could be dangerous. In this scene seeing a burning rag being thrown and the inference that death was likely does not follow in the same manner as it would if what was seen is the firing of a gunshot, or attack by a knife or sword. How many members of the mob saw these being thrown, whether those who did could see, one or

more being thrown and whether they perceived this as an attempt to take life cannot be said.

The fact that the entire train was attacked by pelting stones, in fact, shows that the common object was to attack the moving train with stones, no more , no less. Of the entire lot pelting stones, a handful may have indulged in incendiarism. Incendiarism or death, cannot then be the common object.

The following will make the defence argument clearer.

Passenger Accounts of inflammable objects

Though it has not been quantified till now, it is evident that the number of persons throwing burning rags, or the number of burning objects thrown, is only a fraction of the total number of persons assembled outside the train at A Cabin.

- The prosecution has examined a total of 50 passengers travelling in various coaches of the train including S-2, S-4, S-5, S-6, S-7 and S-8 coaches.

- The 1st investigation officer (pw-241) has stated that S-6 coach was full with about 200-250 passengers. About 190 of them escaped the coach.

- Out of these 50 passengers examined as witnesses by the prosecution, 20 do not mention any inflammable object or anything that may aid inflammation in the nature of burning kakda /rag, inflammable liquid / material or

carboys etc being thrown inside the coach.

- Out of the remaining 30 witnesses who refer to inflammable objects in the nature of burning kakda /rag, inflammable liquid / material etc, only 13 have made a contemporaneous reference to the same, in the statements recorded soon after the event. (the other 17 are statements made for the first time in 2005, or those who refer to inflammable objects at the trial for the first time).

- As fire is the most serious fact, uppermost in any mind or contemporaneous statement would be any aspect of flammable material. Therefore, if a statement made soon after the incident contains no reference to it, then it is unlikely that such a person would have seen it. Later additions are likely to be a play of imagination, for one would be loathe to call traumatised passengers liars. Therefore it would be prudent to keep out of consideration, the 17 witnesses who give refer to inflammable objects so very belatedly.

- The 13 witnesses who have made contemporaneous statements of inflammable objects in the nature of burning kakda / rag, inflammable liquid / material etc, should be treated with utmost respect.

- However, the location of some of these is available. 7 of these are from coaches other than S-6, such as from S-2 (1 passenger), S-4 (2 passenger), S-5 (1 passenger), S-7 (2 passenger), S-8 (1 passenger)

- From S-6 itself, there are some who give their seat numbers.

1st Compartment-3 (PWs-124, 81 & 8)
2nd compartment-nil
3rd compartment-1 (PW-119)
4th compartment-nil
5th compartment-3 (PWs-120, 84 and 150)
6th compartment-1 (PW-175)
7th compartment-2 (PWs-168 and 75)
8th compartment-1 (PW-82)

- Only PWs 119, 82 and 85 speak definitely speak of rags falling into their compartment. One passenger who was in the passage near seat 72 speaks of 2 persons setting hay on fire (PW-114)

- From the above accounts, it can be inferred that some persons were using inflammable material.

- However the number of those using / throwing inflammable material could be as few as 8 or less because:
  - It is possible that all the people located in one compartment are speaking of one and the same burning object.

  - It is also possible that witnesses who do not specify where they saw a burning object fall are speaking of the same object that those in other compartments perceived.

Passengers of coaches other than s 6 may have seen the very same objects which fell into coach 6. Only the witness from S-2 speaks of a rag falling into his coach, which was promptly extinguished.

- So it is entirely possible that several witnesses, within the coach and other across other coaches are speaking of the same burning object/s that fell into s 6. This way 4-7 witnesses may be speaking of the same burning objects or sprinkling.

- Further, the same person may have thrown more than one inflammable object and carried carboys. The persons throwing objects and bending window rods to facilitate the bending of rods are likely to be the same. Thus, it could well be that no more than 4-7 persons actually indulged in these acts from the entire lot present, of whom 135 persons are charged in this case by the state and out of the 800-900 alleged to be present.

Non passenger accounts

VHP witnesses (whose very presence at A Cabin has been disbelieved by the Trial Court) speak of sprinkling / throwing of inflammable objects. Even Bhikha Harman (**PW 206)** only speaks of stone pelting and though he claims presence at the time of seeing the fire, but can see neither the mode of fire not who set it on fire. Anyway, those whom non-passengers saw may well have been the same set that the passengers saw.

There is not necessarily a one to one correspondence between the thrower and the object thrown, as one person may throw more than one burning object.

Even if the exaggerated figure of 23-27 persons throwing burning rags or bulbs is taken, it is barely a quarter of the total of a 135 odd accused. If the more reasonable number of 13 which may be as low as less than 8 is taken, it is a miniscule fraction. In the absence of any further evidence to show either that the rest of the mob had any common cause with this, when the maximum that is attributed to the rest is stone pelting, how can an inference be drawn of the common object of arson?

From out of a total escaping passenger load of 150-190 persons in the coach S-6, only 13 speak contemporaneously of flammable objects thrown into the train. This number is less than a third of even the 50 passengers examined. This too shows that the throwing of flammable objects from outside is only a fractional phenomenon, not even one observed by all or even the majority of the passengers how can every single member of the assembly be credited with knowledge of this.

One thing is clear, when the majority of the passengers were getting off, even then the stone pelting had begun to abate. **PW175**, Gayatriben does not speak of any continued offensive from the mob other than her harassment by a group of 6 or 7 who did not seriously impede her escape. The RPF and State Police were not hit by a single stone.

If the test for S.149 IPC is continued participation in an unlawful

assembly after coming to know of burning the train, what manner of participation can be alleged against a crowd that seems to have stopped its hostile behaviour? Some RPF and state police officers do speak of stone pelting after they reached A Cabin. Some of these are silent on stone pelting, some others are improvement. However, the biggest factor which suggests that this form of offensive behaviour had abated is that not one officer of either the RPF or the State police was hit by a single stone.

In the aforesaid circumstances, how then can an inference of knowledge of the likelihood of death be attributed to the entire mob? Particularly in the face of exonerating conduct relevant under S.8 of the Evidence Act. The offside was left free and unimpeded, the coach was not surrounded. No violence was shown to passengers as they escaped. No aid to trapped passengers by other passengers or bystanders was impeded. The alleged attack on fire-fighters at another point cannot therefore be attributed to those at A Cabin or with a shared intent with those at A Cabin. There is no reason to assume they were the same set.

Failure to disperse upon being asked to disperse is not the same thing as an object to commit murder or even a sympathy with that object. Every act of continued lawlessness is not indicative of the object to kill, although it may indicate indiscipline or unlawfulness generally.

The entire lot was throwing stones, of which only a small handful, possibly, was throwing rags. The entire train being attacked with stones is no doubt sign of a hostile mob. However, it is also a sign

that no murderous intent accompanied this. The burning objects were sporadic as against the common pattern of stone throwing.

The prosecution admits that more than one girl was molested and the crowd believed that a girl had been abducted into the train. This factor explains an irate, spontaneous crowd, and further improbabalises any serious intent to harm the train by fire. Unlike cases where the common object is often discerned by an unprovoked attack, or the presence of an unlawful group which cannot be explained by any immediate cause other than a pre planned attack, there is a clear explanation and pretext for a spontaneous gathering in this case. This circumstances is *res gestae* under Sections 8 and 11 other Evidence Act.

If those who threw these objects are identified, they could be charged individually with the acts, but that is not the case. Although some passengers purport to identify individuals of the mob, none of them is identified as a person seen throwing inflammable material. The identification is only as a person pelting stones. Passengers who identify the accused do so after 8 years, without a previous TIP. Their contemporaneous statements give no identification that they can identify anyone, nor do they contain the barest description of the miscreants.

There is no material to distinguish who was a bystander, who was simply throwing stones, who was carrying anything else and who threw burning objects into the train.

The allegation rests on passengers noticing inflammable objects thrown into the train like rags etc. The same is a self defeating

proposition because by the very fact of notice, the rag would be extinguished or the object destroyed. The only way an unnoticed tag or bulb thrown into the train could set the coach ablaze is by smouldering into a fire. It would follow the pattern of a smouldering fire. As no scientific evidence in support has been placed by the state, and in fact the evidence they place is contrary to this proposition, this is a new case set up, which is impermissible. See **Ugar Ahir V State of Bihar** (AIR 1965 SC 277). *"A court cannot disbelieve the substratum of the prosecution case or the material part of the evidence and reconstruct a story of its own out of the rest."*

See also **Devi Lal & Anr. V State of Rajasthan** (1971 3 SCC 471). The defence had no notice of such a case as the cause of fire or the forensic basis for it. In fact the defence was led to believe that the prosecution case was that fire could not be caused by burning objects thrown from the outside.

At this stage, the defence material on smouldering fires must also be read to see that that the time taken to flaming is usually a minimum of 22 minutes in upholstery (though it could be less but could also be 306 minutes or more). The general range in a compartment is 50-150 minutes. (As flames erupted even as the first lot of escaping passengers landed on the ground and turned to look at the train, soon after they claim to have seen rags/other inflammable substances thrown in, it is improbable that rags caused the fire.

The slogans alone cannot prove intent or object. Often violent slogans are used in peaceful protests. There is no evidence on

how many persons from out of the mob were shouting slogans. The *words* of the slogans should be seen against the *deeds* of the majority, more than 80 percent of the mob, which did no physical harm to the passengers.

The State's argument that contemporaneous record notes “setting the coach S-6” on fire is no legal proof. The makers of that record were examined and they gave no oral direct evidence of the fact or who set the train on fire and how. The record signifies their impression, which is neither oral nor documentary evidence of the cause of the fire. It is only evidence of the factum of fire, and the time of its sighting. Of the cause of fire, the records are not even hearsay.

VIII. **The case of Salim Zarda**

- There is absolutely zero evidence of Salim Zarda's presence at A Cabin.
- The only material against him is Jabir's confession and the evidence of Ranjit and Prabhat, the petrol vendor employees of Kalabhai station.
- Ranjit, severely compromised, as stated earlier is unreliable. He does not mention Salim's name in any statement. He mentions one Siraj Zarda, which is hardly identification. He does not identify Salim Zarda in Court.
- Prabhat too is discredited as his first statement in April 2002 is completely different from his second statement in February 2003, a year later. He denies that he was sitting inside the petrol-pump cabin (**PW231 / Vol.-37 / Para-14 / Pg.12691)** however this improvement is admitted by the recording officer (**PW-244 / Vol.-**

39 / Para-159 / Pg.13236) and is wholly unreliable on the identity of those coming outside to buy petrol.

PART V-B

NOTE SUBMITTED IN CRIMINAL CONFIRMATION 6/2011 ALONG WITH CRIMINAL APPEAL NO.586/2001

(State of Gujarat v. Salim @ Salman Yusuf Sattar Zarda)

Summary of arguments made by Ms Nitya Ramakrishnan, Adv for Respondent – Salim Zarda, regarding inaccuracies in the Forensic Reports

1. **Thin layer Chromatography and Gas Chromatography – Insufficient for detecting Ignitable Liquid Residues by themselves individually or in conjunction with each other.**

Thin layer chromatography and gas chromatography have been carried out by **Mr. Talati** (PW-227).

Thin layer chromatography is used as a cleanup procedure and as a means of identifying dyes in gasoline. (P. 520 – Fire Debris Analysis). At P. 521, it is pointed out that as a cleanup procedure thin layer chromatography is obsolete while identifying dyes in gasoline is useful for the "fingerprinting" of gasoline (petrol), that is, it is useful for figuring out the brand of petrol, but not necessarily to figure out the presence of petrol. At the same page, P. 521, there is a discussion of the utility of analysis of gasoline dyes. It is pertinent to mention here that Thin Layer Chromatography even in the past required to be coupled with a UV detector and subjected to a Marquis reagent and the presence of a dye does not necessarily mean presence of petrol.

Gas chromatography is of many types and the many methods are

listed in Chapter 13 of Fire Debris Analysis. It has, however, to be combined with a detector such as Mass Spectrometry or UV Spectrometry or a Flame Ion Detector to be useful and in this case no spectrometry was carried out. As per Page 236 of Fire Debris Analysis (second paragraph) “It is important to understand that gas chromatography is not an analytical tool in itself. It is merely a separation technique. It is necessary to couple it to another device – called a detector – in order to obtain a signal, and thus data. Once coupled to a detector, such as a mass spectrometer, a full analytical technique is obtained.” Also Gas Chromatography cannot be used as a stand alone test, and will only show the retention time and abundance.

In the instant case, it has been admitted that the multiplier test was not conducted which is an admission that a mass spectrometer was not used. The mass spectrometer carries involves the electron multiplier test.

Redsicker supports the aforesaid (See pages 306-309 of the book Practical Fire and Arson investigation)

2 **Identification of sub-strates**

While it may be possible to identify petrol from a neat sample of petrol (P. 306-310 from the book Practical Fire and Arson Investigation, (Redsicker) it is not possible to do so in case there is any interference. Paragraph 12.1.2 at Page 442 of Fire Debris Analysis (Stauffer)details “how fire debris samples can contain organic compounds hindering the identification of ILR”. Paragraph 12.1.2 running from Page 442 to Page 446 details the many factors which will give an indication of what kind of interfering

substrates may be present at the place of a fire. Extremely pertinent here the mention of PVC Flooring (the same as in the train) at Page 448 as one such interfering substrate. Page 454 contains Figure 12-4 titled "Origins of the different categories of interfering products through the steps undergone by the substrate" which details the many ways in which interfering products 'contaminate' the sample of ignitable liquid making identification of the liquid impossible. At Page 175, Paragraph 6.3.6, it is observed that "There are numerous examples of common household materials containing detectable levels of petroleum. Without an appropriate comparison sample, it is difficult for the analyst to form an opinion as to whether or not a recovered ignitable liquid is incidental or foreign to tested material. By having a sample of the same substrate material, the criminalist is able to determine what, if any, ILR are inherent to that specific substrate. In addition, some materials may produce significant pyrolysis and partial combustion products that may interfere with the analyst's ability to interpret the data." The substrate data may show inherent products *including an ignitable fluid, with identical features as the suspected external one/* data may be

It is, thus, imperative to understand the substrates involved so that hydrocarbon residues emitted or left by such interfering substrates do not contaminate the finding of ignitable liquid. Mr. Talati has admitted that he made no such differentiation and neither did he ask the police to do so.

See also Lentini on petrol (gasoline being the most misidentified IL) **(Lentini, pg 161)**

"*Gasoline is, in this author's experience, the most frequently misidentified ignitable liquid residue. That is because many of the compounds present in gasoline as it comes from the pump are also produced when polymers, such as PVC and polystyrene, degrade as a result of exposure to heat. The key to avoiding misidentifications is making sure that the ratios between groups of compounds and within groups of compounds are consistent with the standard. Toluene is a very common pyrolysis product. It is an unusual fire debris sample that does not contain toluene at some level. Because it is one of the first compounds to evaporate, one does not expect to see a tall toluene peak in the absence of equally tall xylene peaks in a sample that is positive for gasoline. Figure 5.12 shows the chromatogram of a 10- μ l standard of gasoline adsorbed using an activated charcoal strip, and eluted with diethyl ether spiked with 100 pm perchloroethylene. The toluene and xylene peaks are almost equally tall. If a fire debris sample contains toluene from gasoline, it will be accompanied by xylenes and the higher peak groupings of gasoline. Toluene that is not so accompanied comes from something other than gasoline. Xylenes are also produced by the decomposition of plastics but they are the first group of compounds that we can examine for correct inter-group ratios. Figure 5.13 shows ion 91, the base ion for xylenes, from gasoline in three different stages of evaporation, kerosene, and a medium petroleum distillate. The relative ratios for the three peaks are almost indistinguishable."*

3 **Pyrolysis**

As per the definition on Page 96 of Fire Debris Analysis, "Pyrolysis is a process by which a solid (or a liquid) undergoes thermal degradation into smaller volatile molecules, without interacting

with oxygen or any other oxidants."

Pyrolysis products are one of the most serious interferants. As per **P. 461 of Fire Debris Analysis** in the third paragraph, "*Pyrolysis products can seriously complicate the chromatogram, however, they are not known to create diagnostic patterns that are typical of IL. However they will significantly modify them, when both pyrolysis products and IL are present." On the same page, in the previous paragraph the example of polystyrene (PS) products has been used to state that "Again, although many aromatic compounds that are present in gasoline, aromatic products, and some petroleum distillates are present in PS pyrolysis products, the diagnostic patterns for IL are not present."*

In a situation as in the Sabarmati express, the PVC flooring, the plastic-heavy construction of the coach itself, the passenger's belongings and clothing all of which are capable of producing the same aromatic compounds as are found in petrol, it is not possible for anybody to come to a positive finding of petrol without first accounting for such interferences, including pyrolysis products, which admittedly existed in the coach. If attention may be drawn towards **P. 475 of Fire Debris Analysis,** it is stated that the interpretation of a chromatogram should be performed using the following steps:

1 Identify the sample and its substrate.
2 Estimate the typical contribution from that substrate.
3 Determine to which influences the substrate was subjected.
4 Estimate the effect of these influences.

5 Study the TIC from start to end, including peak identification.

6 Study the MC in the regions of interest, including peak identification.

None of this has been done in the instant case.

As observed by the Court itself, there are many factors from Weathering to microbes which can interfere with the Ignitable Liquid Residues. These are listed from Pages 468 to 474 of Fire Debris Analysis.

Comparison samples and their analysis in normal and burnt condition, and subtracting those patterns alone will lead to a correct conclusion. This too was not done.

4 **Sample Selection**

As **per P. 164 of Fire Debris Analysis**, adequate care has to be taken to choose the right sample and to choose it with all due care. Due care has to be taken of the properties of Ignitable Liquid properties. As per P. 165 of Fire Debris Analysis, Volatility significantly affects how a liquid fuel burns and its potential for having detectable quantities that survive a fire. The more volatile a liquid, the faster it evaporates. As per PW 240, a temperature of 910 degrees Celsius was reached in the coach. The possibilities of any amount of liquid fuel surviving at that temperature are remote. When coupled with the fact that neither was a proper sample taken nor was there any consideration of substrate properties, this makes the FSL report wholly unreliable.

The same section goes on to speak about consideration of the sample location at Page 166. It has been noted in the first Paragraph of Section 6.2.4 titled "Consideration of Sample Location" as "Samples that are protected from the fire can better retain ILR than those that are exposed to the fire. Similarly, samples found at lower levels often contain a greater quantity of ILR due to the natural spread of a liquid by gravity." ILR here refers to Ignitable Liquid Residue.

5 Unreliability of assumptions about the fire based on 'pour pattern' and temperature of the fire

As per PW-240, Mr. Dahiya in his statement to the Special Investigations Team, he has opined that the pour pattern was a natural one (answer to Query No. 7. On the contrary, Fire Debris Analysis states the following at Page 138, "**As a result, the presence of an ignitable liquid must not be drawn solely from the shape of a fire pattern, unless exceptional circumstances allow for this. Also, many times an investigator might think there is a liquid involved as he or she observes irregularly shaped patterns. In such instances, the laboratory analyst should not necessarily expect a positive identification of an ignitable liquid because these patterns might be created by factors other than the pouring of a liquid. Besides flashover, these factors may include melting from a polymer present on the ceiling of a room or from a particular venting configuration." This is precisely what PW 240 has done. According to PW-240 Alligatoring is observed. In an article named "Mythology of Arson Investigation"** it has been observed that Alligatoring has given rise to many myths including that the

shape of Alligatoring proves whether it was a fast or a gradual fire. It has been pointed out that there is nothing to substantiate such a conclusion. The same article goes on to quote the international non-profit named the National Fire Protection Association which is regarded as an authority on fire safety (at P. 7 of the article) "**The final word on this and most other myths may be found in NFPA 921. Here is what it says about alligatoring:**

Interpretation of Char. The appearance of the char and cracks has been given meaning by the fire investigation community beyond what has been substantiated by controlled experimentation. It has been widely stated that the presence of large shiny blisters (alligator char) is proof that a liquid accelerant was present during the fire. This is a misconception. These types of blisters can be found in many different types of fires. There is no justification that the appearance of large, curved blisters is an exclusive indicator of an accelerated fire. Figure 6.5.5, showing boards exposed to the same fire, illustrates the variability of char blister.

It is sometimes claimed that the surface appearance of the char, such as dullness, shininess, or colors, has some relation to the use of a hydrocarbon accelerant or the rate of fire growth. There is no scientific evidence of such a correlation, and the investigator is advised not to claim indications of accelerant or fire growth rate on the basis of the appearance of the char alone."

Similarly, it has been stated that the practice of estimating the

origin of a fire based on its perceived temperature is faulty (at Page 18): Actually, fire temperature and the perceived speed of the fire are not valid indicators of a fire's cause.

A major misconception underlying many false determinations of arson is that the temperature achieved by a particular fire can help an investigator evaluate whether a fire was "normal" or "abnormal," with an abnormal fire being attributed to incendiary activity. Higher than "normal" temperatures indicating a set fire is such an appealing notion that even Paul Kirk bought into it, as previously discussed. To this day, investigators sometimes infer the presence of accelerants when they observe a melted aluminum threshold." The same caution is repeated in "**Practical Fire and Arson Investigation" a book cited by PW 240 himself as an authority. On Page 97** of Practical Fire and Investigation it has been stated that "*It has been suggested that the presence of large shiny blisters (alligator char) and the surface appearance of the char such as dullness, shininess or colours, have some relation to the presence of a liquid accelerant as the cause, but no scientific evidence substantiates this. The investigator is advised to be very cautious in using wood char appearance as an indicator as incendiarism*". In the same book at Page 76, it is observed that it is only at the initial stages of a fire that some conclusion can be drawn on the basis of the colour of the smoke or the flame.

6 **PW – 240's assertion that smoke could have been so thick as to completely obscure the flame, on a question as to why smoke was seen first and then flames.**

This assertion of PW-240 seems to have been selectively and misleadingly taken from Page 226 of Practical Fire and Arson Investigation. The explanation of PW 240 that when a large

amount of accelerant is used, smoke obscures the fire is not made out here at all. In fact, the opposite is stated at Page 226 that a fire in which smoke appears first might be a precursor to a flashover. In fact the smoke in the early stages would be scanty compared to later. (See Redsicker pg 78)

In such a flashover, all the soot and even bloodstains are pyrolised. A perusal of the 'Phases of Fire' at Page 67 show PW – 240's assumptions to be quite unfounded. As per the four phases of fire given, that is, Incipient, Emergent Smouldering, Free Burning and Oxygen-Regulated Smouldering, the theory that an accelerant like petrol would first produce smoke is not borne out. As stated above, it is more consistent with the idea that such a smouldering fire could lead to an increased in temperature leading to a flashover.

The following Arguments were made in Court on the second day of Court, that is, April 8, 2015

Fire Behaviour

As stated above, the four phases of fire that have been outlined on Page 67 of Practical Fire and Arson Investigation are: 1. Incipient, 2. Emergent Smouldering, 3. Free Burning, 4. Oxygen Regulated Smouldering.

An Accelerant induced fire, which is in the instant case, a petrol induced fire will have a very short incipient stage and will quickly come into notice. At Page 67 it is stated, "The incipient phase for a liquid accelerant in the presence of an open flame is obviously much shorter than that of a prolonged exothermic reaction, such as in spontaneous combustion." At page 68 it is pointed out that a

smouldering fire (as distinct from a flaming fire) may pass straight to oxygen related smouldering, without going into free burning. This could explain why smoke was seen first and then only later, the flames. The explanation of PW 240 that this always happens in a petrol induced fire is not supported by any scientific authority whatsoever. At page 58, the concept of a flame-spread is described, which is "the movement of the flame front across the surface of a material that is burning (or exposed to an ignition flame)." At page 64, in Section 3.7, there is a discussion on "Compartment Fires" according to which flame spread vertically and horizontally. An accelerant induced fire, it is reasonable to conclude, would have produced visible flame first, much before the smoke became so overwhelming that it completely obscured the flames. Page 89 of the book, Fire Debris Analysis, contains the definitions to Flaming Combustion and Smouldering Combustion where it is pointed out that smouldering fire is chemically a solid-to-gas reaction and the Smouldering Combustion often occurs "due to a deficiency of oxidizer. Glowing combustion can be sustained at a much lower concentration of oxygen than the 10% required for flaming combustion." This would most likely be the condition of air in a tightly stuffed coach which has by one estimate upto 250 people inside.

Though, an originally flaming combustion may die down in the absence of oxygen, to be replaced by dense smoke, a smouldering combustion, could straightaway transit to this stage and given enough oxygen, subsequently erupt into flames. This could also take the form of a flashover. PW-240 states that flashover is not possible in such a circumstance with some windows and doors open. On the contrary, it is scientific fact flashover can happen in

a compartment and that windows can break because of flashover. **As per Page 73 of Scientific Protocols for Fire Investigation, (Lentini)"***When flashover occurs in a compartment, one thing that usually happens is that the windows break. In fact, the breakage of the windows is often considered the event that defines when flashover has occurred."* Paragraph 3 on the same page describes how flashover has come to be accepted scientifically. Page 68-70 of the same book also states that flashover can occur when the temperature reaches 500 to 600 degree Celsius. Page 72 states that "The most intense parts of the fire will necessarily be in those locations where there exists a good air supply..". There needed to have been a scientific mapping of the coach and of the fire to figure out what actually happened. Instead, the forensic expert is trying only to support the prosecution theory with arguments that are not supported by established science.

Similarly, the discarding of the possibility of a short-circuit by PW 240 is not supported by any scientific study on his part and nor is it supported by any scientific authority. PW-240 has merely stated that since the train was stationary at the time, it was running on battery and therefore there can be no short-circuit. The same has been said in response to query no. 6 in Exh.1356. He states also that the FSL team studied this but there is no detail of why the possibility of short-circuit was ruled out.

In his answer to Query No. 5 in Exh. 1356. PW 240 has ruled out cigarettes as a cause because of the presence of flame retardant materials. What is ignored is that as per the railways itself, these materials only resist fire for 15-50 seconds (Exh. 993). The common misconception that a cigarette or a beedi would only

cause a gradual/weak fire has been specifically negated as per page 10 of the Mythology of Arson Investigation. It is pointed out that terms like sharp, gradual, fast or slow are terms that seem intuitively true but are actually so subjective as to be meaningless as scientific categories. The following extract is from page 10 of the Mythology of Arson Investigation, "*He then goes on to provide a perfectly reasoned analysis of why this should be so, but, like O'Connor, provides neither data (though he also provides a drawing), nor a definition of what is meant by "sharp," "gradual," "fast," or "slow." It seems to be a case of "I know it when I see it." To his credit, DeHaan cautions that a fast-developing fire may or may not be accelerated. Nonetheless, this is the type of "data" that an investigator may use to incorrectly "eliminate" a smoking fire, since smoking fires are not "fast-developing." (Actually, once a smouldering fire started by a cigarette makes the transition to flaming combustion, the speed of fire growth is not distinguishable from a fire ignited by an open flame*.)".

Conclusions have been drawn by PW-240 on incorrect scientific principles.

After this, the attention of the Court was drawn to the following articles/extracts which further support the theory of 'smouldering fire' as a cause for the fire.

Smouldering Combustion by T.J. Ohlemiller

On page 2-200, in the third paragraph, first column, after repeating the definition of smouldering fire, it is pointed out that

not only is a cigarette an example of smouldering combustion, it is also one of the most common initiator of smouldering in other materials, especially upholstery and bedding. Page 2-206, in the right hand column points out that smouldering is a major contributor to residential fire deaths. It is pointed out that in "two out of five tests the smolder process underwent a transition to flaming combustion after 65 to 80 minutes, which is close to the time at which total carbon monoxide exposure was estimated to be lethal." This extract at page 2-208 discusses smouldering fire in detail and on the same page in the third paragraph on the right hand side column states the following about how easily a smouldering fire can overcome a retardant, "Ohlemiller also found that both boric acid (a smolder retardant) and borax (a flame retardant) could each eliminate the transition to flaming when the retarded cellulosic insulation was the only fuel. However, the effectiveness of the acid and borax was substantially reduced if the smouldering fuel abutted unretarded wood (as it typically does in residential housing). Heat transferred from the smolder zone readily ignited the wood." The role played by wood in this example could easily have been played by a piece of cloth, clothing or luggage in the crowded coach. The answer of PW – 240 to query 5 where it is stated that an incidental fire will necessarily take hours and the flame retardants would necessarily stop such a fire is, as such, incorrect.

Article: An Analysis of Smouldering Fires in Closed Compartments and Their Hazard Due to Carbon Monoxide published by the US Department of Commerce, National Bureau of Standards

On page 5 of this Article, it is observed that "although CO appears

to be the principle hazardous agent of smoldering fires, other combustion products generated can increase the hazard." Further, on page 9 it is observed that in a smouldering fire, the level of carbon monoxide poisoning can reach a hazardous level. This is consistent with the fact, in the instant case, of death through asphyxiation. On page 10 it is noted that "It appears that hazardous conditions due to CO occur in 50 to 150 minutes and that the transition to flaming is also very likely in this period." On page 17, the results of two experiments are noted, in both a chair was burnt in the living room but in one case the door to the bedroom was open and in the other the door the bedroom was shut. In both cases, the transition to flaming occurred within an hour. It is pertinent to mention here, that one witness has seen a primus in the S-6 coach and people have a habit of being careless with such stoves and fuels not to mention with things like cigarettes. The possibility that the fire had nothing to do with the mob cannot be ruled out.

Article: Upholstered Furniture Transition from Smoldering to Flaming

On page 1030 of this Article under the heading Conclusions it is stated that "*Out of a total of 102 items subjected to smouldering ignition in laboratory tests, 32% burned up partially or completely without erupting in flaming: 64% did go to flaming, while the remainder were manually extinguished or were indeterminate."* In the next paragraph it is observed that "*The mean smouldering-to-flaming transition observed in the laboratory tests was 88 min, the minimum 22 min, and the maximum 306 min. The conclusion can be drawn that transition times in the range 22 to 306 min are possible,*

but NOT that transitions outside this range are impossible." As such, the insistence of PW-240 that only an accelerant based fire could have engulfed the coach so quickly is not correct. Smouldering fires can be fast or slow, no presumption of the use of petrol can be made, especially when there is no other corroborative evidence to suggest the presence of petrol when the correct techniques such as the combination of gas chromatography with mass spectrometry have not even been used."

Smouldering Combustion Phenomena in Science and Technology

On page 4, in the left hand column it is stated that "*Typical values in smouldering at ambient conditions are around 500-700 degree Celsius for the peak temperature and 6-12 kJ/g for the average heat of combustion; typical values during flaming are around 1500-1800 degree Celsius and* 16-30 kJ/g respectively." This article like others notes the possibility of solid objects sustaining smouldering fire. It mentions cotton, tobacco, dust, paper, peat, duff and hummus, wood, board of organic fibers, synthetic foams and charring polymers including polyurethane foam as solids that sustain smouldering. These are very common solids and many of these ingredient were definitely present in the unfortunate coach S-6. Smouldering fire can transition to flaming fire. At page 5, right hand column, second last paragraph it is observed that "*Thus, the transition from smouldering to flaming combustion provides a hazardous shortcut to flaming fires, which could be initiated with heat sources that are too weak to directly ignite a flame on the solid fuel." At page 11, it mentions Borax, a flame retardant and Boric Acid (a smoulder retardant), and notes that "Wang et al studied wood*

ignition and showed that Borax tends to reduce flame spread but promotes smouldering, conversely boric acid suppresses smouldering but has little effect on flame spread. This conflictive interaction of current flame-retardants with smouldering and flaming ignitions poses a dilemma in fire safety and requires further research." Flame retardants are, as such, no defence to smouldering fires. The answer of PW – 240 to query 5 where it is stated that an incidental fire will necessarily take hours and the flame retardants would necessarily stop such a fire is, as such, incorrect.

PART V-C

TABLE-A : That the following table in brief descending version of passengers travelling in various coaches of the train, including S-2, S-4, S-5, S-6, S-7 and S-8 about their place of sitting, place of escape, weapons carried by the mob and articles which were thrown inside and from which part of the coach and identification.

Sl. No.	Name of the Passenger	Place of sitting	Place of escape	Weapons carried by the Mob	Which articles were thrown inside and from which part of the coach	Description of smoke/fire	Identification
1	Mohmmad Imdad Bismillah Ansari PW-216 Exh.1115/ Vol.37	S-2 coach	NA	Iron rod and pipes - (para 3/Pg.12419)	One cloth soaked in inflammable liquid was thrown inside S2 coach (Para-3/Pg.12429)	This burning piece of cloth was doused with water by passengers (para 3/Pg.12429	
2	Kalpeshbhai Jha, PW-74/Exh.-607/ Vol.32 At the time of the incident, he	S-4	NA	Dhariya, Pipes, sword, many had plastic Carboys. (Para-3/Pg.-	Pelting stones, sprinkling petrol or kerosene like substance on the coach from the carboy,	After the throwing of the burning kakda, there was smoke coming out of the coach. (Para-	

	was in S-4 coach (para-26/Pg.-11040)			11027)	throwing of burning kakda and acid bulb. (para-3/Pg.-11027)	3/Pg.11027). Cross-He has admitted that he has not stated in his police-statement about the fire being started by kakda. (para-20/Pg. 11036)	
3	Hariram Shriramdev Chouhan PW-76/Exh.-613/ Vol.32	S-4	NA	Not stated	Stone pelting	Not stated	
4	Ashwinbhai Govindbhai Patel PW-118/Exh.727/ Vol. 33	S-5	NA	Sticks, Pipes, iron-rod, sword, carboys etc. Para-2/Pg,11327) Cross – improvement proved. (para-13/Pg,-11333)	Stone-pelting was going on from the metal-heap. The windows-rods were broken by pipes. Some persons were sprinkling liquid from the Carboy. (para-2/Pg.11327 to 11328) Cross-Improvement proved. (para-13/Pg.11333 to 11334)	Not stated	1st time identification . a)Irfan Mohammed Hanif Pataliya (A-1/S.C.No. 82/09) (Para-2/Pg.11329) Role-pelting stones in the mob. (para-2/Pg.11328) Cross-He admits that he has not seen this person before the incident and even after the incident, there has been no occasion to see or identify this person since the incident. (para-8/Pg.11331)
5	Rubidevi Sriramohan Mali PW-90/Exh.650/ Vol.33	Near Dahod side toilet	Uncons cious. Para-2/Pg.11152)	Not stated about the same	Glasses of windows and doors broken because of stone pelting (para-2/Pg.11151)	Smoke and shouts of fire and she fell unconscious (para-2/Pg.11152)	
6	Dilipkumar	1	Door	Dhariya,	Because of	There were	1st time

	Jayantilal Patel PW-124/Exh.738/Vol. 33		(Para-2/Pg.11363)	Pipes, Sword, carboys etc. (para-2/Pg.11363)	stone pelting the window glasses were broken and broke the aluminium window from outside. When he was sitting near the window, one person of the mob tried to attack him with a sword but he was saved by window iron-bars. Persons in the mob were throwing acid bulb, petrol bulb as well as petrol from the carboy. (para-2/Pg.11363) Cross-improvement proved. (para-7/Pg.11367)	shouts from the 3rd compartment and the iron-bars of the window came to be broken and from the window petrol-dipped kakda were thrown and fire started there. He excited the coach in order to escape from smoke and fire. He has seen many persons coming out while the coach was on fire and many persons came out in a burning condition. (para-2/Pg.11363). The spread of fire was upto 15 feet .(para-3/Pg.11363). He came out of the coach immediately after seeing smoke. (para-18/Pg. 121373). He says that sprinkling of petrol was being done from a distance of 3-4 feet and the acts of stone pelting, breaking of the windows with pipes and sprinkling of liquid were all going on simultaneously. (para-27/Pg.11377 to 11378). Cross –	identification: a) Shabbir Hussein Abdul Rahim Badam (A-1/S.C.No. 70/09) (para-2/Pg.121364) b) Abdul Sattar Ismail Giteli (A-13/S.C.No.-69/09) Role-persons in the mob at the time of the incident (para-2/Pg.11364) Cross-He admits that he had not given any reference to age, body-structure, face, physical features, identification marks etc. in his police statement and even after the incident, there has been no occasion to identify anyone.(para-8/Pg.-11369)

						improvements proved. (para-7/Pg.11367).	
7	Govindsinh Ratansinh Panda, PW.202/Exh.1024/ vol.36	3	North-side door (para-3,Pg.12249)	Stone, iron rod, pipe, knife etc. (para-3/Pg.12249), (Para-4/Pg. 12249)	Stone from on side.(para-3/Pg.12249)	Notice of flame from Godhra side during stone pelting, sees others going under the seat and sees, faces, breathing problems sees flames gets down. (para-3/Pg.12249), cross-improveemnt proved. (para 7/Pg. 12252)	An attempts was made to identify the persons who had assaulted hiim on the off side however, he could not identify any one.
8	Pujaben Bahadursinh Kushwaha PW-81/Exh.625/ Vol. 32	4,5,6	Jumped from the vestibule passage side towards Vadodara (para-2/Pg.11985).	Weapons and stoned. (para-2/Pg.11085) Croos-improvements put.(para-11/pg.11088)	Windows broke because of stone-pelting and hence her family went towards the toilet-side. From the smell she could make out that petrol like liquid was being poured into the toilet (para-2, Pg.11085)	Because while she was standinv near the west-side toilet, because of the smoke in the coach, she was feeling suffocated. (para-2/Pg.11085) after coming out, when she turned around, she saw fire. (para-2/Pg. 11085; para-12/Pg.11089). Because of the articles thrown in the coach from the window, smoke was suddenly caused and leading to breathing issues and burning in the eye. (para-9/Pg. 11088; para-12/Pg. 11089) Tough initially she says that the smoke had a petrol-like	

						smell of different types (para-12/Pg.11089)	
9	Radheshyam Ramshanker Mishra PW-113/Exh.715/ Vol.33 (Hawaldar in the military) 2005 statement	Near 7	Window Para-2, Pg.11298	Not stated	Stones from windown (para-2/Pg.-11298	There was a flash due to explosion of a bottle resulting into smoke which so intense that he had difficulty in breathing. During this time there was shouts, 'fire' 'fire'. The smoke had become so intense that nothing could be seen. When he came out, he saw the coach on fire (para-2/Pg.-11298)	
10	Gyanprakash Lalanprasad PW-80/Exh.-621/ Vol. 32 Father-90% brun-injuries. Mother-40% burn injuries. Nephew-died (paras-2&4/Pg.11079)	8		Many people ran towards the train and started to pelt stones. (para-3/Pg.11079) Cross-improvement is proved. (para-8/Pg.11082)	Stone pelting went on for a long time. There was sprinkling of petrol and chemicals in the backside and fire was started from the back side and fire was started from the back side. (para-3/Pg. 11079) Cross-improvement proved. (para-8/Pg. 11082). Window-glass came to be broken in stone pelting and before the iron window could be shut, burning object was thrown inside (para-7/Pg.11081).	Burning-object was thrown inside from broken window which resulted in thick black-smoke. Due to which PW-80, his father, mother and his nephew came down from the upper-berth. Thereafter, the door came to be opened to enable people to come out (para-7/Pg.11081)	

11	Pravinkumar Amthalal Patel PW-170/Exh.873/ Vol.35	8	Door (para-14/Pg. 12008)	Stones, sticks, dhariya etc. (para-3/Pg.-12000) Cross – improvement is proved. (para-19/Pg.12010)	Kerosene from the carboy was poured from the 3rd window in the back side. (para-3/Pg. 12000) Cross-improvement is proved. (para-19/Pg.12010)	He sees smoke smoke coming from Godhra-side and because of fire he gets down. (para-3/Pg.-12000) He admits that due to smoke, there was suffocation and breathing difficulty. (Para-10/Pg.12005). Cross-improvement is proved. (para-19/Pg.12010.	Without name points out 3 persons as being present on the offf-side and who allegedly had looted 2 ring, 1 chain and cash. a)Ahmed Abdul Rahim Hathibhai (A-22/S.C.No. 69/09), b) Jabir Bin Yamin Behera (A-2/SC No.72/09 and c) Siddik Ibrahim Hathila (A-1/SC No. 86/09) Cross:-Even though he denies stating in his 1st police statement dated 17.4.02 that “as he had fallen unconscious, he cannot identify those 2 person who had taken his 2 ring, 1 chain and cash” (Para-14/Pg.12008) and hence this omission has been proven through the S. 161 of Cr.P.C. statement recording has admitted this omission. (PW-222/Exh.1136/ Vol. 37/Para-3/Pg.12478

12	Hariprasad Munalal Sharma PW-97/Exh.668 Vol. 33 Wife died	11,13	North-West door, (para-8/pg. 11199)	Pipe, Dhariya, Sword and Stones. (para-2/pg. 11196)	Windows were broken in the stone-pelting and the stones started to come inside (para-2/pg. 11196)	People started shouting from back-side that there is fire during which time there was smoke and it was smelling of petrol. He and his wife were coughing due to the smoke. Both has hands and his clothes were burnt at the time of coming out of the coach. (para-2/Pg. 11196) cross-improvement proved (para-5/Pg.11198)	
13	Amar Kumar Jamnaprasad Tiwari PW-79/Exh.619/Vol. 32	24	Door near seat 324 (para-4/Pg. 11071)	Not stated	Stone Pelting broke window-glasses. (Para-13/pg.11076)	Stone pelting shouts of fire by his father, he had burning sensation in the eye. When he gets down he sees the coach on fire. (para-4/Pg.11071). Cross-there was intense smoke and nearby persons were not visible. (Para-8/Pg. 11074) at the time of fire, he was on the top-most 3rd berth in front of seat #24. (para-13/Pg. 11076)	
14	Poonamkumari Sunilkaur Janoprasad Tiwari PW-119/Exh.729/ Vol. 33 Both her father-in-law	24	Door (para-2/Pg. 11337)	Not-stated	Stone-pelting broke windows. A burning cloth came from the window which was put-out by her father-in-law.. (Para-	Fire started from the back-side and smoke also started to come because of which there was difficulty in breathing. She saw the coach on fire when	

	and mother-in-law-died.				2/Pg.11337)	she came out. (ara-2/Pg.11337). Cross-improvement proved. (para-5/pg. 11339).	
15	Babubhai Somdas Patel PW-122/Exh.733/ Vol.33	24	Window near seat no. 24 (para-3/Pg.11354).	Swords, Dhariya, iron-rods, and other weapons, (para-2/pg. 11353) Cross-improvement proved. (para-6/pg.11356)	Stones-pelting (para-2/pg. 11353)	Smoke started from the Godhara end of the coach. (para-2/pg.11352) the incident of stone pelting and development of smoke was sudden, due to which there was difficulty in breathing. (para-3/pg. 11354) Cross-improvement proved. (para-6/pg.11355)	1st time identification of a) Yunus Abdul haq Samol (A-2/SC No. 78/09) (para-2/pg. 11353) Role-present in the mob (para-2/pg.11353) Cross- He admits that he had not stated in his 1st police statement that he can identify the members of the mob and had not given any information about the age, body structure or identification related features though he had stated he can identify some of them he had stated he can identify some of them if shown to him. (para-5/pg.11355; para-8/pg. 11356) He admits that he cannot remember detail facial features

							details of the person identified in the dock by him as it is not possible to remember those details in 2 minutes (para-8/pg. 11356)
16	Premaben Ayodhyaprasad Mali PW-89/Exh. 648/ vol.33 Shailendra-her nephew died.	25-29	Off side windo w (para-3/Pg. 11148)	Not stated.	Stone (para-3/pg. 11147)	After stone pelting, shouts of fire. When she came out, she saw that the coach was on fire.(para-3/pg.-11147 to 11148) Cross-She admits that the smoke started suddenly and spread in the entire coach resulting breathlessness. (para-6/pg.11149)	
17	Nitinbhai Chaturbhai Patel PW-120/Exh. 731/ Vol. 33	33	Windo w (para-2/pg. 11342) .	Not stated	Stone-pelting broke window glasses. (para-2/pg. 11342).	He exited the coach upon seeing fire and smoke. Due to smoke, he had felt suffocation. Upon exit, he saw the coach on fire. (para-2/pg. 11342) He admits that he had told in his police-statement that the members of mob might have set the coach on fire with some inflammable material. (para-9/pg. 11345). He also admits that windows were not	An attempt is made to identify the accused for the 1st time in the court.

						opened till the time there was smoke in the coach. (para-10/pg.11346)	
18	Vandanben Ramanbhai Patel, PW-95/Exh.663/ Vol. 33, 2005 statement	33	Window (para-2/pg. 11177)	Not stated	Stones from broken window. (para-2/pg.11176)	There was smoke in the coach and fire and passengers shouted 'fire' 'fire'. Breathing was difficult because of smoke. (para-2/pg.11176 to 11177) she saw the coach on fire after she came out and had seen Prahlabhai and Savitaben taken out of the coach with burn injuries. (para-3/pg.11177) The smoke was very inflammable and it was so dense that even a nearby person was not visible.; However, she is not able to say as to what was caused the smoke. She was having breathing problems as she was on the upper berth. At that time the passengers on the floor of the coach were shouting the there is fire in the coach. (para-6/pg.11178).	
19	Satishmukar Ravidatta	33,34,35	Window	Upon firing by the	Stones from window (para-	Fire started from the back-	

	Mishra PW-96/Exh. 666/ Vol. 33		(para-2/pg. 11184)	police, a mob of muslim men, women and children having pipes, Lakdi, Sword, rods, dhariya and karboy full of liquid were chases away. (para-2/pg.11184, para-6/pg. 11187).	2/pg. 11183)	side resulting in smoke. While he was trying to escape with his wife and daughter, the fire took strength and followed him. He re4ceived burn injuries when he was trying to come out of the windows. (para-2/pg. 11183 to 11184) Cross-improvement put. (para-6/pg. 11187). The coach had caught fire at the time he came out from the window. (para-9/pg. 11188)	
20	Hetalben Babubhai Patel PW-84/Exh.634/Vol. 32 Lalitaben-died. Manguben died. Prahlabhai-died at hospital while receiving burn treatment.	35	Not stated	Stone-pelting and weapons in general. (para-3/pg.11109)	Burning kakda and inflammable materil from the broken window. (para-3/pg. 11109)	Kakdas followed by inflammable material followed by a flash. There was not visibility due to intense smoke. Lack of breathing, suffocation and heat could be felt on the eyes and ears. After she was pulled out, she was the coach on fire. PW-157 had suffered burn injuries. (para-3/pg.11109) because of the kakda thrown inside followed by the inflammable material, the	

						reksine seat and the passengers luggage caught fire and there was smoke in the coach. She had fallen unconscious inside the coach. (para-7/pg. 11111)	
21	Parchottambhai Gowardhanbhai Patel PW-107/Exh. 690/ Vol. 33 Statement of 2005	35	Door (para-2/pg. 11254)	Sticks, Pipes and iron rods. (para-2/pg. 11254)	Stone-pelting broke window glasses and iron-rods. Inflammable liquid was poured, followed by burning kakda from the back-side window. (para-2/pg. 11254)	Coach set on fire because of throwing of burning kakda. (para-2/pg. 11254)	
22	Savitaben Tribhuwandas Sadhus PW-157/Exh. 828 Lalitaben-died Manguben-died	37	Window (para-2/pg.11802)	Not stated	Stone pelting broke the window and then burning kakda and petrol like substance was thrown. (para-2/pg. 11801) . Cross-improvement denied but proved through the S.161 of Cr.. PC statement recording officer-PW-222/ Vol. 37/para-9/pg. 12480.	Because of throwing of burning kakda and petrol like material, there was fire from Godhra-side as well as where they were sitting . One Kakda fell on her shawl which she threw. One kakda also fell on her shen she came down from upper berth. (para-2/pg. 11801 to 11802). Cross-improvement denied but proved through the sec. 161 of Cr. PC statement recording officer-PW-222/ vol. 37/ para-9/pg.	

						12480	
23	Jayantibhai Umeddas Patel PW-150/Exh.812	40	Window (para-3/pg.11658	Sticks, dhariya, pipe carboy etc. (para-3/pg. 12658)	Stone pelting broke the windows and kakda came from the windows. (para-3/pg.11658) Cross-improvement put. (para-10/pg.11662)	Fire started because of kakdas thrown inside because of which there was smoke inside due to which he was feeling suffocated (para-3/pg. 11658, para-7/pg.11660). The smoke did not start immediately after throwing of kakda but he cannot estimate the time after which smoke was seen. (para-7/pg. 11660)	1st time identification of a0 Rajsh Jussein Mitha (A-1/SC No. 81/09), b) Yunus Abdul Haq Samol (A/2/SC No. 78/09), (c) Shokat Faruk Pataliya (A-5/SC No. 75/09) and (d) Mohammed Saiyed Abdul Salam Badam (A-4/SC No. 85/09) (para-2/pg. 11658 to 11659) Role Present in the mob (para-2/pg.11658) Cross- He admits that he cannot say about age or physical features of the persons identified in the court. (para-4/Pg. 11659; para-11/pg. 11663; para-12/pg. 11663
24	Gayatriben Harshabhai Panchal PW-175/Exh. 891/ Viol. 35 Harshadbhai Panchal, Nitaben Panchl, Pratikshaben Chayaben, travelling with	41-46	On-side window. (para-3/pg. 12068)	Sword, rod, pipe carboy etc. (para-3/pg.12068)	Inflammable liquid from carboys alongwith burning object was thrown inside from the windows. (para-3/pg. 12068) (para-18/pg. 12076).	On account of inflammable liquid followed by the burning object thrown in the coach, there was smoke which was to an extent that they could not see any thing inside and she lost	1st time identification of a) Habib Binyamin Behra (A-2/SC No. 75/09) b) Abid Hussain Abdul Karim Shaikh (A-31/SC No. 69/09, (c) Idris Abdulla

	her died .					contact with her family (para-3/pg. 12068)	Umraji (A-24/SC No. 69/09), (d) Mohammed Jabir Abdulla Kalam, (A-44/SC No. 69/09), (e) Jabir Bininyamin Behra (A-2/SC No. 72/09), (f) Ibrahim Abdul Razak Samol (A-5/SC No. 78/09 and (g) Sadikkhan Sultankhan Pathan (A-11/SC No. 69/09) (para-5/pg. 12069) Role- 7 accused persons seen by her when she had got out on the on side. (para-5/pg. 12069) Cross- she admits in her police statement dated 8.3.02, that, she cannot identify any of the accused persons even if shown to her. (para-7/pg, 12070); she also admits that, she has not given any physical description or identification features of those person identified by

							her. (para-10/pg. 12071); She also admits that, she had told the SIT that, she does not wish to say anything more than what had stated in her police statement. (para-13/pg. 12073).
25	Hariprasad Maniram Joshi PW-86/Exh.638/ Vol. 33 Wife-died	43	N-W Door, (para-3/pg. 11131)	Not stated	As the window of seat # 41-46 remained opened, the stones came from there. (para-3/pg. 11131) because of stone-pelting, large number of passengers went on upper berth. (para-3/pg. 11131 & para-6/pg.11133)	When passengers had gathered near Seat # 72 side, suggestion of fire came from seat # 72 side. Plumes of smoke resulted in suffocation. (para-3/pg. 11131) cross-suggestion came loudly from # 72 that there is fire in the coach, he admits that he had seen fire in seat # 33 compartment (para-6/pg. 11133) at the time when he was scrawling on the floor towards N-w door, his backside and hand of his jacket as well as the cap had burnt effect alongwith his hand and face. (para-9/pg. 11134).	
26	Raju	45	Off-	Not stated	He went	Went towards	

	Kripashanker Pandey PW-78/Exh.-615/ Vol. 32		side Door (para-2/pg. 11067)		towards the toilet-side passage to hide from stone pelting. (para-2/pg. 11067.	the toilet-side passage to hide from stone pelting. At that time some passenger shouted that there is smoke in coach. Does not know from which side the smoke came from. He and others exited from door after it was opened by someone. Once out, he saw S-6 coach on fire and it was burning from back side (para-2/pg. 11067) Cross-improvements proved. para-6/pg.11068	
27	Maheshbhai Jayantilal Shah PW-87/EXH.-641/Vol.-33	47	Door (Para-3/Pg.-11139)	Stick, Iron rods and other weapons. (Para-3/P.g11136) Cross-Improvement proved. (Para-5/Pg.-11138)	Intensive stone-pelting was going on. Then windows were broken by stone-pelting and pipes. Burning kakdas, bulbs and stones were coming through the windows. (Para-5/Pg.11138)PW-82	Smoke was caused due to some burning object thrown in the back-side and shouts came that the coach has been set on fire from the back-side. Thereafter the coach caught fire. He was feeling suffocated and had nausea when he came out. (Para-3/Pg.-11137; Para-6/Pg.11139) Cross-Improvement proved. (Para-5/Pg.11138 to 11139)	
28	Rajendrasingh	51	Windo	The	Stone-pelting	Smoke started	

	Ramfersingh Rajput PW-77/EXH.-614/Vol.-32		w (Para-3/Pg.11060)	members of mob had sticks and other weapons. (Para-2/Pg.-11059) Cross-Improvement about sticks proved. Para-13/Pg.-11063)	and attack with sticks and pipes broke the windows. (para-3/Pg.11060) Cross-Improvement proved. (Para-13/Pg.11063) He heard 2-4 stones falling on the coach. (Para-12/Pg.11063)	in the back-side (Para-3/Pg.11060) it was not possible to see other people because of smoke. (Para-8/Pg.11061) He came out from the window because of smoke. (Para-12/Pg.11063)	
29	Mandakiniben Nilkanth Bhatiya PW-168/EXH./867/Vol.3	54	Window (Para-3/Pg.-11956	Carboy, Dhariya, Swords, pipe. (Para 3, Pg.11956) Cross-Improvement proved. (Para-12/Pg.11960)	Acid bulb and burning kakda from window. (Para-3/Pg.11956); Cross-Improvement proved. (Para-17/Pg.11963)	Because of the throwing of inflammable material in the back side fire started resulting in smoke. Stone pelting, kakda, suffocation, felt unconscious, she was taken out. (Para-3/Pg.-11956) Cross-Improvement proved. (Para-12/Pg.11960)	1st time identification of a) Usmangani Mohmmad Coffeewala (A-4/S.C. No.-78/09), (b) Siddiq Ibrahim Hathila (A-1/S.C. No.86/09) (A-52/S.C. No.69/09) (Para-4/P.g 11957) Role- People in the mob standing on the metal heap who had carboy and weapons. Cross- She admits in her police statement dated 6-3-2002, that, she is not able to give any detail as to the body structure, clothings worn by them, identification features etc. (Para-

							13/Pg.1196); She also admits that, had not stated before the police as to whether she will be able to identify anyone or not as the police did not ask her. (Para-15/Pg.11962) ;
30	Nilkanth Tulsidas Bhatiya PW-75/EXH.-610/Vol.-32 *Burn injuries from thighs to knees due while escaping from the windows. (Para-4/Pg.11043)*	56	Windo w (Para-4/Pg.-11043)	Pipes, dhariya, swords, plastic carboy in the hand. (Para-3/Pg.-11043) Cross-entire improvemen t admitted. (Para-14/Pg.1104 9) Cross- He had seen people with plastic carboy in the hand. (Para 18, Pg.11051)	Stone, petrol and acid bulb from outside. (Para-3/Pg.11043; Para-18/Pg.-11050) Stone-pelting done from the metal heap. (Para-14/Pg.11048)	The smoke had started from the back-side/Dahod Side. (Para-3/Pg.-11043) however, this improvement is proved in the cross. (Para-14/Pg.-11043) He climbed up to escape stone pelting and he noticed smoke. Then there was denser smoke because of which he was feeling suffocated. Thereafter the fire spread. In order to escape from fire, people went towards the door. (Para-4/Pg.-11043) Cross-The smoke was coming out in large quantity and was chemical-like. (Para-10/Pg.11046)	
31	Rakeshbhai Kantilal Patel	56	Door near	Attacking the	While he was near the toilet-	Members of the mob had	Hasan Ahmed Charkha was

	PW-85/Exh.-637/Vol.-32 2005 statement hence omitted here.		seat#72 (Para-4/Pg.11120)	windows with weapons like pipes, sticks etc. (Para-4/Pg.-11119)	side, passengers were shouting that train is being set on fire by throwing kakdas. Some Hindi speaking persons had doused the said burning kakdas by pouring water. At this time the mob was shouting that, "**UNHONE BUJA DIYA, AUR LAO, AUR JALAO**". Thereafter, they had thrown some more liquid from outside and again through burning kakdas and because of the burning smoke was caused. (para-4/Pg.-11119) Cross-Improvement proved. (Para-14/Pg.-11125)	thrown some liquid inside and some more kakdas after the intial ones were doused by water. There was smoke and suffocation in the inner part of the coach. The smoke only increased after opening of the off-side windows. He had seen fire in the coach from the middle which was coming out from the (Para-4/pg.11119-11120) Cross- He admits that he came to know about the smoke based on the shouts raised by someone in the front part of the coach. (Para-13/Pg.11124) Cross-improvement proved. (Para-14/Pg.11125)	pointed out in the court for the 1st time as being part of the mob that was pelting stones w.o. any reference to name or features. (Para-5/Pg.-11120) Cross-He has admitted that he had not stated in his police statement that he can identify those who were pelting stones. (Para-14/Pg.-11125; Para-15, Pg.11126)
32	Virpal Chhedilal Pal PW-82/EXH.-627/Vol.-32 (officer of the Indian Air force) Sima Pal – died	58, 59, 61	N-E side door. (Para 8/Pg.11094; Para 12, Pg.11096; Para-15/Pg.11097)	Not stated.	Stone-pelting broke the windows. (Para-7/Pg.11094) Heard sound of breaking of bottles and this smoke was suffocating in nature. (Para-8/Pg.-11094). However, he has admitted that, he has	Breaking of bottles (Para-10/Pg.-11099) in the back-side resulted in smoke which was chemical in nature and causes suffocation. He saw fire in the back-side after he had jumped out from the door. He had	

					not stated this fact in his police statement. (Para-17/Pg.-11098)	also seen his wife's shawl, sari and her bag burning. However, someone from S-7 coach was able to get in and was able to remove the shawl and doused the burnt part of the Sari and pushed her down from the door. (para-8/Pg.-11094) Smoke started in the coach only after he heard a sound and this smoke spread in the entire coach. This smoke was poisonous and was chemical in nature. (Para-12/Pg.-11096) The smoke had spread in the entire coach after he had come out. (Para-16/Pg.-11098)	
33	Bachubhai Dhanjibhai Ladwa PW-94/EXH.-662/Vol.-33 2005 statement	On the Floor in 57-62	Door near seat#7 (Para-9/Pg.-11172)	Pipes, hockey, sticks, sword, karboy etc. (Para-5/Pg.11168) Cross-improvement proved. (Para-8/Pg.11171)	Something was poured in the back-side due to which there was fire. Burning kakda was also thrown from the windows. (Para-5/pg.11168) Cross-improvement proved. (Para-8/Pg.11171) He has not seen anyone pouring the liquid. (Para-15/Pg.-11174)	Something was poured in the back-side due to which there was fire. When he came out of the coach, then he saw the flames coming out of the windows. (Para-5/Pg.-11168) Cross-improvement proved. (Para-8/Pg.-11171)	

34	Subhash Chandra Ramchandra Mishra PW-114/EXH.-719/Vol.-33	69	N-E Door opened by him. (Para-2/Pg.11305)	Not stated.	Stones breaking glass of windows. (Para-2/pg.11305)	While he was standing holding his polio-affected sister and his mother near the toilet, he saw that 2 youngsters had kept haw-stack on the window and smoke started spreading because fire was put to the coach in this manner. Because of difficulty in breathing due to smoke, he came out. He saw the coach on fire when he looked back. (Para-12/Pg.-11305) Cross-improvement proved. (Para-12/Pg.11309)	
35	Shantilal Shankarbhai Patel PW-93/EXH.-642/Vol.-33	70	Door. (Para-2/Pg.-11144)	Not stated.	Stone pelting done by 50-100 persons resulted in breaking of windows. (Para-2/Pg.11144)	Coach was on fire when he came out of the door. (Para-2/Pg.11144)	
36	Shardaben Manubhai Patel PW-93/EXH.-657/Vol.33 Some co-passengers who went inside the coach died. 2005 statement.	72	North-each Door. (Para-2/Pg.-11162)	Not stated.	Poured petrol and threw burning Kakda inside the coach. (Para-2/pg.-11162)	Coach was on fire when she came out of the door. (Para-2/Pg.-11162) When standing near the toilet-side of the coach, she notice that there was smoke after throwing of burning kakda.	

						(Para-6/Pg.11164)	
37	Prakash Harilal Teli PW-99/EXH.-674/Vol.-33 2005 statement.	Near the Daho d-side toilet.	North-East Door. (Para-3/Pg.-11210)	Not stated.	Stones-pelting. (Para-3/Pg.11210)	The fire started from the out-side toilet near the place where they were sitting. At this time there was smoke in the coach and he had difficulty in breathing. He and his family members came out after the door came to be opened. When he looked back at the coach, fire had spread. 9Para-3/Pg.11210) He has not seen any fire flames at the time of sighting smoke. (Para-8/Pg.-11212) Cross-improvement proved. 9Para-8/Pg.-11213)	
38	Rampal Jigilal Gupta PW-102/EXH.-680/Vol.-33 2005 statement.	Near the Daho d-side toilet.	North-East Door was opened. (Para-2/Pg.11225)	Not stated.	Stones-pelting (Para-2/Pg.11225)	At this time there was smoke in the toilet near the place where he was sitting. He and his family members came out after the door came to be opened. Because of smoke he had difficulty in breathing. When he looked back at the coach, fire had started from the door that he had got out from. Many people were	

						able to come after the fire had started. (Para-2/Pg.11225; Para-6/Pg.11227)	
39	Somnath Sitaram Kahar PW-103/EXH.-681/Vol.-33 2004 statement, hence omitted here.	Near Dahod side luggage rack.	N-E Door was opened. (Para-2/Pg.-11232; Para-9/Pg.11235)	Sticks and rod. (Para-2/pg.-11232)	Stone pelting resulting in breaking of the glass of windows & doors. (Para-2/Pg.11232)	He had difficulty in breathing when he was standing near the toilet-side in order to escape stone-pelting. (Para-2/Pg.11232) His eyes were burning because of smoke. (Para-7/Pg.11234) The door came to be opened when there was smoke in the coach and they came out. (Para-9/Pg.11235)	
40	Rambhai Bhudardas Patel (PW-123/EXH.-734/Vol.-33	Not stated	N-W Door (Para-2/Pg.11359)	Not stated.	Sprinkled Petrol in the back side and thew kakda so that, liquid was coming from the back side **(AATHAMANA BHAGETHI).** (Para-2/Pg.11358-11359) Cross-Improvement proved. (Para-5/Pg.-11360)	Coach set on fire by sprinkling of petrol in the back-side and throwing of kakda. He felt suffocated because of the smoke and became unconscious. (Para-2/Pg.-11359) he felt suffocation due to smoke. (Para-3/Pg.11359) Cross-Improvement proved. (Para-5/Pg.-11360)	
41	Hirabhai Umeddas Patel PW-160/EXH.-839	Not stated	Window (Para-3/Pg.-	Dhariya, Sticks, Iron rod. (Para 3/Pg.11843	Stones, petrol like substance and burning kakda was	Due to throwing of the inflammable material	1st time identification of a) Sabir Hussain

			11843)	)	thrown from the window. (Para-3/Pg.11843)	followed by burning Kakda, there was smoke in the coach resulting in suffocation and burning of the eyes. (Para-3/Pg.11843)	Abdul Rahim Badam (A-1/S.C. No.-70/09) and (b) Yasin Habid Malik (A-14/S.C. No.-69/09) (Para-3/Pg.11843) Role-Out of the people who were pelting stones. 9Para 3/Pg.11843) Cross-he admits in his police statement dated 8-5-2002, that, he can identify any person out of those already arrested. (Para-4/Pg.-11844); he admits that, he had not given any specific identification features on the basis of which he was able to identify the two persons in the court (Para 11/Pg.11847)
42	Veenaben Mafatbhai Patel PW-83/EXH.-630/Vol.-32 3 of her co-passengers died. CHECK	Not stated.	Window (Para-4/Pg.-11102)	Dhariya, Pipes, Sword, Carboys etc. (Para-3/Pg.111020	Some liquid was thrown in the coach and thereafter kakda was thrown. (Para-3/Pg.-11102)	Throwing of liquid and thereafter kakda resulting in fire in the coach. (Para-3/Pg.11102)	
43	Jitendra Mangalgiri	Not stated	Door. (Para-2/Pg.1	Not stated about the same	Stone-pelting broke the window and	The fire started because of petrol-bomb	

			1380)		Petrol-bomb was thrown inside. (Para-2/Pg.-11380) Cross-Improvement proved. 9para-3/Pg.-11381)	being thrown inside. Many of his co-passengers felt suffocation due to smoke. (Para-2/Pg.-11380 to 11381) Even he felt suffocation because of smoke. 9Para-3/Pg.-11381) He admits that fire started sometime after stone-pelting. (Para-3/Pg.11381) Cross-Improvement proved. (Para-3/Pg.11382)	
44	Keshubhai Devjibhai Patel PW-91/EXH.-651/Vol.-33 Bhimjibhai and Lakhubhai – died.	Not stated	Not stated.	Not stated about the same.	From the window, burning bag, Kakda, gabha came to be thrown. (Para-3/Pg.-11156) Cross-improvement proved. (Para-11/Pg.11159)	There was fire in the coach. There was heavy smoke in the coach and nothing was visible which caused suffocation. He saw coach on fire after getting out. (Para-3/pg.-11152 to 11153) He admits that 1st there was smoke in the coach because of which passengers shouted that there is fire and this smoke spread in the compartment. The smoke was so intense that he lost his consciousness. (Para-9/Pg.11158 to 11159) Cross-improvement	

						proved. (Para-11/Pg.11159)	
45	Maheshkumar Cheljibhai Chowdhary PW-98/Exh.-670/Vol.-33	Not stated	Window (Para-2/Pg.-11205)	Not stated.	Stones were coming from the windows. (Para-2/Pg.11204 to 11205)	Sometime after stone-pelting, smoke started. He could smell of petrol being sprinkled. He was feeling suffocated due to the smoke. (Para-2/Pg.-11205) Smoke started in the train very suddenly after stone-pelting. (Para-5/Pg.-11206) Cross-Improvement proved. (para-6/Pg.-11207)	Has tried to identify the members of the mob but has not been able to do so.
46	Amrutbhai Joitaram Patel PW-121/EXH.-73/Vol.-33	Not stated		Not stated about the same	Continuous stone-pelting. (Para-2/Pg.-11348)	He could smell something in the coach followed by smoke with people raising shouts of fire. He felt suffocation due to smoke. (Para-2/Pg.-11348 to 11349) Cross-improvement proved. (Para-6/Pg.-11350)	
47	PW-92 (is not in the paper-book)						
48	Mukeshbhai Ramanlal Makwana PW-109/Exh.-695/Vol.-33	S-7	-NA-	Pipes, sticks, dhariya, spear, many white/yellow colour karboy of 10 liter capacity. 9Par-2/Pg.-11265) Cross-improvement proved. (Para-	On S-6 coach, the mob thew acid bulbs and sprinkle inflammable liquid after breaking of the windows. (Para-2/pg.-11265) The sprinkling of petrol was taking place from karboy	From S-7 window, he saw smoke and the coach immediately caught fire. (para-2/Pg.-11265)	1st time identification of a) Mujjaffar Usman Hayat (A-5/S.C. No.69/09). (Para-3/Pg.-11266) Cross-He admits that he had not stated in his

				20/Pg.11272)	below the coach. (Para-18/Pg.-11271)		police statement dated 7/03/2002 that he can identify the members of the mob as and when they are arrested. (Para-9/Pg.-11268) He has not given any information about the age and body structure related information in his police statement. (Para-11/Pg.-11269) Role-In the mob. (Para-3/Pg.-11266)
49	Bhupatbhai Maniram Dave PW-110/Exh.-696/Vol.-33	S-7	-NA-	Sticks, pipes, swords, plastic carboys. (Para-2/Pg.11276)	Were putting petrol on the kakdas and throwing them inside and were sprinkling petrol on the coach from the karboy. (Para-2/Pg.11276)	Due to this fire started in the coach and smoke started and when he came out of S-7 coach, he saw S-6 coach on fire. (Para-2/Pg.-11276)	1st time identification of a) Abdul Sattar Ismail Giteli (A-13/S.C. No.69/09) (Para-2/Pg.-11277) Cross-He admits that he had not given any information about the age, body structure, other identification feature related information in his police statement. (Para-11/Pg.11281) Role-in the mob. (Para-

							2/Pg.-11277)
50	Gandaji Ramsinhji Thakor PW-117/Exh.-726/Vol.-33	S-8	-NA-	Not stated.	Stone pelting on his coach. (Para-2/Pg.-11322)	Not stated.	Has tried to identify the members of the mob but has not been able to do so. (Para-2/Pg.-11323)

TABLE-B : Learned counsel appearing for the defence has relied on the following table to show that Coash No.6 was a closed space / coach No.S/6 was overcrowded / place of escape from S/6 coach:

1	2	3	4	5
NAME OF PASSENGER	**SEAT NO**	**PARTICULAR – S/6 WAS A CLOSED PLACE**	**PARTICULAR-S/6 WAS OVERCROWDED**	**PLACE FROM WHERE THE PASSENGER ESCAPED**
Dilipkumar Jayantilal Patel PW-124/EXH-738	1	(**PW-124 Dilipkumar Jayantilal Patel [Karsevak] /EXH-738/Vol.33** – the doors and windows came to be closed in S-6 when the train stopped for the 2nd time. (**Para-17/Pg.11373 & Para-26/Pg.-11377).**		Door Para 2, Pg.11363
Govindsinh Ratansinh Panda PW.202/Exh. 1024	3	PW-202 Gonvidsing Ratansing Panda [Armyman]/Exh.-1024/Vol.36- After he saw the flames of a rapidly spreading fire and when he had difficulty in breathing, he came down from the top berth. When tried to open the off-side door towards the engine-side of the coach, he found the same to be wound up with wire and there were belongings as well. He was able to open the door only with the help of 2-3 other people.	**PW-22 Gonvindsing Ratansing Panda [Armyman]/Exh.-1025/Vol.36**-the entire coach was completely full of passengers and there was a large number of bajrang dal members. (**Para 29/ Pg.12248)**	North-side door (para-3, Pg.12249)

		(Para-3Pg.12249) He also admits in cross that when the bajrang dal people had boarded the train after it had briefly stopped, they told all the windows and doors to be closed as something had happened. (Para-8/Pg.12253)		
Pujaben Bahadursinh Kushwaha PW-81/EXH-625	4,5,6	The passengers started to close the windows of the coach when the mob attacked with stones and weapons **(PW-81 Pujaben Bahadursingh [Passenger]/ Exh.-625/Vol.32/Para-2/ Pg.11085)** and after these was smoke, the people inside the coach were raising shouts 'open the door'. **(para-9/Vol.-32/pg.-11088)** She also says that the karsewaks had closed the vestibules-door towards the Vadodara-side as well. **(Para-13/Pg.11090)**	The passage near the door as well as the toilet was full with the passengers and karsevak that any movement was difficult and that on each 2 Karsevak were sleeping. **(PW-81 Pujaben Bahadursingh [Passenger]/ Exh. 625/Para-6/Vol.-32/pg.-11086 to 11087]**	Jumped from the vestibule-passage side towards Vadodara
Radheshyam Ramshanker Mishra PW-113/EXH-715	Near 7			Window Para 2, Pg.11298
Gyanprakash Lalanprasad PW-80/EXH.-621	8	The passengers started to close the glass and iron-strip windows as well as the doors of the coach when stone-pelting began near the A-cabin **(PW-80 Gyanprakash Lalanprasad Chaurasiya [Passenger]/Exh.-621/ Vol.32/Para-7/Pg.11081)** and many people, including him and his family members were able to escape from the coach as someone opened the door in the off-side of the coach. **(PW-80**	S-6 had 150-200 passengers. **(PW-80 Gyanprakash Lalanprasad Chaurasiya [Passenger]/ Exh.-621/Para-2/Vol.-32/pg.-11078)** Even though he had reservation near Seat no.72, yet he did not go there as the door on that side as well as the	At the time when there was intense smoke in the coach, the door came to be opened and then they were able to get down. Para-7, Pg.11081

		Gyanprakash Lalanprasad Chaurasiya/ Exh.621/ Vol.32/ Para-7/Pg.11081)	passage was full with the passengers and no movement was possible. **(Para-5/ Pg.11080)**	
Pravinkumar Amthalal Patel PW-170/EXH.-873/Vol.-35/	8	**PW-170 Pravinkumar Amthalal Patel/Exh.873/ Vol.35-** because of excessive stone pelting they had closed the windows. **(Para-3/Pg. 12000)** even though he says that the doors and windows (on-side and off-side) came to closed when the train stopped for the 2nd time. **(Para-10/Pg.-12005)**	PW-170 Pravinkumar Amthalal Patel/Exh.873/vol.-35- there was over-crowding in the coach because of the passengers and kasevaks and they were sitting in the space between the seats, compartment and toilet passages. **(Para-8/Pg. 12004)**	Door (Para-14/Pg.-12008)
Hariprasad Munalal Sharma PW-97/EXH-668	11,13	They saw a mob of 200-300 people with weapons and therefore they closed the windows. **(PW-97 Hariprasad Munnalal Sharma [Passenger]/EXH.-668/Vol. 33/Para-2/Pg. 11196)**	**PW-97 Hariprasad Munnalal Sharma/EXH.-668/Vol.-33-** the S-6 was completely full of passengers and so he sat on the floor beside his reserved seat. **(Para-1/Pg.-11195)** there were many such passengers who were sitting on the floor. **(Para-8/ Pg.11199)**	North-West side door Para 8, Pg.11199
Amar Kumar Jamnaprasad Tiwari PW-79/EXH.-619	22 & 24 (reserved in 17,18,19 & 21)	Passengers had closed the windows **(PW-79 Amarkumar Jamnaprasad Tiwari [Passenger]/Exh.619/Vol.32 / Para-4/Pg.11071)**	S-6 had 75-80 VHP, BD and Ramsewaks. **(PW-79 Amarkumar Jamnaprasad Tiwari [Passenger]/Ex**	From the door near to seat #24

			h.-619/Para-3/Vol.-32/pg.11070 & Para-7/Pg. 11073)	
Poonamkumar Sunilkuar Jannoprasad Tiwari PW-119/EXH.-729	24		**PW-119 Punamkumari Sunilkumar Tiwari [Passenger]/EXH.-729/Vol.-33-** People were sitting in the passage, on the seats as well as on the top berth of the seat in the compartment. **(Para-3/ Pg.11338)**	Door para 2, Pg. 11337
Babubhai Somdas Patel PW-122/EXH.-733	24	**PW-122 Babubhai Somdas Patel [Karsevak]/EXH.733/ Vol.33-** There was extensive stone pelting on the train because of which the windows and doors came to be closed. **(Para-3/Pg. 11354)**		From the window near the seat no. 24 where he was sitting. Para 3, Pg. 11148
Premaben Ayodhyaprasad Mali PW-89/EXH.-648 Connected to PW-90/Exh.650	25-29		The coach was extremely crowded. There were passengers sitting in the coach-passage and other open spaces. There were many people sleeping on the reserved seats as well. **(PW-89 Premaben Ayodhyaprasad Mali [Passenger]/EXH.648/Vol.-33/Para-5/Pg.11148)**	Off side Window para 3, Pg.11148
Vandanaben	33	**PW-95 Vandanaben**	**PW-96**	Window

Ramanbhai Patel PW-120/EXH.-731		**Ramanbhai Patel [Karsevak] /Exh.-663/Vol. 33-** because of stone pelting the window and doors came to be closed **(Para-2/Pg.11176)**. Even as other people were escaping from a door that came to be opened, however, she was not able to (para-2/Pg.-11177)	**Satishkumar Ravidutt Mishra/EXH.-666/Vol.-33-** the S-6 was completely full of passengers from Lucknow station and other passengers were sitting on their reserved seat. **(Para-4/Pg.-11184)**	(Para-2/Pg.-11177)
Nitinbhai Chaturbhai Patel PW-120/EXH.-731	33	There was extensive stone pelting and because which the windows came to be closed **(PW-120 Nitinbhai Chaturbhai Patel [Karsevak] /EXH.-731/Vol. 33/Para-2/ Pg.11342)** and they remained closed till there was smoke in the coach. **(Para-10/ Pg.11346)**		Window para 2, Pg.11342
Satishkumar Ravidatta Mishra PW-96/EXH.-666	33,34,35	**PW-96 Satishkumar Ravidutt Mishra – Passenger /EXH. 666/Vol.33-** Because of the intensity of stone pelting, the windows came to be closed. **(Para-2/Pg.-11183 to 11184 & Para-5/Pg.-11186)**		Window
Hetalben Babubhai Patel PW-84/Exh.634	35	**PW-84 Hetalben Babubhai Patel [Karsevak]/Exh.634 /Vol.32/Para-7/Pg.-11111-** before becoming unconscious, he had un-successfully tried to open the door of the train.	There was arrangement for 2200 karsewaks to go from North Gujarat to Ayodhya on 22/02/2002 and when the train returned from Ayodhra then it was full of karsewaks. (**PW-84 Hetalben Babubhai Patel [Karsevak]/Exh .634/Vol.-32/Para-6/Pg.-**	Not stated.

			11110)	
Parshottambhai Gowardhanbhai Patel PW-107/EXH-690	35	Because of the fire and resulting smoke, in order to help the escape, the karsewaks opened the off-side door from which many people came out. **(PW-107 Purshottambhai Gordhanbhai Patel [Karsevak]/ EXH.690/Vol.-33 /Para-2/ Pg.11254)**	The S-6 coach was totally jam packed with karsewak and passengers. **(PW-107 Purshottambhai Gordhanbhain Patel [Karsevak]/EXH.-690/Vol.-33/Para-10/Pg.11258 & Para-13/ Pg.11259)** and there were approximately 100 karsewaks travelling. **(para-12/Pg.11259)**	Door Para 2, Pg. 11254
Savitaben Tribhuwandas Sadhu PW-157/EXH-828	37	**PW-157 Savitaben Tribhovandas Sadhu /Exh.828/Vol.-35/Para-2/ Pg.-11801-** When the mob started to pelt stones, the doors and windows came to be closed. The S.161 Cr.P.C. recording officer has proved the omission of **PW-157(Savitaben Tribhovandas Sadhu)** had in her police-statement dated 28/01/2005 she had said that 'after some one had opened the engine side off-side door, then there was a scramble of people to get out'. **(PW-243 Suryakant Bhudarbhai Patel, P.I. LCB/ EXH.-1393/EXH.-38/PARA-19/PG.-13122)**	**PW-157 Savitaben Tribhvandas Sadhu/Exh.-828/ Vol.35/Para-3/Pg.-11802-** as the coach was co crowded that there was no free movement of people.	Window Para 2, Pg. 11802
Jayantibhai Umeddas Patel PW-150/EXH.891	40	**PW-150 Jayantibhai Umeddas Patel/Exh.812/Vol. 34/Para-3/Pg.11658 & Para-7/Pg.11660 & Para-10/Pg.11662-**	**PW-150 Jayantibhai Umeddas Patel/Exh.-812/vol.-34 –** a S-6 passenger	Window Para 3, Pg.11658

		When the mob started to pelt stones, the doors and windows came to be closed.	says that all the coaches of Sabarmati Express was over-crowded with passengers and karsewak and that it was difficult even to sit properly. **(para-5/ Pg.11659)**	
Gayatriben Harshadbhai Panchal PW-175/EXH.-891	41-46	**PW-175 Gayatriben Harshadbhai Panchal/Exh. 891/Vol. 35-** At the time of 2nd stoppage, the windows were closed due to excessive stone pelting. **(Para-3/Pg. 12068)** Admits in the cross examination that even at the time when the train left Godhara station, many karsewak got on to the train running and told to shut the windows as stone-pelting is on. **(Para-12/Pg.12072)**	**PW-175 Gayatriben Harshadbhai Panchal/Exh. 891/Vol. 35- the entire coach was completely full of passengers and karsevaks with the luggage of the passengers kept in the passage which made it difficult to even visit the toilets. (Para-9/Pg.12071)**	Window on the on-side (Para-3/Vol.-35/Pg.-12068)
Hariprasad Maniram Joshi PW-86/EXH.-638	43	In order to escape the smoke, as soon as the smoke rose up, he took some air and crawled towards seat#1 to seat#3 as there were large no. of people near seat#72 and the door got opened when he reached near the door and so he ran out of the door. **(PW-86 Hariprasad Maniram Joshi [Passenger]/ EXH-638/Vol. 33/Para-3/Pg.11131)** he also admits of having told the police on 12/06/2002 that the doors and windows of the coach were closed. **(Para-7/Pg.-11133)**	When he reached the coach, it was extremely crowded. There were passengers in the coach-passage, gallery near the doors, space near the toilet and near the seats inside the coach and there were approximately more than 150 passengers. **(PW-86 Hariprasad Maniram Joshi [Passenger]/ EXH.-638/Vol.-33/Para-1/**	Off side Door near Seat No.1 Para 3 Pg.11131

			Pg.11130)	
Raju Kripashanker Pandey PW-78/EXH.-615	45	Many people were able to escape from the coach as someone opened the door in the off-side of the coach. **(PW-78 Raju Krupashankar Pande [Passenger]/ Exh.-615 /Vol.32/Para-2/Pg.11064 & 5) (PW-78/Exh.-615/Para-2/Vol.-32/Pg.-11066)**	S-6 had 150-200 passengers. **(PW-78 Raju Krupashankar Pande [Passenger/] Exh.-615/Para-1/ Vol.-32/pg.11066).** He also says that the train must be having 2000-2500 karsewak over and above the passengers. **(para-5/pg.11068)**	He had gone in the gallery between the 2 toilets and at that time some passenger shouted that there is smoke in the coach. At that time someone opened the door towards the off-side, he came out, then he saw the coach on fire from the back-side. (Para-2/Pg.-11067)
Maheshbhai Jayantilal Shah PW-87/EXH.-641	47	When the train was attacked by a mob having stick, pipes etc, the windows came to be closed. **(PW-87 Maheshbhai Jayantilal Shah [Karsevak]/ EXH.-641/ Vol.-33/Para-2/ Pg.11136)**		Not stated. However, he admits that, he came down from the coach from off side of the coach. Para 6, Pg. 11139
Rajendrasingh Ramfersingh Rajput PW-77/EXH.-614	51 (reserved for 62, 63 & 64)		S-6 had more than 100 passengers. **(PW-77 Rajendrasingh Ramfersingh [Passenger]/Exh.-614/Para-11/Vol.-32/pg.11062)**	He escaped from a broken window and thereafter, he along with other volunteers took out his father from the window. He had also seen that,

				other people were also coming out from the window. Para 3, Pg. 11060.
Mandakiniben Nilkanth Bhatiya PW-168/EXH.867	54	**PW-168 Mandakiniben Nilkant Bhatia/Exh.867/ Vol.-35/Para-7/Pg.11958-** the doors and windows came to be closed after the stone pelting started when the train stopped for the 2nd time.	**PW-168 Mandakiniben Nilkant Bhatia/ Exh.867/Vol.-35/ Para-6/Pg.11957 –** the S-6 coach was packed and it was not possible to move around as people were sitting in the coach passage. It was so much so that when the stone pelting started near A-cabin, she could not even manage to go to her. **(Para-8/Pg.-11958)**	Window para 3, Pg. 11956
Nilkanth Tulsidas Bhatiya PW-75/EXH.-610/Vol.-32/Pg-11042 to 11058	56	Due to commotion at the station, passengers closed the windows and doors and it remained closed when the train stopped for the 2nd time near A-cabin. **(PW-75 Nilkanth Tulsidas Bhatia [injured]/ Exh.610/ Vol.32/Para-3/Pg.-11043 & Para-9/Pg.-11046)**	S-6was jam-packed with passengers **(PW-75 Nikanth Tulsidas Bhati [injured]/ Exh.-610/Para-13/ Vol.-32/pg.-11047)**	Through a window, according to this witness after the fire started, people started to flee towards the door. (Para 4/Pg.11043) he does not see that people could not escape from one Godhra side door on the off side.
Rakeshbhai Kantilal Patel	56	When he was coming out from the toilet near		He though that even if

PW-85/Exh.-637		Seat#72, they poured something from outside and again put kakdaa following which there was smoke inside and this caused suffocation to people inside. At that time he told everyone to open the windows on the off-side,. This did not reduce the suffocation and so he told people to open the doors as well. He realised that staying inside is going to kill every one, hence he suggested that the front door should also be opened. **(PW-85 Karsevak/ EXH-637./Vol.32/Para-4/ Pg.-11119 to 11120)**		he remained inside, he would die of suffocation and so he opened the off-side door of S-6 coach and she came out from the same. (Para-4/Pg.11120)
Virpal Chhedilal Pal PW-82/EXH.-627	58, 59, 61		There was so much of crowding that it was not possible to even reach the toilet. **(PW-82 Virpaul Chedilal Pal [Passenger]/Exh.-627/Vol.32/Para-11/Pg.11096)**	Door para 12, Pg. 11096 and Para 8 Pg. 11094. He also says that, the door that he had come out from was about five to six feet away and that, this door was open. Para 15, Pg.11097.
Bachubhai Dhanjibhai Ladwa PW-94/EXH.-662	60 or 62	Because of stone pelting, the windows on both sides came to be closed the coach was completely full. **(PW-94 Bachhubhai Dhanjibhai Ladva [Karsevak]/EXH.-662/Vol.-33/Para-9/Pg.-11171 to 11173)**	The coach was completely full. **(PW-94 Bachhubhai Dhanjibhai Ladva [klarsevak]/EXH.-662/Vol.-33/Para-9/Pg.-11171 to 11173)**	Door near seat#7 (para-9/Pg.11172)
Subhash	69	There was extensive stone		N-E Door

Chandra Ramchandr Mishra PW-114/EXH.-719		pelting and because which the windows came to be closed. There was too much smoke due to which breathing was difficult. Hence, he opened the outside door and came out carrying his sister and mother. At the time that he was near the toilet side, he had heard knocking from outside on the sliding door. **(PW-114 Subhashchandra Ramchandra Mishra [Passenger]/EXH.-719/ Vol.33/Para-2/Pg.-11305)**		Para 2, Pg.11305
Shantibhai Manubhai Patel PW-88/EXH.-642	70			
Shardaben Manubhai Patel PW-93/EXH.-657	72			Door (Para-2/Pg.11162)
Veenaben Mafatbhai Patel PW-83/EXH.-630	S/6 (in Cross she admits her S.161 version dated 5/03/2002 that she was in General Coach.	The doors and windows came to be closed to protect the coach from stone-pelting. **(PW-83 Veenaben Mafatbhai Patel [Passenger-Karsevak]/Exh. 630/ Para-9/Vol.32/ Pg.11104)**		Window para 4, Pg.11102
Rubidevi Sriramohan Mali PW-90/EXH.-650 Connected to PW-89/Exh.648	Passage near the engine side Toilet		The coach was extremely crowded, due to which she was not able to reach the reserved seats and she had to sit in the toilet passage. **(PW-90 Rubidevi**	From window. Para 2, Pg.11152

			Shrirammohan Mali [passenger] /EXH.-650/Vol.-33/Para-3/Pg.-11152)	
Keshubhai Devjibhai Patel PW-91/EXH.-651	Not stated		The coach was full with the karsewak and passengers and people were sitting in the passage along with their luggage due which there used to be difficulty in even going to the toilet. **(PW-91 Kesubhai Devjibhai Patel [Karsevak]/ EXH.-657/Vol.-33/Para-5/Pg.11163)**	
Maheshkumar Cheljibhai Chowdhary PW-98/Exh.-670				Window Para 2, Pg. 11205
Prakash Harilal Teli PW-99/EXH.-674 Connected with PW-102/EXH.-680	Near the Dahod-side toilet	As there was suffocation, he and his family members came out of the coach when someone opened the door. **(PW-99 Prakash Harilal Tailli [Passenger]/EXH.674/ Vo.33/Para-3/Pg.11210)** and both the doors also were closed. **(Para-5/Pg.11211)** and someone opened the off-side door as him and other people were feeling suffocated and anxious and difficulty in breathing **(Para-8/Pg.11212)** and people started to push each other to get out as soon as the door came to be opened. (Para-	As S-7 was crowded, so despite his reservation he had come to S-6 and sit near the Dahod-side toilet seat in S-6 coach. **(PW-99 Prakash Harilal Tailli [Passenger]/EXH.674/Vo.-33/Para-3/Pg.-11210** He also says that the passengers were sitting on the wash-basin as well as the door-passage. **(Para-5/Pg.-11211)**	North-East side door Para 3, Pg.11210

		8/Pg.11212 to 11213)	there were about 200-250 passengers in S-6. **(Para-6/ Pg.11211)**	
Rampal Jigilal Gupta PW-102/EXH.-680 Connected with PW-99/EXH.-674	Near the Dahod side toilet	As it was cold in the night, so so the vestibule sliding door as well as both the main doors came to be closed. **(PW-102 Rampaul Jigilal Gupta [Passenger-injured]/EXH.- 680/ Vol.33/ Para-1/Pg.-11224)** and because of the stone pelting the passengers sitting inside closed the windows. **(Para-2/Pg.11225)** and people were able to come out after it was getting difficult to breathe as the door on the off-side came to be opened. **(para-2/Pg.-11225 & Para-10/Pg.-11229)**		N-E door of the coach, Para 2, Pg.11225
Somnath Sitaram Kahar PW-103/EXH.-681	Near luggage rack near the Dahod side toilet.	He and his family was able to get out after there was smoke in the coach when someone opened the off-side door. **(PW-103 Somnath Sitaram Kahar [Passenger/EXH.-681/Vol.-33/Para-2/Pg.11232 & Oara-9/Pg.11235)**		From the N-E door Para 2, Pg.11232
Amrutbhai Joitaram Patel PW-121/EXH.-73		**PW-121 Amrutbhai Joitaram Patel [Karsevak]/EXH.-732/Vol.-33 –** There was extensive stone pelting on the train because of which the windows and doors came to be closed. **(Para-2/Pg.11348 to 11349)**		Window para 2, Pg.11349
Rambhai Bhudardas Patel PW-123/EXH.-734	NA	**PW-123 Rambhai Bhudardas Patel [karsevak]/EXH.-734/Vol.-33-** the windows and doors came		From the N-W Door Para 2, Pg.11359

		to be closed at the time of stone-pelting. **(Para-3/Pg.-11359)**		
Jitendra Mangalgiri Goswami PW-125/EXH.739	NA			Door Para 2, Pg.11380
Hirabhai Umeddas Patel PW-160/EXH.-839	NA	**PW-160 Hirabhai Umeddas Patel/Exh.-839/Vol.35 (Para-3/Pg.11843 & Para-8/ Pg.11846) –** when the mob started to pelt stones, the doors and windows came to be closed.		Window Para 3, Pg. 11843

TABLE-C : Learned counsel appearing for the defence has relied on the following table of injured passengers in S/6 coach and the medical history:

Sr. No.	NAME OF PASSENGER	SEAT NO.	MEDICAL HISTORY GIVEN IN THE M.L.C. RECORDS
1	Gonvindsinh Ratansinh Panda PW.202/Exh.1024	3	Laceration and abrasion injury on his fingers. (Exh.-535/Vol.32/Pg.-10936 dated 27/02/2002)
2	Gyanprakash Lalanpurasad PW-80/EXH.621/Vol.-32	8	**Superficial blackening of face and hands.** (Exh.-569/Vol.-32/Pg.-10994 dated 27/02/2002)
3	Pravinkumar Amthalal Patel PW-170/EXH.-873/Vol.-35/Vol.-35	8	No injury inside the coach. (Exh.541/Vol.-32/Pg.-10943 dated 27/02/2002)
4	Poonamkumar Sunilkumar Jannoprasad Tiwari PW-119/EXH.-729	24	Smoke inhalation and difficulty in breathing (Exh.-557/Vol.-32/Pg.-10982 dated 27/02/2002)
5	Babubhai Somdas Patel PW-122/EXH.-733	24	**Burning sensation on face and hands** and difficulty in breathing. (Exh.-575/Vol.32/Pg.-11000 dated 27/02/2002) Mild congestion, inhalation burns, difficulty in breathing, chest pain and no external burns. **His face covered in 'carbon soot'.** (Exh.-494/Vol.32/Pg.-10865 dated 27/03/2002)
6	Nitinbhai Chaturbhai	33	Difficulty in breathing. He also had **blackening**

	Patel PW-120/EXH.731		**of face.** (Exh.-564/Vol.32/Pg.10989 dated 27/02/2002)
7	Satishkumar Ravidatta Mishra PW-96/EXH.-666	33,34, 35	**Superficial burns of the face, whole of right face, arm and upper arm, lower back region and left hand totaling about 15% superficial burns. (Exh.-570/Vol.32/Pg.-10995 dated 27/02/2002)**
8	Savitaben Tribhuwandas Sadhu Pw-157/EXH.-828	37	**9% superficial burns** of face, hands, both sides and both fore arm lower parts along with difficulty in breathing. (Exh.-568/Vol.-32/Pg.10993 dated 27/02/2002) **1st to 2nd degree burns** on the right upper leg as well as **12% thermal and respiratory burns** and throat pain and eye burns. (Exh.-545/Vol.-32/Pg.-10952 dated 7/05/2002)
9	Jayantibhai Umeddas Patel PW-150/EXH.-812	40	Pain in the left side of the chest and smoke inhalation. (Exh.580/Vol.-32/Pg.-11005 dated 27/02/2002) Complained of difficulty in breathing, inhalation burns and pain in the chest. **His face was covered with black mesh.** There was no external burn. (Exh.-488/Vol.-31/Pg.-10858 dated 27/03/2002)
10	Raju Kripashanker Pandey PW-78/EXH.-615	45	C.L.W. injury on the right frontal region (due to a hit by a a blunt-object on the right side of the head) (Exh.-579/Vo.-32/Pg.11004 dated 27/02/2002)
11	Mandakiniben Nilkanth Bhatiya PW-168/EXH.-867	54	Difficulty in breathing. **Blackening of face.** (Exh.-562/Vol.32/Pg.-10987 dated 27/02/2002) Complain of **burning in the neck** and chest and inhalation burns and inhalation of fumes. (Exh.-508/Vol.-32/Pg.-10879 dated 10/04/20020)
12	Nilkanth Tulsidas Bhatiya PW-75/EXH.-610/Vol.-32/Pg.-11042 to 11058	56	**Total 6% superficial burns.** The burn injuries were **on left thigh (middle part, left knee joint, left leg below left knee joint, left thigh (lower part), front side of knee joint**. (Exh.-571/Vol.-32/Pg.-10996 dated 27/02/2002)
13	Prakash Harilal Teli PW-99/EXH.-674 Connected with PW-102/EXH.-680	Near the Dahod-side toilet	Difficulty in breathing and inhalation of smoke. (Exh.589/Vo.-32/Pg.-11014 dated 27/02/2002)
14	Rampal Jigilal Gupta PW-102/EXH.-680	Near the	Difficulty in breathing and inhalation of smoke. (Exh.585/Vol.-32/Pg.-11010 dated

	Connected with PW-99/EXH.-764	Dahod side toilet	27/02/2002)
15	Rakaran Sriram Gupta	Near the Dahod side toilet	Difficulty in breathing and smoke inhalation. (Exh.-576/Vol.32/Pg.11001 dated 27/02/2002)
16	Ramnaresh Ramnilgori	Near the Dahod side toilet	Burning in eyes and pain and swelling in the right foot. (Exh.-582/Vol.-32/Pg.11007 dated 27/02/2002)
17	Shyam Bihar Sriram Gupta	Near the Dahod side toilet	Difficulty in breathing and smoke inhalation. (Exh.-586/vol.-32/Pg.11011dated 27/02/2002)
18	Rambhai Bhudardas Patel PW-123/EXH.734	NA	Difficulty in breathing due to smoke inhalation. Laceration on the right knee due to hard and blunt substances. (Exh.578/Vol.-32/Pg.-11003 dated 27/02/2002)
19	Hirabhai Umeddas Patel PW-160/EXH.839	NA	Burning pain the eye. (Exh.-577/Vol.-32/Pg.-11002 dated 27/02/2002) Complain of difficulty in breathing and cough. Burning pain in the eyes and throat pain. **Face is covered in 'carbon' soot.** (Exh.-490/Vol.-32/Pg.-10861 date 27/03/2002).
20	Amar Kumar Jamnaprasad Tiwari PW-79/EXH.-619	22 & 24 (reserved in 17, 18, 19 & 21)	Difficulty in breathing, burning pain in the throat. (Exh.-558/Vol.-32/Pg.-10983 dated 27/02/2002)
21	Ashish Sunilkumar Tiwari		Smoke inhalation injury and breathlessness. (Exh.-559/Vol.-32/Pg.10984 dated 27/02/2002
22	Dinesh Narinhdas Patel		**Burn** on face and hands and difficulty in breathing. (Exh.560/Vol.-32/Pg.-10985 dated 27/02/2002)
23	Amruthbhai Jainarayan		Difficulty in breathing. (Exh.-561/Vol.-32/Pg.10986 dated 27/02/2002)
24	Vinobaben Mafatbhai Patel		**Superficial burn** on the face and difficulty in breathing. (Exh.563/Vol.-32/Pg.-10988 dated 27/02/2002)
25	Choudhary Maheshkumar		Pain in chest. (Exh.565/Vol.-32/Pg.10990 dated 27/02/2002

	Veljbhai		
26	Ramanlal Makwana		Difficulty in breathing and smoke inhalation. (Exh.-566/Vol.-32/Pg.10991 dated 27/02/2002)
27	Dwarkadas Shankarbhai Patel		**6% superficial to deep burn** on face and right-hand and smoke inhalation injury. (Exh.-567/Vol.-32/Pg.10992 dated 27/02/2002)
28	Lalanprasad Kishorilal Chorasiya		**Total 15% superficial burn,** burn of head and face and right-hand and left-hand. (Exh.-572/Vol.-32/Pg.10997 dated 27/02/2002)
29	Jankidevi lalanprasad		**Approximately 5% superficial burns** and smoke inhalation. (Exh.-573/Vol.-32/Pg.10998 dated 27/02/2002)
30	Ramdin Jigilal Gupta		Difficulty in breathing. (Exh.581/Vol.-32/Pg.11006 dated 27/02/2002)
31	Arjun Jamnabhai Pandey		Difficulty in breathing and smoke inhalation. (Exh.-583/Vol.-32/Pg.11008 dated 27/02/2002)
32	Archanaben Satish Mishra		Difficulty in breathing and smoke inhalation. (Exh.584/Vol.-32/Pg.11009 dated 27/02/2002)
33	Manglamben Satish Mishra		Difficulty in breathing and smoke inhalation. (Exh.-587/Vol.-32/Pg.11012 dated 27/02/2002)
34	Ram Hariya Gupta		Difficulty in breathing and burning pain in throat. (Exh.-588/Zvol.-32/Pg.-11013 dated 27/02/2002)
35	Maheshbhai Jayantilal Shah PW-87/EXH.-641	47	**Burn** in the railway compartment and breathlessness and smoke related injury. (Exh.-552/Vol.-32/Pg.-10961 dated 27/02/2002)
36	Sanjaybhai Rasiklal Sukhadiya		Injury due to fall from train and tenderness on the ankle. (Exh.-553/Vol.-32/Pg.-10962 dated 27/02/2002)
37	Ramfersinh Babusinh Thakor		**Burns** in railway compartment, suffocation, breathlessness and inhalation related injury. (Exh.-554/Vol.-32/Pg.-10963 dated 27/02/2002)
38	Rajendrasingh Ramfersingh Rajput PW-77/EXH.-614	51 (Reserved for 62, 63 & 64)	**Burns** in railway compartment, suffocation, breathlessness and inhalation related injury and tenderness on the right leg. (Exh.-555/Vol.-32/Pg.-10964 dated 27/02/2002)
39	L.K. JATAV		CLW during accidental fall while getting out of the train. (Exh.-601/Vol.-32/Pg.-11025 dated 27/02/2002)
40	Bhupatbhai Maniram	-NA-	Pain on back (Exh.-527/vol.-32/Pg.-10927

	Dave PW-110/Exh.-696/vol.-33 (in S-7 at the time of the incident)		dated 28/02/2002)
41	Saburbhai Dhulabhai Parmar	-NA-	CLW while getting out of the train. (Exh.-596/Vol.-32/Pg.-11022 dated 28/02/2002)
42	Kalpeshbai Jha, PW-124/EXH.-738	-NA-	Blunt injuries on the right side of the chest. (Exh.-543/Vol.-32/Pg.10947 dated 2/03/2002)
43	Dilipkumar Jayantilal Patel PW-124/EXH.-738	1	Anxiety and depression. He was under care from 28/02/2002 to 3/03/2002. (Exh.514/Vol.-32/Pg.-10884 dated 4/03/2002)
44	Radheshyam Ramshanker Mishra PW-113/EXH.-715	Near 7	(illegible)
45	Jitendra Mangalgiri Goswami PW-125/EXH.739	NA	Difficulty in breathing and respiratory burns. (Exh.-547/Vol.-32/Pg.-10954 dated 2/04/2002)

Learned counsel appearing for the defence has relied on the following table of witnesses travelling in S/6 coach without any M.L.C. Papers:

1	Pujaben Bahadursinh Kushwaha PW-81/EXH.-625	4,5,6	N/A
2	Hariprasad Munalal Sharma PW-97/EXH.-668	11,13	In the evidence, he speaks of injury on both hands x also injured due to stone pelting. (Para 2 / Page no.11196)
3	Premaben Ayodhyaprasad Mali PW-89/Exh-648 Connected to PW-90/Exh.-650	25-29	N/A
4	Vandaben Ramanbhai Patel PW-95/Exh.-663	33	N/A In the evidence before the Ld. Trial Court she was suffering from suffocation. (Para 2/page no.11177)
5	Hetalben Babubhai Patel PW-84/Exh.-634	35	N/A In the evidence before the Ld. Trial Court, she was suffering from burning sensation in eyes and ears and also from breathing problem (Para-3/Page No.11109)

6	Parshottambhai Gowardhanbhai Patel PW-107/EXH.-690	35	N/A In the evidence before the Ld. Trial Court he received simple injury on legs and hands. (Para-2/pg.11154)
7	Gayatriben Harshadbhai Panchal PW-175/EXH.891	41-46	N/A Did not take any treatment
8	Hariprasad Maniram Joshi PW-86/EXH.-638	43	N/A
9	Rakeshbhai Kantilal Patel Pw-85/Exh.0637	56	N/A In the evidence before the Ld. Trial Court **he received burn injury on** right side eye. (Para -5/Pg.11120)
10	Virpal Chhedilal Pal PW-82/EXH.-627	58,59,61	N/A
11	Bachubhai Dhanjibhai Ladwa Pw-94/EXH.-662	60 or 62	N/A
12	Subhash Chandra Ramchandr Mishra PW-114/EXH.719	69	N/A In the evidence before the Ld. Trial Court, he complained of suffocation. 9Para-2/Page No.11305)
13	Shantibhai Shankarbhai Patel PW-88/EXH.642	70	N/A
14	Shardaben Manubhai Patel Pw-93/EXH.657	72	N/A In the evidence before the Ld. Trial court, she complains of injury on the fore-hand. (para-2/Pg.11164)
15	Veenaben Mafatbhai Patel PW-83/EXH.-630	Not specified	N/A In the evidence before the Ld. Trial Court, she was treated for injuries on both hands (Para-4/Pg.11102)
16	Rubidevi Sriramohan Mali PW-90/EXH.650 Connected to PW-89/Exh.-648	Passage near the engine side toilet	N/A In the evidence before the Ld. Trial Court she was unconscious. (Para-2/Page No.11152)
17	Keshubhai Devjibhai Patel PW-91/EXH.651	Not stated	N/A In the evidence before the Ld. Trial court he has complained of suffocation. (Para-3/Pg.11157)
18	Maheshkumar Cheljibhai Chowdhary PW-98/Exh.-670	Not stated	N/A In the evidence before the Ld. Trial Court, she has complained of suffocation and not being able to speak. (Para-3/Pg.11137)

19	Somnath Sitaram Kahar PW-103/EXH.681	Near luggage rack near the Dahod side toilet	N/A In the evidence before the Ld. Trial Court, he complains of suffering from suffocation and he has no knowledge of how he received injury. (Para 2/Pg.-11232)
20	Amrutbhai Joitaram Patel PW-121/EXH.-73	Not stated	N/A In the evidence before the Ld Trial court, he suffers from suffocation. (Para-2/Pg.-11349)

NOTE:

1) Some of the passengers whose MLC records are available but were not examined to which reference is made.

2) Those whose statements were recorded later in 2004 or 2005 and those who have made improvements in what they saw have been left out of consideration because their accounts are too removed from the occurrence.

3) Apart from one, the majority speak of smoke and dense smoke before they see flames.

4) The majority see flames/fire only after exiting the coach. It appears that far from being very speedy, flames only erupted after most had exited at the stage of smoke in spite of the large crowd and only 2 available exits.

5) The burn injuries are 16 at the most. The seat distribution is between compartment 5 to compartment 7.

6) The passengers who saw *kakda/*petrol/carboys/acid-bulb are 9 in number. Their seat distribution seems to be spread out without any clear pattern. There is also a specific reference in PW-119 about a burning rag being put out.

7) 3 passengers were themselves rendered unconscious but witnesses refer to many passengers fall down and become unconscious.

8) Although a pattern may emerge from the manner and place of escape, there is not enough material on where every one exited from and their situation vis a vis others which would affect their access to exits.

To sum up, the smoke was seen before the flames. The majority got out the train before it erupted into flames and smoke related health problems clearly out weigh the burns and only 1 person is found with burn on the lower limbs.

Had this mapping been done by the police or insisted upon by the FSL as soon as possible after the event, there would have been much greater understanding fire pattern.

The aspect of common object as emerging from the version of the passengers:

[1] That the prosecution has examined total of 50 passengers travelling in various coaches of the train including S-2, S-4, S-5, S-6, S-7 and S-8 coaches.

[2] The 1st investigation officer (PW-241) has stated that S-6 coach was full with about 250 passengers.

[3] Out of the 50 passengers examined as witnesses by the prosecution from different coaches of the Sabarmati Express, a total of 20 passengers do not mention any inflammable object of anything that may aid inflammation in the nature of burning kakda/rag, inflammable liquid/material or carboys etc being thrown inside the coach.

[4] Out of the remaining 30 witnesses who give reference to the throwing of inflammable object in the nature of burning kakda/rag, inflammable liquid/material etc, only 17 have made a contemporaneous reference to the same, i.e., have their police-statements recorded soon after the event. A total of 13 witnesses make material improvement (on this very point of sighting

inflammable material) from the their earliest version given during investigation and therefore it would be prudent to keep them out of consideration.

[5] Out of the remaining 17 witnesses who give reference to the throwing of inflammable object in the nature of burning kakda/rag, inflammable liquid/material etc, a total of 4 witnesses police statements were only recorded in the year 2005 and therefore their entire testimony ought to be kept out of consideration.

[6] Out of the remaining 13 witnesses who have given some reference to the throwing of inflammable object in the nature of burning kakda/rag, inflammable liquid/material etc, it is clear that 3 witnesses (PWs-124, 81, & 8) were seated in the 1st compartment, 1 witness (PW-119) was in the 3rd witnesses (PWs-120, 84 & 150) were in the 5th compartment, 1 witness (PW-175) was in the 6th compartment, 2 witnesses (PW-168 & 75) were in the 7th compartment, 1 witness (PW-82) as in the 8th compartment. Only PWs-119, 82 and 85 speak of rags falling into their compartment.

[7] It is pertinent to note that not all the witnesses speak of their seat numbers or the exact position where they were located and the from which exact place these burning articles have been thrown inside. Even those who do, are not specific that the burning objects fell in their compartment. So it is possible that all the people located in one compartment are speaking of one and the same burning object.

[8] It is also possible that witnesses who do not specify where they

saw a burning object fall are speaking of the same object which perceived by others in various compartment. Other than S-2 into which a rag fell, passengers of no coach apart from S-6 say that any burning object fell into their coach. So it is entirely possible that several witnesses, within the coach and other across the coaches are speaking of the same burning objects that fell into S-6 coach.

[9] Also it is entirely possible that one person may have thrown more than one burning object. So the number of persons throwing/number of objects thrown may have been as few as or less than 8 and at the very outward limit would have been considerably less than 30. It is not beyond probability that the same person who is holding the carboy may have also thrown the rag.

[10] Even if the outer most limit of the total number of burning rags which at any rate will be considerably less than 30 is considered, this figure will still be much less than the total number of accused persons against the 135 who charge-sheets have been filed. This number will be a mere fraction of the strength of the mob (900-1000) who are alleged to have gathered near a-cabin. However, when over-lapping witnesses excluded, then the number of burning objects thrown inside the coach would be a minuscule fraction and it is not beyond probability that such activities would have remained unnoticed by the other persons alleged to have been present.

[11] Even in respect of identification by the passengers, none of the passengers have even stated at the earliest opportunity during the

investigation that they can specifically identify anyone. Further, in view of the catena of decision of the apex court, this type of identification in the eye of law. The pattern and extent of throwing of inflammable objects as perceived by passenger does not reveal that incendiarism was at all the common object.

PART V-D

Learned counsel appearing for the defence additionally submitted the following two aspects viz. [1] Suppression of documents / best evidence and non-examination of important witnesses essential to "unfolding of narrative" and [2] Improvements made by the witnesses to suit the prosecution's version during the trial:

[1] Suppression of documents / best evidence and non-examination of important witnesses essential to "unfolding of narrative"

[a] Map of Scene of Offence - The sight plan/ scene of offence map was prepared on 30-4-2004, by Shri Janak Popat (PW. 185/ Exh. 917/ Vol. 36) on the request made by the police. On that day the investigating agency was aware of the facts and the places relevant to the case. Despite the same the map does not show the distance between the parcel office and periphery wall of railway property (Para 4/ Pg. 12115/ Vol. 36), the map does not show the length, breadth and height of "A Cabin" as well as other topographical feature around "A Cabin", the map does not show the height of the railway track on the Garnala from the road level, it does not show 7-8 tracks between "A Cabin" side and Bhamaiya side, it does not show total electrical poles at the place of incident, it does not show stairs leading from the road to railway track near garnala, it does not show the place where the fire fighters was

alleged to be stopped, the route which the tempy had taken, the place where it was finally parked, the place where it was found, the place where PW. 170 & 202 were assaulted, the place where Siddiq Buqqar was assaulted, the place where mother and daughter were molested, the place from where the VHP witnesses and tea vendor are alleged to have seen the incident, it does not show Kalabhai petrol pump and the route from Kalabhai Petrol Pump to Aman Guest House, the place from where some of the carboys were seized from the scene of offence. All the aforesaid places relevant to the case were not shown and were deliberately suppressed in the map which has seriously prejudiced the defence of the accused.

[b] The records on the basis of which the letter dated 22/07/2002 came to be prepared by Gangaram, Ahmedabad Railway Yard showing the repairs which had taken place in S2 and S7 coach are suppressed. The records are important evidence on the basis of which the story of the prosecution of cutting of vestibule could have been established. Non production of the same has prejudiced the defence.

[c] Shri K.C. Bava, the investigating officer has admitted that he got information in respect of a tempy lying near “garnala” which was used by the accused for transportation of inflammable material used in commission of offence, on 24-4-2002. It is admitted by Shri K.C. Bava that, he gave a “yadi” to his PSI Shri Yadav dated 24-4-2002, to seize the tempy. The said “yadi” is not produced on record and it’s non production raises a doubt on the case of prosecution.

[d] Of the forwarding letter dated 24/01/2003 given by PW-244 to PW-218 at the time of carrying out discovery proceedings where PW-218 admits that in the said letter complete details of disclosures/confession made by Jabir before the Police was incorporated. The said confession was recorded under a videography. The said letter wrote by Shri Noel Parmal to PW. 218, the discovery officer of alleged looted gold chain and gold ring is not on record. The said letter is important because if the said letter contains all the details and on the basis of that some discovery is made under Sec. 27 of the Indian Evidence Act, the same would not amount to a disclosure as per Sec. 27. The videography done while recording the confession of Jabir by police is suppressed. The said videography was important to show that under what circumstances the said confession was recorded. This goes to decide the voluntariness of the accused Jabir, which is suppressed from coming on record of the court.

[e] The fax messages addressed from investigation agency to the FSL for calling them for inspection on various occasions, dated 28-4-2002, 1-7-2002 and 10-7-2002 has not been produced on record.

[f] PW-241/Exh.-1366/Vol-38/Para-110/Pg. 13088 the 3rd I.O. has stated that he had seized the concerned record of the messages exchanged between Shri Satyanarayan Panchuram Verma (Railway Guard) (PW-135) & Harising Fulsing Meena (Assistant Station Master) (PW-126). These messages are very important to know all the incidents of chain pulling, 2nd stoppage of train, alleged intimidation to the driver by the accused, damages caused in the train and other important and relevant

facts. The said messages are not produced on record.

The record of message given on walkie-talkie from the driver to the Deputy S.S. by the guard as to the 2nd stoppage has also not been produced as PW-228 has himself admitted that important messages like the threats to the driver and attack on the engine given which are given on the walkie-talkie are recorded in the 'engine repair book' which has not even been investigated till date. (PW-228/Exh.-1189/Vol.-37/Para-3/Pg.-12613) and (Para-8/Pg.-12616)

[g] The records of Carriage and Wagon Department, Godhra, which inspected and made repairs in various coaches of the train were not produced on record.

[h] The records of Carriage and Wagon Department, Ahmedabad, which inspected and made major repairs in S2 & S7 coaches of the train were not produced on record.

[i] Non examination of Shri V.D. Patel Sr. Section Engineer in whose presence the panchnama of 15-7-2002, of S2 and S7 coach were drawn in Ahmedabad and non examination of Shri S.Y. Nitin Rane (Sr. Section Engineer, Carriage and Wagon Department, Ahmedabad) responsible for carrying out major repairs in sick coaches. This non examination has resulted in truth not coming on record in respect of the evidence of cut on the vestibule canvas of S7 coach.

[j] The inspections of S6 coach, preparation of panchnama and collection of Muddamal were videograph on 27-2-2002 and 28-2-

2002 and also video recording was done in respect of inspection of 1-5-2002 are not produced on record.

[k] A Test Identification Parade of Shri Sikandar Shaikh (PW. 237) was carried out in the presence of Shri Ajay Kanu Bariya (PW. 236) exonerating Sikandar. The said panchnama of Test Identification Parade of April, 2004 was not produced on record.

[l] All the investigating officers have consistently stated before the court that, they have not produced the case diaries and the same is suppressed and not produced in the court.

[m] Exh.- 998/ (P.B. Pg. No.-12210 & 12211) is a letter relied on by the investigation agency which gives the figure of vacuum drop from 53 cm.sq./hg to 25-30 cm.sq./hg" at the stage of chain pulling. However, the investigation agency has failed to bring anything on record to suggest as to how this particular figure was arrived at and whether this figure is consistent with the version of the prosecution witnesses who suggests that, the reading on the vacuum meter in the guards coach had become zero.

[n] PW-244/EXH.-1406/VOL.-39/PARA-136/PG.-13224- the 4th I.O. has stated that exact information about the late running of any train is published on every railway station, but no document in respect of the same is produced on record. However, the person in charge of the same at Godhara Railway Station which is the best evidence in this regard has not been examined by the prosecution. The railway records of 26-2-2002 to 27-2-2002 to showing the nature of information about the delay in the scheduled arrival of Sabarmati Express train as available with the

Godhra Railway Station.

[o] Police statement of Ajay Bariya dated 3-7-2002 has not been brought on record.

[p] PW-171/Exh.-876/Vol.-35- A RPF staff having his duty at Godhara Railway Station. When he was on duty, PW-173 sent a message from Guard-Lobby to the RPF office that 'Sabarmati Express standing at A-cabin is being stone-pelted from Signal-falia side by a mob and therefore send reinforcements'. (Paras- 1 & 2/Pg.-12017) however, from the entire investigation, there is no effort to place the records of the Guard-lobby and the RPF office before the court. The investigation agency has not brought on record the statement of Inspector RPF Shri George as well as had failed to examine him in the trial.

[q] PW. 224 & 231 Ranjit Singh & Prabhat Singh of Kalabhai Petrol Pump have stated that, they read the news of confession of Jabir in the News Paper and therefore, they had approached the police station for giving their statement. The said news paper cutting is not placed on record.

[r] Non examination of Shri Asgar Ali owner of the Petrol Pump who could have thrown light of the alleged sale of 140 Ltrs. of loose petrol on 26-2-2002.

[s] Non production of the documents of the sale from Kalabhai Petrol Pump of the relevant day like stock register, Bill book, Payment receipt register etc. The I.O. Shri K.C. Bava had admitted that, he had examined the said documents and had directed his

subordinate to seize the same. But the said documents which are best evidence to decide whether there was any sale of 140 Ltrs. of loose petrol on 26-2-2002 has not come on record and is suppressed from the court prejudicing the defence of the accused.

[t] Non examination of Mohansinh and Gopalsinh, the employees of Kalabhai Petrol Pump who were admittedly at the Petro Pump on duty on 26-2-2002.

[u] Non examination of the original owner of the tempy Shri Dawood and the present owner Shri Siddiq Vali and his nephew Anas. This has resulted in the truth not coming on record in respect of the use of tempy, possession of tempy from 26-2-2002 to 16-7-2002 (the day on which the tempy is shown to be seized) and the same would be seriously prejudice the defence of the accused.

[2] Improvements made by the witnesses to suit the prosecution's version during the trial

[a] The prosecution through a witness Pradipsinh Bholasinh Thakor (PW. 156/ Exh. 826/ Vol. 34/ Pg. 11777 @ 11779/ Para 5, 9 and 11) has tried to offer belated explanation to the complete silence in respect of the alleged attack on fire brigade engine by offering letters exhibited for the first time in the trial by the fire fighter though the occurrence book register (Exh. 827/ Pg. 11792) does not state of any damage or attack on the fire engine on the date of occurrence.

[b] Kerosene/ petrol:

The prosecution has deliberately improved it's version in respect of use of kerosene which was unanimously present till the filing of the 1st charge sheet in the statements of the passengers as well as in the documents showing recoveries from various places. However, as soon as Jabir was inserted during the investigation, the prosecution has blatantly made improvements in the evidence of crucial witnesses like Ajay Bariya who have gone to the extent of denying that, they had ever stated about kerosene before the magistrate.

[c] Turning witnesses hostile: The prosecution has deliberately turned all those witnesses like PW. 234 Anwar Kalandar, PW. 232 Iliyas Mullah, Panch Witnesses of Tempy and other witnesses hostile who has the potential of destroying the prosecution's case at many levels if they would have stuck to their original prosecution version. It is not the arguments of the defence that, their original prosecution is any reliable. However, it is stated that, this conduct of the prosecution prosecuting agency in selectively turning witnesses hostile so as to present a particular view of the investigation alone before the trial court rather than dealing with those versions at the stage of investigation itself suggests malafide and the guided manner in which the investigation as well as the prosecution had proceeded.

[d] It is the consistent pattern in the prosecution that, witnesses after witnesses have refused to look into their previous police statements and investigation documents. Also the investigation officers have refused to look in to their own case diaries.

For example PW-231-He has refused to have a look at his police-

statement or even read it though he is prepared to listen to it. (Para-41/Pg.-12707).

[e] Shri Mangalbhai Ramjibhai Bariya (Driver of Eagle Mobile) (PW-142/Exh.-790/Vol.-34) has admitted that S.161 Cr.P.C. was recorded 1st in C.R. No. 66/02 (Para-3/Pg.-11566) which was in respect of all the work that he had done on 27/02/2002 however he is refusing to identify his deposition about the same in the Court vide Exh.-791/Vol.-34/Pg.-11569 to 11570 (Para-3/Pg.-11566) this peculiar improvement shows the manner and interest with which the prosecution has went about discharging its solemn duty as on a previous occasion this question came to be answered in a natural manner when Shri Jaswantsinh Gulabsinh Bariya (Wireless Operator of Alpha Mobile and Gasman) (PW-141/Exh.-787/Vol.-34) - has admitted that S.161 Cr.P.C. was recorded 1st in C.R. No. 66/02, Godhara Town Police (Para-4/Pg.-11555) which was in respect of all the work that he had done on 27/02/2002 and he had deposed in about the same in the Court vide Exh.-789/Vol.-34/Pg.-11562 to 11563 (Para-5/Pg.-11556).

Shri Rupsinh Chagansinh Bariya (Telephone Operator, Fire Brigade) (PW-133/Exh.-766/Vol.-33) - is categorical that when the fire-fighter returns back to the office then the same is noted in the occurrence-register and when it goes out again, the details are also noted. (Para-5/Pg.-11460) however, he has shown great reluctance to see the entries of the Occurrence-book and after denying in the cross that he had not seen the entries of 27/02/2002, he has specifically said that he says that he is not willing to even see or read the entry of 1930hrs of 27/02/2002 (see Mark-755/1).

[f] In order to support the story of spot arrest, the prosecution has sought to make improvements through other witnesses so as to lend corroboration to this story. Shri Mohammad Imdad Bismillah Ansari (PW-216/EXH.-1115/VOL.-37/Para-4/Pg.-12429 & Para-6/Pg.-12430) - In the cross he has admitted that he has come up with a new story for the 1st time before the trial court that he had seen 10 odd persons who were kept sounded up near A-cabin at about 1100hrs on 27/02/2002. This is part of the deliberate attempt on part of the prosecution to seek for corroboration of prosecution's case one way or the other.

[g] It is significant to note that the improvement in the version of all the VHP witnesses that their improvement in the version put forth for the first time in the court that they had witnessed the incident from behind (otth) the A-cabin is not co-incidental but is well planned exercise undertaken and supervised by the prosecution. In fact the original prosecution case as has been put to 2 tea-vendors who were declared hostile in the court was that they had witnessed the incident from behind (otth) the A-cabin where it is claimed that they had seen the police-personnel disperse the mob by firing upon them. (SEE- Shri Rameshbhai Raisinhbhai Solanki (Hawker) (PW-215/EXH.-1108/VOL.-37/Para-4/Pg.-12415 & Shri Arvindbhai Raisinhbhai Solanki (Hawker) (PW-221/EXH.-1131/VOL.-37/Para-5/Pg.-12471) hence the original case of the prosecution which was subject to a further investigation by the SIT did not deem it fit to review this finding and hence only with a view to achieve consistency in the versions of VHP witnesses came to be examined before them and then these 2 witnesses have been conveniently declared as hostile.

This conduct of the prosecution is required to be viewed with the seriousness that it deserves.

[h] There is deliberated attempt made by the prosecution to seek corroboration in respect of the presence of the Godhara VHP witnesses on the platform vide the testimony of the passengers of the Sabramati express-

i] PW-118/EXH.-727/Vol.-33- (Para-2/Pg.-11327) and (Para-13/Pg.-11333)
ii] PW-124/EXH.-738/Vol.-33- (Para-25/Pg.-11376) and (Para-15/Pg.-11372)
iii] PW-126/EXH.-742/Vol.-33/Para-8/Pg.-11388-
iv] PW-140/EXH.-786/Vol.-34- (Para-3/Pg.-11533) and (Para-8/Pg.-11388)
v] PW-144/Exh.-793/Vol.-34/Para12/Pg.-11588-

The said aspect in respect of VHP witnesses has been dealt with by the trail court in detail and these witnesses are not believed.

[i] During the course of hearing several material improvements in the versions of important prosecution witnesses were pointed out which clearly establishes that, the efforts made by all the witnesses by improving their earlier versions and supporting the overall story of prosecution indicates that, the prosecution and investigating agencies were driving the whole case towards achieving conviction of the accused. Several improvements were made in respect of quantity and number of carboys, the identification of tempy, the size of carboys, the place from where the carboys recovered, bringing implications of accused in the

offence for the first time in the court and all aforesaid actions clearly reveals that, a deliberate attempt was made by the investigating agency and the prosecution so that, the truth may not come on record and it becomes difficult for the court to separate the truth from falsehood.

PART V-E

LIST OF CITATIONS RELIED ON BY MS NITYA RAMKRISHNAN, LEARNED COUNSEL FOR THE DEFENCE ARE AS UNDER:

Sr. No.	Parties	Citation	Issue
1	State v. Mukesh	(2013)2 SCC 587	Sting Operation
2	Dayal Singh v. State of Uttaranchal	(2012) 8 SCC 263	Appreciation of expert Testimony
3	Sudevanand & Ors. v. State through CBI	(2012)3 SCC 387	Section 391 of Cr.P.C.
4	Roy Fernandes v. State of Goa	(2012)3 SCC 221	Section 149
5	Santosh Kumar Singh v. State Through CBI	(2010)9 SCC 747	Books not shown to the expert
6	Smt. Selvi & Ors. v. State of Karnataka	(2010)7 SCC 263	
7	Sidhartha Vashist @Manu Sharma v. State NCT of Delhi	(2010)6 SCC 1	Appreciation of expert Testimony
8	Ramesh Chandra Agrawal v. Regency Hospital Ltd.	(2009)9 SCC 709	Appreciation of expert Testimony
9	R.K.Anand v. Registrar, Delhi High Court	(2009)8 SCC 106	Sting Operation
10	Kalyani Bhaskar v. M.S.Sampooran	(2007)2 SCC 258	Entering into Defence

11	State of Madhya Pradesh v. Sanjay Rai	(2004)10 SCC 570	Books not shown to the expert
12	Mohd. Khalid v. State of West Bengal	(2002)7 SCC 334	Co-accused confession and Sections 30 & 10 of Evidence Act.
13	State of Himachal Pradesh v. Jai	(1999)7 SCC 280	Appreciation of expert Testimony
14	State of UP v. Dan Singh	(1997)3 SCC 747	Section 149
15	Mahmood v. State of Uttar Pradesh	(1976) 1 SCC 542	Appreciation of expert Testimony
16	Santosh v. State of Madhya Pradesh	(1975)3 SCC 727	Section 149
17	Devi Lal & Anr. v. State of Rajasthan	(1971)3 SCC 471	Changing prosecution story
18	Ugar Ahir v. State of Bihar	AIR 1965 SC 277	Changing prosecution story
19	Haricharan Kurmi v. State of Bihar	AIR 1964 SC 1184	Co-accused confession and Sections 30 & 10 of Evidence Act.
20	Suleman Usman Memon v. The State of Gujarat	AIR 1960 Guj. 120	Appreciation of expert testimony.
21	Bhagwan Das v. State of Rajasthan	AIR 1957 SC 589	Books not shown to the expert
22	Chikkarange Gowda v. State of Mysore	AIR 1956 SC 731	Section 149
23			

PART VI

Submissions of Mr. M.H.M. Shaikh and Mr. Khalid G. Shaikh, advocates on behalf of the appellant Nos.1, 2 and 3 in Criminal Misc. Appeal No.629 of 2011, are as under

1 That the appellant Nos.1, 2 and 3 are original accused

Nos.29, 49 and 50 in Sessions Case No.69 of 2009 tried by the learned Sessions Judge.

2 That the appellant Nos.1, 2 and 3 are convicted by way of a common final judgment dated 22.02.2011 and all are awarded life imprisonment.

3 Appellant No.1 Suleman Ahmed Pir was arrested on 14.03.2002, Appellant No.2 Kasim A. Sattar Ghaji was arrested on 23.03.2002 and appellant No.3 Irfan Siraj Pada was arrested on 23003.2002.

4 The allegation / roll of the appellant Nos.1, 2 and 3 as per case of the prosecution is as under:

[a] Appellant No.1 Suleman Ahmed Pir was alleged to be in the mob when incident took place.

[b] Appellant No.2 Kasim A. Sattar Ghaji was found in mob pelting stones and encouraging the mob.

[c] Appellant No.3 Irfan Siraj Pada was found in mob with sward, pelting stones, damaged the coach.

5 Evidence against the appellant No.1 Suleman Ahmed Pir is based on the police statement of PW No.230 Shri Dilip Gehimal Chelanai dated 03.03.2002 [Volume No.37 page 12724]

6 It is submitted that the witness has a refreshment canteen at platform No.2 and when train stopped second time at A cabin, he went

at the end of platform No.2 and behind the coach of guard he saw the incident. The guard coach was at garnala which is 200 to 300 feet away from A cabin. It is further submitted that witness claims that he identified 9 accused from A cabin and they were 500 to 600 feet away in the mob of 900 to 1000.

7 From the cross examination, it appears that no test identification was held by the investigating officer and for the first time identifies in the court. Further, during the examination in chief this witness identifies appellant No. as “Shaka” and Shaka was accused in Sessions Case No.72 of 2009 and he is acquitted by the trial court.

8 Evidence against the appellant No.2 Kasim A. Sattar Ghaji is under the panchnama u/s. 27 of Evidence Act, Investigating Officer discovered 5 liter carboy [muddamal article No.80] at the instance of appellant No.2 Further, PW-11 Narendra Lakhwani Exh.111 discovery panch [Volume No.27 page 9883].

9 It is submitted that panch had not identified the accused / appellant No.2 during his deposition. 5 liters carboy was sent to FSL and the the report dated 26.04.2002 Exh.1177 shows that the presence of kerosene was found. It is not the case of prosecution that the kerosene was used in setting the train / coaches on fire.

10 Evidence against the appellant No.3 Irfan Siraj Pada is under the panchnama u/s. 27 of the Evidence Act and Investigating Officer discovered sword [muddamal article No.76] at the instance of appellant No.3. PW-25 Trilokchand Dulhanimal Exh.215 discovery panch [volume 28 page 10028]. PW-239 Amita Dipeshkumar Shukla Exh.1322 [page No.1263] Lie Detection Test Report.

11 It is submitted that PW-25 turned hostile and he admits that at least 5 to 6 times he was instructed by Railway Police as to the contents of his deposition. It is further submitted that lie detection test is a violation Article 20(3) of the Constitution of India and in support of his submission reliance is placed on th decision in the case of Selvi & Ors. v. State of Karnataka [2010(3) SCC (Cri.) 1 para 262] that the compulsory administration of the impugned techniques violates the right against self incrimination – violates Article 20(3) of the Constitution of India. It is further submitted that none of the witness identified and no evidence about inflecting any injury to any person. It is further submitted that none of the witnesses deposed that appellant No.3 was pelting stones.

12 It is further submitted that oral testimony of all concerned eye witnesses like passengers, karsevaks, VHP workers, GRP personnel, RPF personnel, fire brigade personnel, railway employees, police personnel, investigating officer, etc.

13 That delay in recording of statements of important witnesses like Ajay Kanu Baria, Sikandar Mohammad Shaikh, Ranjit Jodha, Prabhatsinh and others who are available from day one [AIR 1979 SC 135]. Lacunas – defects in recording the confessional statements under Section 164 of the Code, 1973 relating to accomplices. Twofold contradictory evidence from FLS witnesses regarding setting the coaches on fire in first charge sheet and after recording of statement of Ajay Kanu Bria i.e. cutting of vestibules with knife and entering in S/6 coach with 20 liters carboys and pouring of near toilets inside in overcrowded coach etc.

14 Improbable theory of conspiracy and contradictions, improvements, omissions, etc. by important witness during trial with a view to support prosecution case.

15 Learned advocates for other accused who have appeared and assisted learned Senior Counsels for defence have adopted submissions.

PART VII-A

SUBMISSIONS OF MR J.M.PANCHAL LEARNED SPECIAL PUBLIC PROSECUTOR AND SHRI N.N.PRAJAPATI, LEARNED PUBLIC PROSECUTOR AND SHRI A.Y.KOGJE, LEARNED PUBLIC PROSECUTOR AND SUPPORTED AND ADOPTED BY SHRI RS JAMUAR, LEARNED PUBLIC PROSECUTOR FOR S.I.T.

1 Mr. J.M.Panchal, learned Special Pubic Prosecutor has taken us through evidence of passengers, who were travelling in S/6 Coach of Sabarmati Express. Out of total 50 passengers so examined, 10 injured passengers had valid reservation and travelling in the coach, 21 injured passengers though having tickets but without reservation of seats and 19 other passengers, who are victim of the crime, were examined.

2 Beginning with PW-96 Exh.666 page 11183 to 11189 of Volume-33, Mr. Satishkumar Ravidatt Mishra, travelling with his family and having reservation of seat numbers 33, 34 and 35. In his examination-in-chief he stated that fire started from the backside of the bogie, smoke appeared thereafter. Earlier, statements of the above PW were recorded on 28.02.2002, 06.03.2002 and 18.03.2002.

3 PW-74 Exh.607 Page-11026 of Volume-33 Mr. Kalpesh Ashok Jha, though does not mention anything about first chain pulling,

narrates about alleged incident of violent mob of 1000 to 1500 persons armed with lethal weapons shouting anti-national and anti-Hindu slogans to kill the passengers, damaging bogies of the train, etc. However in paras 16 & 17 of cross-examination, the above PW states that from the window it was possible to see what was happening outside and nearby. While confronting with his earlier statement dated 06.03.2002 certain contradictions are proved about shouting of slogans by violent mob, but according to learned Special Public Prosecutor, the contradictions are not material and of such a grave nature which will go to the root of the case and in substance what was stated earlier before the police was adhered to and, therefore, it is natural. PW-67 Exh.542 Page-10994 Vol.32, Dr. Sanjay A. Rawal confirms the injury of the above PW.

4 PW-75, Exh.610 Page-11042 Vol.32, Mr. Nilkanth Bhatia states about 6 co-passengers, who died in the incident, and the PW is injured eye witness. In paras 4, 5 and 6 incident of crime is narrated and in para 10 he states about smoke engulfing the coach followed by fire. However, in para 14 minor contradictions are noticed. Injuries of the above PW are corroborated by two doctors PW-68 and PW-70, who treated him.

5 PW-83 Exh.630 Page-11101 Vol.32, Ms. Veenaben Patel in para 4 confirmed injuries and death certificate of co-passengers. It is to be noted that no motive is attributed in cross to witnesses for false implication of accused persons. In this case also, doctor PW-70 has confirmed the injuries.

6 PW-87 Exh.641 Page-11136 Vol.33, Maheshbhai Jayantibhai Patel, injured eye witnesses and can be said to be a pair

witnesses of Nilkanth Bhatia, treated by Exh.69 and same contradictions appear on record in paras 9 and 19.

7 PW-92 Exh.652 Page-11160 Vol.33, Dineshbhai Narsibhai Patel and his injury is confirmed by one Dr. Bhavin Shah. Likewise in the very Volume i.e. 33, there are other witnesses viz. PW-98 Exh.670 Page-11204, Maheshbhai Cheljibhai Chaudary treated for injury by PW-70.

8 PW-109 Exh.695 Page-11264 Vol.33, Mukeshbhai Ramanbhai Makwana travelling S/7 bogie and his injuries are confirmed by PW-70. Certain contradictions appeared on record in paras 19 and 20 of his testimonies.

9 PW-110 Exh.696 Page-11275 Vol.33, Bhupatbhai Manirambhai Dave. Contradictions appears in para 17 and for injuries he was treated by PW-63, a private Doctor, Dr. Roop Agrawal.

10 PW-117 Exh.726 Page-11322, Gandaji Ramsiji Thakor treated by Dr. Anilkumar K.Patel, CHC, Harij.

11 PW-118 Exh.727 Page-11327, Ashwinbhai Govindbhai Patel, who also identified one of the accused – Irfan Pataliya. According to this witness inflammable material was sprinkled and for injuries received by him, he was treated by Dr. R.M.Agrawal, PW-63.

12 PW-120 Exh.731 Page-11341, Nitinbhai Chaturbhai Patel, who could not identify any accused, which shows that this witness is genuine and his version is also natural. That contention of learned counsel for defence that lapses on the part of the investigation and the

same was carried out with vengeance and oblique motive is denied and it is submitted that version of the above witness reveal that investigation is fair, impartial and de-void of any malafide inasmuch as 13 accused for which report under Section 169 of the Code of Criminal Procedure was filed. In the case of above witnesses PW-70 treated his injuries and confirmed in the medical certificate about the injuries.

13 PW-121 Exh.732 Page-11438, Amritbhai Joitaram Patel was also treated by Medical Officer PW-70 for his injuries.

14 PW-122 Exh.733 Page-11352, Babubhai Somdas Patel identified one of the accused and treated for his injuries by PW-60 and PW-70 both the doctors at Sola Civil Hospital, Ahmedabad and Civil Hospital, Godhra respectively.

15 PW-123 Exh.734 Page-11358, Rambhai Bhuderdas Patel was also treated by PW-60 and PW-70 and no contradictions appears in his statements.

16 PW-124 Page-11362 Dilipkumar Jayantibhai Patel identified 2 accused and some contradictions appear in paras 7 and 8 and at page 11367 it is stated about sprinkling of petrol / kerosene from carboy. In his police statement it was stated that members of violent mob were pelting stones, but not that they were setting the coach on fire. Again, for injuries he was treated by Dr. Mukesh Patel PW-61. Paras 15, 16 and 26 of the depositions to be considered in view of the fact that the above PW is also Panch Witness of Inquest Panchnama.

17 In vol.34 PW-150 Exh.812 Page-11657 Jayanti Umedbhai Patel, who identified 4 accused persons. Paras 6 and 7 of his deposition

for narration of the incident and para 10 for contradiction to be taken note of. For injuries he was treated by PW-60 and PW-70.

18 PW-160 Exh.839 Page-11842 Vol.35 Hirabhai Umeshdas Patel identified 2 accused persons and was treated by PW-60 and PW-70. The above PW is the brother of PW-150.

19 PW-168 Exh.867 Page-11955 Mandakiniben Nilkanth Bhatia, wife of PW-75. She has identified 3 accused persons and her first statement was recorded by investigating agency on 06.03.2002 and her second statement after 3 years. Though some contradictions appeared in para 12 that in her police statement of not stating that inflammable material was poured from back / rear of the coach and it was set on fire then smoke appeared. Paras 17, 18 and 22 also to be taken note of.

20 PW-170 Exh.873 Page-11999 Pravinkumar Amthabhai, whose chain was snatched and was recovered later on. He identified one of the accused – Shaukat @Bhano Faruq Pataliya.

21 Exh.291 Page-10166 Vol.28, Exh.294 Page-10173 and Exh.297 Page-10179 are identification and discovery panchnamas. That Jabir Behra - accused No.2 from whom metal ingot was recovered as per Exh.381 Page-10362 para 29.

22 Another group of witnesses viz. passengers not physically injured but also victims and injured as per definition of `injury' defined under Section 44 of the Indian Penal Code.

23 PW-84 Exh.634 Page-11108 Hetalben Babubhai Patel paras

7 and 34.

24 PW-85 Exh.637 Page-1118 Rakeshbhai Kantibhai Patel, who identified one of the accused Hasan Ahmed Charkha @Lalu. In para 33 following witnesses are referred viz. PW-88 Exh.642 Page-11143 Shanti Shankar Patel; PW-91 Exh.651 Page-11156 Keshubhai Devjibhai Patel paras 9 and 11 to be taken note of including contradictions and reference is made to PM note of co-passengers viz. Bhimji Exh.461, Shardaben PW 93 Exh.657 mentions about other female passengers accompanying her in the coach viz. Manjulaben Champaben and Shantaben, who died and PM notes are available in Volume 31.

25 PW-94 Exh.662 Page-11167 Bachubhai Dhanjibhai Ladwani referred to co-passengers viz. Nitaben, Pratikshaben, Sadashiva and Satish and PM notes are available on record. The above co-passengers are relatives of PW-175 Gayatriben. Reference is also made to PW-95 Exh.663 Page-11176 Vandanaben Patel and PM notes of Manglaben and Lalitaben are available on record.

26 PW-107 Exh.690 Volume 33 Page 11253 Pursottambhai G. Patel.

27 In Volume-35 a detailed reference is made and importance of testimonies of PW-175 Exh.891 Page-12607 of Gayatriben Harshabhai Panchal, who lost her 4 family members. One of the notable features of testimonies of this PW is that she got down from window as she noticed heavy smoke in the compartment making it impossible to even notice her parents and she jumped towards platform/onside and fell on metal heap. That she had noticed a mob of 200-250 persons armed with weapons proceeding towards S/7 and S/8 coaches. Para-20 is relevant.

She was helped by one elderly person and Pujaben, a friend of her sister Pratikshaben, who also jumped from window. That PM notes of 4 persons of the family of above PW are appearing on record at Exhs.403, 458, 524 and 525. She later on crossed over to offside by crossing beneath the bogie relieving herself from members of unlawful assembly, who tried to caught hold of her.

28 That in Volume-38 page 13004 a map of Demonstration PM carried out on 03.05.2002 reveal that such metal heap was 14 feet away on Southern side / on side / also see photographs taken on the day of incident.

29 Thus, Mr. J.M.Panchal, learned Special Public Prosecutor, relied on 31 injured passengers, 10 authorized travelers with tickets and 9 other passengers and unauthorized and without reservation travelling in S/6 and S/7 in Sabarmati Train. Mr. Panchal, learned Additional Public Prosecutor placed reliance on the following decisions:

[1] Mano Dutt vs. State of U.P. reported in (2012)4 SCC 79 [paras 30 & 31] for credibility of injured witnesses.

[2] Thoti Manohar vs. State of Andhra Pradesh reported in (2012)7 SCC 723 [para 38] for submissions that minor discrepancies not touching to the core of the matter are not relevant and prosecution case cannot be discarded on the basis of such discrepancies, inconsistencies, contradictions, etc.

[3] State of Karnataka vs. Suvarnamma reported in (2015)1 SCC 323 [Para 12.4] which also referred to earlier decision of Shivaji Bobde (1973)2 SCC 793 about reasonable doubt.

[4] Vinod Kumar vs. State of Haryana reported in (2015)3 SCC 138 [para 24] about minor discrepancies to be ignored and also against principles to be born in mind in a case under Sections 378 and 386 of the Code of Criminal Procedure Code – acquittal.

30 **Brief submissions are made for 1st set of evidence and passengers that**;

[a] they are injured and victims; eye witnesses

[b] their presence is very natural and not to be doubted / suspected;

[c] totality of the circumstances to be appreciated on the premise that all the witnesses are independent with no enmity or animosity and no motive to implicate innocent persons. No cross appears contrary to the above.

[d] That evidence is given in a natural way and even minor discrepancy, if any, is natural and to be appreciated accordingly. That some of the witnesses could not identify the accused in the court, show their natural behaviour / conduct.

[e] that injuries are corroborated by medical evidence and also corroborated by circumstantial evidence;

[f] the reliance is placed on panchnama of coach S/6 and other coaches, scene of offence, railway record and documents, Railway Protection Force and Gujarat Railway Protection Force personnel,

FSL reports, and other employees of Railway present at A cabin.

31 Thus, according to Mr. Panchal, learned Special Public Prosecutor what is proved viz. incident took place at A Cabin; train was attacked nearby A cabin; many passengers were assaulted; heavy pelting of stones damaging bogies of the train, causing injuries to the passengers and also resulting into breaking of windows; active participations of members of violent mob / unlawful assembly armed with lethal weapons and attacking the train and passengers throwing or pouring inflammable materials / liquids, the coach was set on fire, etc. Therefore, there is no possibility of any short-circuit, smouldering of accident or mishap. Even cause of fire is proved by direct evidence of injured and other witnesses.

32 About Section 120B and 149 of the IPC, behaviour and conduct of crowd with wild utterances and shouting anti-national and anti-Hindu slogans and to kill passengers would manifest their intention and object of unlawful assembly to be inferred from the acts committed at the time of incident. Cause of chain pulling twice, within a few moments of train leaving platform towards Vadodara and thereafter at A Cabin was surrounded by Muslim community and selection of time and isolated place, where no police assistance was available, cumulatively resulted into in execution of conspiracy.

PART VII-B

IInd set of evidence of public servant viz. Gujarat Railway Police Force

1 Gujarat Railway Police Force made all attempts to disburse the crowd by warning, lathi charge, bursting teargas, etc. but the violent

mob was reluctant and started disbursing only after resorting to firing. All these things clearly show the intention, object and determination of unlawful assembly to commit crime.

2 Following public servants, who are working for Gujarat Railway Police Force reveal true and correct happening of the incident, which remained almost without any major contradictions.

SUBMISSIONS

From the depositions of the above PWs viz. Gujarat Railway Police Force personnel, it is clear that; [a] all these witnesses are public servants; [b] they were discharging their duties; [c] they had no animosity or grudge towards accused and they are independent; [d] no reason to falsely implicate by creating any false version or supporting prosecution; and [e] even presumption can be drawn under Section 114 of the Evidence Act.

On the basis of their evidence it is proved that the incident took place at A cabin towards Vadodara side.

Presence of violent mob with lethal weapons, heavy pelting of stones and usage of such weapons in damaging public property viz. passenger train, causing injuries and in spite of warning the violent mob had not disbursed until firing was resorted.

They were shouting anti-national and anti-Hindu slogans and to kill the passengers travelling in the train. Since their evidence corroborate with passengers viz. injured and other eye witnesses, that is the first set of evidence referred herein above and in absence of any

major contradictions, when accused were apprehended at the scene of offence cordoned off and arrested and later on presented before the learned Magistrate, reveal no doubt about offences committed by the accused of subject appeals.

3 **Volume-34**

The Gujarat Railway Police Force personnel PW-140 Exh.786 Page-11532, Pujabhai Bavjibhai Patwadia paras 3 and 4 deposes about incident in question.

PW-144 Exh.793 Page-11581 Mansinh Nurjibhai Vasava paras 2 and 13 are important. He also identified Bilal Badam Sulemanahmedpir.

PW-146 Exh.799 Page-11605 Laxmansinh Nansinh Chauhan, para-3 about the incident. He identified 7 accused persons; [1] Kasim Abdul Sattar @ Kasim Biryani GajiGhanchi, [2] Shaukat @ Bhano Faruq Pataliya, [3] Mohamad Badam, [4] Idrish, [5] Anwar Husain Pittal, [6] Irfan Siraj Pado, [7] Jabir Binyamin Behra.

PW-148 Exh.802 Page-11625 [para-3] Hemendra Ramanlal Das. He identified 5 accused persons viz. [1] Idrish Umerji, [2] Ibrahim Abdul Razak, [3] Irfan Siraj Pado, [4] Abdulrazaq Ismailwala, and [5] Mohmmad Ansari Kutbuddin Ansari.

4 **Volume-35**

PW-161, Exh.841, Page-11849 Indrasinh Prabhatsinh Solanki. He caught the assailants on the spot and identified 7 persons in para 20. Contradictions appear on record.

PW-163 Exh.852 Page-11887, Chatrasinh Gambhirbhai. He identified accused - Siddik Ibrahim Bakkar. In paras 8 and 15 certain contradictions appeared.

PW-166 Exh.859 Page-11918, Dalabhai Abhabhai Baria. He identified 13 accused persons at page 11919 and 11920.

PW-199 Exh.986 Page-12194 Prabhatbhai Punabhai Bhoi has identified 6 persons
at page 12194.

PW-230 Exh.1196 Page-12634 Mohabbatsinh Juvansinh Zhala, PSI.

PW-152 Exh.819 Page-11721 Volume-34 Mahendrasinh Bhikusinh Mahida and PW-158 Exh.832 Page 11806 Heerabhai Dola.

PART VII-C

IIIrd Set of Godhra Police Personnel

1 PW-137 Exh.782 page-11495 Volume-34 Kantibhai Rupsinh Damor, Driver of Baker Mobile van whose first statement was recorded before police on 09.03.2002 in para 2 referred to mob belonging to Muslim community proceedings towards A Cabin with weapons, where one Kalota, accused was seen and he was later on identified. Tear gas shells were burst and mob started disbursing. Minor contradictions appeared in para 11 and that another mobile van `eagle' of police

reached nearby scene of offence prior in time.

2 PW-139 Exh.785 Page-11514 Jaswantsinh Kalubhai Baria, Armed Police Constable in para 2 narrates the incident, of course after the coach was set on fire and one of the members of mobile van of police reached.

3 PW-141 Exh.787 Page 11554 Jaswant Gulabsinh Baria, Wireless Operator-cum-Gasman, who had seen two accused viz. Mohmad Husen Abdul Rahim Kalota
and Bilal Haji were later on identified.

4 PW-142 Exh.790 Page-11564 Mangalbhai Ramji Baria, Driver of mobile van identified one of the accused viz. Bilal Haji.

5 PW-143 Exh.792 Page-11571 Vinubhai Kasnabhai Vankar, Driver of `Alpha' mobile also narrated similar version that of earlier PWs of this group and identified 5 accused. However, in para 7 he states that he had not seen Rajubhai Bhargav, DSP at the scene of offence or nearby.

6 PW-147 Exh.801 Page 11617 Raijibhai Gulabsinh Parmar PSI, In-charge of `Eagle' mobile van who was picked up from his residence by mobile and in paras 2 and 3 narration of the evidence and para-10 contradiction appears on record.

7 **Volume-35**

PW-169 Exh.868 Page-11968 Babubhai Bhaljibhai Patel, Assistant Sub-Inspector of `Alpha' mobile, who states that intimation viz. Vardhi was received at 8:10 a.m. On 27.02.2002 and had seen one of

the accused – Kalota and was identified. Statement of this accused was initially recorded by police on 08.03.2002.

8 Volume-35 PW-177 Exh.897 Page 12085 Mansinh Hurjai Parghi Wireless Operator-cum-Gasman, whose statement was recorded on 09.03.2002 and identified two accused viz. Kalota and Bilal.

9 While summing up of evidence of above group of witnesses Mr. J.M.Panchal, learned Special Public Prosecutor would submit that all the above witnessed are Public Servants and discharging their public duties, reached the nearby scene of offence after the coach was set on fire and witnesses violent mob with weapons and mob was disbursed after teargas shells were busted. This group of witnesses also narrated as the earlier group of witnesses and identified accused in the court which corroborate version / testimonies of 50 passengers, who were also injured eye witnesses. All collectively established guilt of the accused, however, testimonies of 50 injured passengers is sufficient on its own to bring home the guilt of the accused.

PART VII-D

FOURTH SET OF WITNESSES VIZ. RAILWAY PROTECTION FORCE

1 **Volume-35**

PW-173 Exh.885 Page 12050 Karan Lalsinh Yadav, Head Constable in para 3 had seen violent mob attacking train and incident taking place at A Cabin, whose initial statement was recorded on 01.03.2002 and read over on 08.03.2002. The above witness has identified 7 accused.

2 PW-171 Exh.876 Page-12017 Ambarishkumar Sairam Sanke, para 2 contains narration of the incident and identified none. The above witness resorted to firing along with other fellow RPF employees viz. PW-173 and PW-164.

3 That evidence of these witnesses and summing up of learned Special Public Prosecutor is on the line of earlier Panch Witnesses, who are Government servants discharging their duties and deposed about the common object and motive of violent mob that was to set the train on fire and that of killing Karsevaks travelling therein since they had refused to disburse in spite of warning and lathi charge bursting of teargas shells and disbursed only when firing was resorted.

PART VII-E

FIFTH SET OF WITNESSES viz. Fire Brigade employees of Godhra -

Volume-33

PW-129 Exh.755 Page-11408 Kanubhai Chaganbhai Varia, Fireman states about violent mob prevented and damaged fire fighter. No contradiction, but states in paras 17 and 20 about tanker was refilled nearby well belonging to one Dhantiya.

PW-130 Exh.757 Page-11425 Vijay Sharma – contradiction appears in para 25.

PW-137 Page 11458 Rupsinh Chaganbhai Baria.

PW-156 Exh.826 Page-11777 Volume-34 Pradeep Thakore. Same version. There are contradictions in para 20.

PW-165 Exh.855 Page 11903 Sureshgiri Gosai Volume-35. Identified two accused persons.

Volume-27 Panchnama of damage of fire fighter Page-9812 dated 07.03.2002 registration No.GRQ-8041.

Summing up the above, it is submitted that the above witnesses are Government servants. Attempts were made by accused persons and mob to prevent fire fighter reaching at scene of offence reveal common object and intention behind. That is exhibited and manifested to cause maximum damage. One of the conspirator viz. Bilal was seen instigating and guiding mob to commit the crime.

PART VII-F

SIXTH set of evidence

1 Vishva Hindu Parishad workers present at the platform No.1 at Godhra Railway Station to offer tea and snacks to Karsevaks travelling in Sabarmati Express.

2 PW-149 Exh.810 Page-11644 Volume 34 Janak K. Dave whose statement was recorded on the day of incident 27.02.2002 and his presence is established. He narrates the incident and in para 14 contradictions appears at page 11652.

3 PW-151 Exh.814 Page-11665 Dipakbhai Nagindas Soni whose statement was recorded on 02.03.2002 and in para 3 of deposition he narrates the incident and later on identified two persons

in the court. This witness is also a witness of recovery of ingots of gold from the shop of a jeweler where accused – Shaukhat was present from whom recovery was effected. In paras 19 and 28 there appears to be contradictions. This witness has not seen any smoke or fire before he reached at A Cabin via offside and thereafter crossing the track from below bogies and reached at A Cabin toward onside.

4 PW-154 Exh.823 Page 11743 Chandrashankar Nathuram Somaiya whose statement was recorded on 02.03.2002, who narrates about the incident in para 3. He identified one accused. Para 19 contradictions.

5 PW-155 Exh.825 Page-11757, Manoj Hiralal Advani whose statement was recorded on 02.03.2002 and in paras 25 and 31 contradictions appeared, who also mentioned about metal heap near the track. He further states about pelting of stones, causing damage to the bogies of train and throwing inflammable material took place simultaneously. According to Special Public Prosecutor some inconsistencies may be there but the above witness remained unshaken so far as main incident is concerned.

6 Volume-35 PW-159 Exh.834 Page-11813 Rajesh Vithalbhai Darji whose statement was recorded on 27.02.2002 i.e. the day of incident and states that he reached at A cabin straight from platform No.1. Likewise, other PWs 154 and 155 states the same. In para 31 major contradictions appeared Page-11923. The above witnesses also noticed one Mehboob Ahmed with knife.

7 Summing up the version of the above witnesses, learned Public Prosecutor Mr. J.M.Panchal would submit that all of them went to

offer tea and snacks to Kar Sevaks at Platform No.1 of Godhra Railway Station and witnessed the incident and narrated without any major contradictions. Version is corroborated by passengers PW-174 viz. Kalpesh PW-75 viz. Nilkanth Bhatia PW-110 Bhupat PW-118 Ashish Dave PW-114, Dilip Patel and other Gujarat Railway Police personnel viz. PW-140 Punjabhai, PW-146 Laxman Chauhan, PW-148 Hemendra Das. Like other witnesses they had seen the violent mob with lethal weapons and criminal action of members of unlawful assembly was visible from the place viz. structures / staircase of A Cabin behind which all these witnesses had taken shelter / hiding behind staircase.

8 **Volume-37**

PW-233 Exh.1219 : Page 12724 Dilip Gaimal Chelani was referred to by learned Special Public Prosecutor whose statement was recorded on 03.03.2002 and later on 03.05.2002. The above witnesses is the owner of Tea Stall situated at Platform No.2 at Godhra Railway Station and in paras 3 and 4 he described the incident seen by him. Further statement of the above witnesses dated 03.05.2002 was in the context of giving full particulars of name of the accused stated in earlier statement dated 03.03.2002. The testimonies of this witness is very important inasmuch as both defence as well as the prosecution relied upon this witness. In the police statement it was stated that he reached A Cabin. Besides, this witness has deposed on the line of other PWs and about crossing over platform No.2 to platform No.1 and thereafter reaching the guard bogie and then reaching A Cabin as per the cross-examination, like route taken by police personnel from offside and then reaching to A Cabin. With regard to some contradictions, it is stated that the above witness support substratum of prosecution case.

PART VII-G

About charge framed under Section 149 of the IPC, learned Special Public Prosecutor relied on the following decisions:-

1 Sunil Kumar vs. State of Rajasthan [2005 SCC [Cri.] 1230] [paras 8 and 9] **with regard to common object and `object' means purpose or design**. That two parts of section 149 in the context of awareness of facts and 5 criteria with explanation mentioned in Section 141 of IPC that earlier decision in the case of Nanakchand v. State of Punjab reported in AIR 1955 SC 274 and in the case of Chikkarange Gowda And Ors. vs State Of Mysore reported in AIR 1956 SC 731 were relied upon along with case of Masalti vs. State of U.P. reported in AIR 1965 SC 202, it is submitted that common object and unlawful assembly and continuing the membership of unlawful gathering can be seen / gathered from the place, time, nature of slogans shouting, weapon used and reluctance on the part of the mob to disburse in spite of lathi-charge and bursting teargas shells. The violent mob disbursed only after firing was resorted to. For the offences under Section 149 of IPC, no proof of overt act is necessary and mere presence of members of unlawful assembly is sufficient. Other decisions on the line are as under:

[1] Sheo Prasad Bhor Alias Sri Prasad vs. State of Assam reported in (2007)2 SCC (Cri.) 45

[2] Vishnu & Ors. vs. State of Rajasthan reported in (2009)10 SCC 477.

[3] Gurmail Singh vs. State of Punjab reported in (2013)4 SCC 228

[4] Om Prakash vs. State of Haryana reported in (2014)5 SCC 753

[5] Anup Lal Yadav & Anr. vs. State of Bihar in Criminal Appeal No. 775 of 2007

2 In the facts of this case, 15 persons were arrested on the spot with regard to first major incident which took place around 8:00 to 8:15 am on 27.02.2002. No Test Identification Parade was undertaken since accused were arrested from the scene of offence i.e. on the spot. All the accused so arrested were produced before the Magistrate on the next day [However such persons were shown to have been arrested during night hours]. It is further submitted that on the very day, night combing was carried out and persons were arrested and they were also assailants and witnesses have stated so. The corroboration comes from Gujarat Reserve Police employees Punjabhai Bavjibhai Patwadia and Mansinh Nurjibhai Vasava PW-144, Chatrasinh Gambhirbhai PW-163.

As per the complaint lodged by driver of the train Rajendra Yadav PW-228 at 9.30 am, on 27.02.2002 certain facts are stated and supported by Laxmansinh Nansinh Chauhan PW-146 and Hemendra Ramandas PW-148. That all 23 witnesses confirmed immediate arrest of assailants on the spot. Even second FIR No.10/2002 is filed about assailants attacking train / police personnel and to get those apprehended released.

3 In support of his arguments that in case of on the spot arrest of the accused, no Test Identification parade is required unless requested by accused. Reliance is placed in the case of The State of U.P. v. Rajju & Ors. reported in AIR 1971 SC 708. With regard to value of identification of accused, value and importance of identification of accused first and before the court decision on Criminal Appeal No.47 of 2014 in the case of Pargan Singh vs. State of Punjab [Paras 9 and 15] of

the Apex Court is relied, wherein, the Apex Court has considered the whole aspect about memory and identification of accused by witness after about 7½ years was held to be reliable. Reliance is also placed on 2000 SCC (Cri.LJ) 113 in the case of Ramanbhai Naranbhai Patel & Ors. vs. State of Gujarat for identification in court is sufficient and not holding Test Identification Parade would not be fatal for prosecution and there is no dishonesty nor any malafide by prosecution. Again, reliance is placed on the decision in the case of State of Himachal Pradesh vs. Lal reported in (199)7 SCC 280 in support of importance of Test Identification Parade.

4 About importance of case diary of investigation vis-a-vis section 172 of Code, reliance is placed in the case of Malkiat Singh vs. State of Punjab (1991)4 SCC 341 [para 11] and in the cases of Shamshul Kanwar vs. State of U.P. 1995(4) SCC 430 [para-10].

About damage to coaches

In support of submission that a violent mob armed with lethal weapons determined by its common object to kill passengers by pelting stones and damaging the train, reliance is placed on report of inspection made by Railway Employees viz. Suleman Abdul Majid Shaikh PW-132, Exh-764 Page 11452. That Coach No.93498 viz. S/6 coach was fully burnt, southern side of vestibule of S/7 was burnt at page No.11457.

PW-162 Exh-845 page-11867 Gangaram Jawanram Rathod at Ahmedabad also exclusively referred to damage to coaches and the above report is dated 27.02.2002 i.e. on the date of incident. He also noticed burnt vestibule towards Vadodara side of S/7 coach. That damage to other 8 to 10 coaches is also described, which corroborates

evidence of passengers and other Railway employees and about common object of members of unlawful assembly.

PART VII-H

Submissions and Evidence about Second Chain Pulling

1 Exh.745 record arrival time of Sabarmati Express at Godhra Railway Station at 7:42 am that signal for departure for Vadodara was given at 7:45 am. When 3 to 4 bogies left the platform, first chain pulling took place around 7:47 am and after resetting it, train restarted around 7:55 am. While the train was at A Cabin according to prosecution second chain pulling took place. Even complaint lodged by driver Rajendra Prasad Yadav at Page-12624 also mentioned about second chain pulling. That another document Exh.990 is about vardhi book information is also an admitted document and information given by Railway Police [GRP] at about 7:55 am stone pelting and causing damage and fire to coach by violent mob. Even, Station Master informed about the incident PW-134 Exh.988 and Exh.990.

2 By relying on decision reported in the case of Akhtar vs. State of Uttaranchal (2009)13 SCC 722, in the context of Section 294 of Cr.P.C., it is submitted by learned Special Public Prosecutor that genuineness of admitted documents can be read over as substantive evidence to prove correctness of its content.

3 Volume-34 PW-136 Exh.780 Page-11488 and 11489 Sajjanlal Raniwal TTE of the train stated in para 12 at Page-11494 that he had not verified any of the coaches to know as to why vacuum had gone down to Zero level.

4 Volume-33 PW-127 Exh.744 Page-11391 Rajendra Prasad Meena, Assistant Station Master at A Cabin at page 11392 mention about mob of 300-400 persons.

5 Volume-33 PW-126 Exh.742 Page-11384 Harimohan Foolsinh Meena, Assistant Station Master at his office with Deputy Station Superintendent – Y.M. Saiyed referred to message by R.P.Meena PW-127 and in para 6 described about procedure and system of chain pulling and further states that 3 coaches viz. WR5343, WR91263 and WR90238 Exh.743 where chain pulling of the coaches had taken place.

6 Volume-33 PW-128 Exh.748 Page-11391 para 2 mention about timings of arrival of train departure, first chain pulling and second departure. According to this witness in chain pulling, two short whistles and one long whistle are blown. Though this PW has not inspected or reset chain pulling as it was not part of his duty.

7 Volume-34 PW-135 Exh.777 Page-11475 the above PW mention about total 18 coaches containing S/1 to S/10 as reserved coaches, 6 general coaches and 2 SLR meaning thereby second class + luggage + Guard van. The above witness state about resetting of mechanism of chain pulling on first occasion with Assistant Driver – Mukesh Pachori.

8 **Even PW-127 – Rajendra Prasad Mishrilal Meena, Asst. Station Master / PW-228 Exh.1189 - Rajendrarao R. Jadav, Driver of the train referred to statement of 2 mechanics repairing / replacing vacuum hose pipe, in para 6 of his deposition. At page-11487 Exh.778 is an extract of guard book referred to vacuum and stone**

pelting and setting of the coach on fire. Original record of Exh.778 was called for. Further, Exh.1008 at Page-12230 Volume-36 is a communication dated 19.09.2005 of Senior Superintendent Engineer, Railway to Dy.S.P., Western Railway, about mechanism of chain pulling, ICV and shaft.

9 Volume-33 PW-131 Exh.760 Page-11442 Mukesh Pachori, Assistant Train Driver in para 3 mention about timings of arrival, then departure of train and first chain pulling, second departure and then stoppage of train at A Cabin. The above witness state about various causes of drainage of vacuum. With regard to specific question in para 17 he says about 2 causes of vacuum viz. one chain pulling and second hose pipe detachment or damage.

10 PW-132 Exh.764 Page-11452 Suleman Abdul Majid Shaikh mention about damage to railway coaches and there appears no resetting after second chain pulling and train started moving around 10:00 am upon re-supply of electricity by raising panto to overhead electricity line [wiring].

11 Volume-34 PW-153 Exh.822 Page-11373 Rajubhai Laljibhai Rathod Pointsman of Railway was pair witnesses of Fatesinh Dabsinh Solanki PW-111 Exh.712 Page-11287.

Submissions : Referring to chain pulling

Records of railway refers to chain pulling and that second chain pulling is admitted by Driver and Assistant Driver of the train. Even attempts were made to break or damage vacuum pipe. The driver of the engine deposes before the court state about replacement of hose pipe.

Though other mechanics at Godhra viz. Suleman and Gangaram at Ahmedabad workshop do not mention about damage caused to hose pipe, collectively and conjoint reading as above lead to only conclusion of second chain pulling.

PART VII-I

Conspiracy use of petrol and line of investigation

1 Reference is made to panchnama of scene of offence Exh.85 Page-9785 Vol. 27, it was drawn between 13:00 to 15:00 hours on 27.02.2002 for about 2 hours and 21 articles were collected and seized. Exh.86 is panchnama of S/6 coach drawn between 5:45 pm to 7:35 pm on 28.02.2002 and collected 13 articles. This panchnama is Exh.86 Page 9790 collected 13 samples and numbered as Articles 22 to 34 from 9 compartments. Thus, total 34 samples were taken from the coach and outside / nearby the coach from the scene of offence, meaning thereby 21 samples as per scene of offence panchnama and 13 samples were from S/6 coach as per panchnama of S/6 coach and 2 other samples were collected i.e. articles 35 and 36 at 03.03.2002 from `Mala garage' viz. one black earth part of petrol and control earth part of petrol Exh.371 page 10329. That all the samples were sent for FSL on 02.03.2002 and also received on the same day by the FSL. That other 2 articles 35 and 36 were forwarded on 04.03.2002 to FSL and they were received on the same day.

2 FSL report dated 28.03.2002 Exh.1173 Page-12576 based on principles of scientific analysis reveal presence of hydrocarbons from belongings and clothes of passengers window and other articles corroborate with direct evidence of eye witnesses viz. passengers,

railway employees and other witnesses including those whose statements were recorded under Section 164 of the Code. Thus, usage of huge quantity of inflammable material is the part of investigation for which evidence already existed and required confirmation by FSL and it was confirmed.

3 Visit to the place of incident by Mr. Dipakkumar P. Talati, Asst. Director, FSL is not only visual examination but it is a scientific examination to know and establish origin, intensity, pattern, nature, etc. of the fire for which rough notes, sketches, diagrams were prepared and it is also a part of investigation. Books on the subject of accident, mishap or otherwise on fire authored by experts should not simply to be pressed into service and relied on, unless they are shown to experts in witness box during the course of trial and confronted with all such writings and thereafter conclusions are to be drawn accordingly.

4 In support of the arguments, following decisions are relied on by Mr. J.M.Panchal, learned Special Public Prosecutor:

[1] Bhagwan Das vs. State of Rajasthan [AIR 1957 SC 589] [para 13]

[2] Piara Singh vs. State of Punjab [AIR 1977 SC 2274] [para7] when there are two conflicting medical opinions, the opinion of that expert which supports the direct evidence must be accepted.

[3] State of Madhya Pradesh v. Sanjay Rai (2004)10 SCC 570] [para 17] also on the line that opinion and books on the subject have no evidentiary value unless put to expert / witness.

[4] Santosh Kumar Singh vs. State through CBI (2010) 9 SCC 747

5 Mr. K.C.Bava, Investigating Officer, took samples of petrol from Kala @Hakimiya Petrol Pump and second from Patel and Co. on 09.04.2002. That first sample is at Exh.130 Page 9897 Volume-27 and second is Exh.134 Page-9903 Volume-28. On 10.04.2002 one Rajnibhai Jodhabhai PW-224 Exh.1139 Page-12488 and another Prabhatsinh Gulabsinh PW-231 Exh.1206 Page-12684 in their statements dated 10.04.2002 before the police stated that no loose petrol was sold, but in their testimonies it was clarified that on the day when the incident took place no loose petrol was sold. On 17.04.2002 discovery under Section 27 of Evidence Act of petrol carboy was recovered from accused No.53 viz. Mohmmad Syed Abdul Salam Badam Shaikh [Exh.1372 Page-13095 Volume-38].

6 On 23rd and 24th April, 2002 one Kishorsinh Jawansinh Sarvaiya, Fire Officer of Alang Ship Breaking Yard PW-187 Exh.931 Page-12129 Volume-36] inspected S/6 coach and took 39 photographs Exh.1813. The said Fire Officer is an experienced one, but having education up to Standard 12. His inspection and deposition establish usage of huge inflammable liquid, breaking of windows by applying force with iron rods and other weapons and also throwing burning rags. The above evidence which has come on record is not to be discarded or brushed aside when cogent and reliable evidence is available to which this PW and his report corroborate. Thus, in view of damage assessed by Railway employees viz. Suleman at Godhra and Gangaram Rathod at Ahmedabad and extent of damage to various coaches and extent of fire etc ruled out possibility of smouldering. On 24.04.2002 Mr. K.C.Bava,

Investigating Officer has given yadi to Mr. Yadav, PSI for further investigation including that of a vehicle `tempi' used for commission of crime.

7 On 01.05.2002 Mr. Mahinder Dahia, Deputy Director of FSL visited the coach and the rough notes, which are not in paper book, but exhibited along with 18 photographs with negatives at Exh.1348 and Exh.1828 to 1845 and negatives at Exh.1847 to 1863 are relied on.

8 On 17.05.2002 report was submitted Exh.1349 Page-13002 Volume-38 containing notes and photographs, which confirm about origin, cause of fire, nature, magnitude, direction, pattern of fire, etc. indicate usage of huge quantity of inflammable causing maximum damage on Eastern side and area around seat No.72, which was completely damaged and destroyed. Photographs 5, 6 and 7 show demarcating line between heavily burnt area and less burnt area and damage to flooring collectively reveal that maximum damage to Coach S/6 was from compartments 6, 7, 8 and 9 and in passage area. Main reports of Mr. Dahia is dated 02.09.2004 Volume-38 Exh.1345 Page-12978. That the above officer was further asked to explain certain phenomena pertaining to fire in S/6 by letter dated 07.11.2008 addressed by officer of SIT in which queries were raised and answered by him.

9 Samples taken, examined initially and reports submitted by Mr. Talati and Mr. Dahia, Deputy Director, FSL dated 02.09.2004, conclusion drawn by them and later on queries answered again get corroboration from 15 eye witnesses viz. passengers travelled, who stated in the testimonies that fire started from backside viz. Dahod side, rear of coach S/6.

They are:

Raju Krupashankar Pandey [PW-78], Gyanprasad Lallanprasad Chorasiya [PW-80], Veerpal C. Pal [PW-82], Rakeshbhai Kantibhai [PW-85], Maheshbhai Jayantibhai Patel [PW-87], Satishkumar Ravindra Mishra [PW-96], Dineshbhai Narsinhbhai [PW-92], Bachubhai Dhanjibhai Ladwani [PW-94] Hariprasad Manilal [PW-97], Parsotam Gordhan [PW-107], Punamkumari Sunikkumr Tiwari [PW-119], Babubhai Somdas Patel [PW-122], Rambhai Bhudardas Patel [PW-123], Savitaben Tribhuvandas [PW-157] and Mandakiniben Nilkanth Bhatia [PW-168].

That 2 other witnesses Shardaben and Hetalben PW-95 and Exh.85 and Radheshyam R.Mishra [PW-113 Exh.715] also support fire taking place in the coach from backside.

10 As per learned Special Public Prosecutor, pouring of huge quantity of inflammable material viz. petrol is the main cause and fire engulfed the coach S/6 pursuant to that, but certain events had also taken place simultaneously viz. even from broken window of S/6 from platform side, members of violent mob, who were assigned different roles pursuant to conspiracy have thrown burnt rags, acid and petrol bulbs, etc. Again corroboration is rendered to FSL report which confirms about breaking of glass, aluminium windows and horizontal iron grill / bar at the outer layer of coaches.

11 PW-81 Exh.625 Page-11084 Volume-32 Pujaben B. Kuswaha having seat Nos.4, 5 and 6 in S/6 coach stated about smoke as mounting and she along with other family members escaped from

vestibule of S/5 and S/6 on offside. Her statement before the police was recorded on 11.07.2002.

12 PW-118 Exh.727 Page-11327 the above PW was initially travelling in S/2 coach and after the train departed from Godhra he had boarded in S/5, who saw persons throwing inflammable liquid in S/6. His police statement was recorded on 06.03.2002.

13 PW-107 Exh.690 Page-11253 Volume-33 Parsottam Gordhan Patel. His first statement was dated 29.01.2005. He was sitting in 5th compartment of S/6 stated about members of violent unlawful assembly and throwing petrol into coach.

14 PW-110 Exh.696 Page-11275 Bhupatbhai Maniram Dave whose statement was recorded on 06.03.2002. According to him he had noticed violent mob from window of door of S/7 which was open.

15 PW-86 Exh.638 Page-11130 Volume-33 Hariprasad Maniram Joshi travelling seat No.33. In his statement of June, 2002 he states in paras 7 and 9 that it is true that stone pelting and setting fire of train was not seen by him as he along with his wife had gone on upper-berth and while escaping initially he moved towards seat No.72 on eastern side, but noticing number of persons being there, came back crawling through seat No.10.

16 PW-124 Exh.738 Page-11362 Dilipkumar J. Patel. His first statement is recorded on 06.03.2002 and further statement is record on 22.01.2005 wherein in par-2 he states about sitting nearby window and witnessed other windows were broken and acid and petrol bulbs were thrown inside the coach from carboys inflammable liquid was sprinkled.

17 PW-113 Exh.715 page-11298 Radheyshyam Ramchandra Mishra. His first statement is recorded on 16.02.2005 by police, who mention about noise heard by him due to throwing of bottle and got down from offside.

18 PW-119 Exh.729 Page-11336 Punamkumari Sunilkumar Tiwari. Her first statement was recorded on 07.03.2002 and other two statements were recorded on 23.07.2005. This witness was travelling with her family on seat Nos.18 to 21.

19 PW-114 Exh.749 Page-11304 Subhashchandra Ramchandra Mishra. His first statement was recorded on 08.05.2002 and further statement was recorded on 18.02.2005. It is stated that a sack of grass / hay was lit and placed on window and thus coach was set on fire and smoke started emitting.

20 PW-157 Exh.828 Page-11801 Savitaben Tribhuvandas having seat No.37. Her first statement was recorded on 06.03.2002 and thereafter on 08.05.2002 and on 28.01.2005. She refers to throwing of burning rags and petrol. According to her, first burning rag fell on her shawl and she threw it away and thereafter second rag fell in the coach.

21 PW-170 Exh.873 Page-11999 Pravinkumar Ambalal Patel whose first statement was recorded on 17.04.2002. This witness suffered injury of fractured leg and no treatment was taken at Godhra, but travelled to Ahmedabad and went to V.S.Hospital and due to cumbersome procedure went to his native at Visnagar and took treatment of a private Orthopedic Surgeon. Likewise, PW-159 Exh.834 Exh.834 Page-11813 Rajeshbhai Dhanjibhai. His first statement was

recorded on 27.02.2002 and thereafter on 03.05.2002. Another PW-167 Exh.862 Page-11935 Harsukhlal Tejandas Adwani in para-9 contradictions appeared on record.

22 Volume-34 PW-149 Exh.810 Page-11645 Janakbhai Kantibhai Dave. His first statement was recorded on 27.02.2002.

23 PW-153 Exh.825 Page 11757 Manoj Advani, whose first statement was recorded on 02.03.2002.

24 PW-154 Exh.823 Page-11744 Chandrashankar Nathuram Soniya whose first statement was recorded on 02.03.2002.

25 PW-208 Exh.1067 Page-12366 Murlidhar Rochiram Mulchandani whose first statement was recorded on 28.02.2002.

26 All the above witnesses in their testimonies deposed that inflammable material / liquid was thrown / sprinkled from broken windows and even some of the witnesses had seen throwing of burning rags and the same corroborate with FSL report and samples collected, analyzed from scene of offence panchnama and S/6 coach panchnama.

PART VII-J

SLIDING DOOR

1 PW-226 Exh.1158 Page-12535 Satishchandra Ganpatram Khandelwal, Officer of FSL Gandhinagar.

2 PW- Exh.219 Page-10035 Bhupatbhai Motibhai Chauhan, a

panch witness of visit of above officer of FSL at Exh.220 Page 10046.

3 Volume-28 PW-145 Exh.794 Page-11598 Jitendrakumar Chimanlal Patel, a photographer accompanying FSL officer and the photographs are at Exh.796 onwards.

4 That above PW-226 visited S/6 coach at Godhra Railway Station on 11.07.2002 and prepared rough notes at Exh.1160 and report was submitted on 20.07.2002 Exh.1159 Page-12544. According to the report and submissions made by Mr. J.M.Panchal, learned Special Public Prosecutor about sliding door that closing direction of the above sliding door was from North [off] to South [on] and opening vice-versa. That scratch mark of 62 cms. appeared on the door and presence of carbon was detected which reveal blackening on the scratch mark and it was fresh and indicative of usage of force and stands corroborated by other witnesses and they are in Volume-33.

PW-88 Exh.642 Page-11143 Shantibhai Shankarbhai Patel.
PW-93 Exh.657 Page 11161 Shardaben Patel.
PW-99 Exh.674 Page-11209 Prakash Hiralal Teli.
PW-102 Exh.680 Page-11224 Rampal Jigilal Gupta.
PW-114 Exh.719 Pg-11304 Subhashchandra Ramchandra Mishra.

Last three PWs are authorized travellers:

5 Three witnesses and their statements under Section 164 of the Code:

[1] Ajay Kanubhai Bariya PW-236 Exh.1231 Page-12782
[2] Anwar Abdulla Ahemad Kalandar PW-234 Exh.1220 Page-

12743

[3] Illiyas Mulla PW-232 Exh.1214 Page-12709

That statements of all the above 3 witnesses were recorded under Section 164 of the Code. Ajay Kanubhai Bariya supported the case of the prosecution while other two did not and they were declared hostile.

6 In the context of submissions made about evidentiary value of Section 164, reliance is placed on the decision of the Apex Court in the case of Ram Kishan Singh vs. Harmit Kaur (1972)3 280, which was later on relied on in the case of Baij Nath Sah vs. State of Bihar reported in (2010)6 SCC 736 [paras 5 and 8] that it can be used to corroborate or to contradict a witness, as required under Section 145 of the Evidence Act. Though such statement is not admissible, but evidence on oath will not be wiped out.

7 Testimonies of Ajay Kanubhai Bariya before the court is indicative of the fact that it establishes conspiracy and about credibility as a witness. It is submitted that he was a hawker at Railway Station, Godhra and had no animosity towards anyone and on the contrary he was employed by a Muslim owner of a refreshment stall at Railway station. Even delay in recording statement or investigation of the case can be scrutinized closely by the trial court and explanation for such delay is to be considered and it is considered accordingly.

8 Since Ajay was familiar with railway system, knew about camp of Railway Magistrate at Anand and approached him accordingly. That no application was given to join Ajay as accused under Section 319 of the Code. That his evidence get support from Ranjitbhai Jodhabhai PW.224, Prabhatsinh Gulabsinh PW-231, Sikandar Mohmad Siddik

Shaikh PW-237 and Bhikabhai H. Baria PW-206 and confessional statement of accused Jabir, which can be used substantially against the accused, but so far as co-accused are concerned, same can only be used for corroboration and limited purpose, but conjoint and collective reading of all these testimonies would establish viz. gathering and meeting of minds by conspirators at Aman Guest House, purchase of petrol, carrying it in a tempi containing 7 carboys of 20 liters each to Aman Guest House, off loading and the loading on the next day i.e. on 27.02.2002 in the morning in the same tempi and took it to A Cabin via Ali Masjid. Cutting vestibule of S/7 coach, forcibly bending sliding door as reflected from scratch mark and position of stopper, allowing co-accused to enter into S/6 with carboys, opening door of South East door of S/6 towards A Cabin side allowing other to enter and pouring huge quantity of petrol and set S/6 on fire.

9 Reference is made to statement of accused Jabir, aged 20 years, Exh.1469 Page-13335 Volume-39 that he was arrested on 22.01.2003 and was given remand up to 30.01.2003, but was taken to the Magistrate for recording statement under Section 164 on 29.01.2003, a day earlier before the period of remand was over. From recording and reading of statement under Section 164, according to Special Public Prosecutor, it is voluntary, truthful and all statutory requirements under Section 164 were followed by the Chief Judicial Magistrate, Godhra and in deposition Mr. Parmar, Chief Judicial Magistrate, Godhra confirmed the same at page-13331. However, the above Magistrate referred to improper behaviour of Noel Parmar, Investigating Officer on 29.01.2003. Later on, Jabir was produced on 04.02.2003 as per yadi dated 03.02.2003 and 24 hours reflection time was given to re-think about statement to be given and thereafter on 05.02.2003 statement under Section 164 was recorded and ample time to think over is given. In support of submissions, reliance is placed on

the decision in the case of Madi Ganga Vs. State of Orissa [AIR 1981 SC 1165][para-5] that statement under Section 164 recorded by Magistrate to be presumed as genuine and in view of Section 80 of Evidence Act Magistrate is not to be examined.

10 PW-243 Exh.1393 Page-13111 Mr. Suryakant B. Patel, PSI attempted to explain circumstances of custody of Jabir on 29.01.2003 and 4th to 5th February, 2003.

11 Certain dates about statements of witnesses and confession of accused recorded **under Section 164 of the Code** are as under:

[a] On 09.07.2002, Ajay Bariya, PW-236 before Camp Anand Railway Magistrate;

[b] On 26.07.2002 Anwar Abdulla Ahemad Kalandar , PW-234 before camp Dakor Railway Magistrate;

[c] On 07.08.2002 Illiyas Mulla, PW-232 before camp Dahod Railway Magistrate.

[d] On 11.03.2003 Ranjit Jodhabhai Patel, PW-224; and

[e] On 12.03.2003 Prabhatsinh Gulabsinh, 231 statements were recorded by learned learned Chief Judicial Magistrate, Godhra upon intervention of learned Additional Sessions Judge, Godhra.

[f] On 22.09.2003 Sikandar [Fakir] PW-237 before learned Chief Judicial Magistrate, Godhra.

[g] On 05.02.2003 Jabir, **accused** before learned Chief Judicial Magistrate, Godhra.

12 It is submitted that conjoint reading of Ranjit Jodhabhai Patel and Prabhatsinh Gulabsinh PW-224 and PW-231 under Section 164 and Jabir and accused would establish conspiracy. So far as cutting of canvas vestibule of S/7 statements of Ajaybhai Kanubhai Bariya PW-236 and Sikandar PW-237 under Section 164 at page 12782 and page 12845 and Jabir at Page 1339 and others viz. Govindsinh Ratansinh Panda PW-202, Pravinkumar Amtabhai PW-170 corroborate the incident.

PART VII-K

On the point of conspiracy following decisions are relied on

[1] Yash Pal Mittal v. State of Punjab - AIR 1977 SC 2433 [paras 9 & 10]

[2] Major E.G. Barsay v. State of Bombay - AIR 1961 SC 1762 [para-78]

[3] Ajay Agarwal v. Union of India - AIR 1993 SC 1637 [paras 9, 11, 12, 13, 16, 22, 24]

[4] Devender Pal Singh vs. State (NCT of Delhi) - 2002(5) SCC 234

[5] Mohd. Khalid vs. State of Bengal - 2002(7) SCC 334

[6] Mohd. Amin v. CBI - (2008)15 SCC 49

[7] Mehbub Samsuddin Malek v. State of Gujarat - 1996 SCC(Cri) 1353

[8] Chandra Prakash v. State of Rajasthan - 2014 AIR SCW

3055

On the point of solitary witness following decisions are relied

[1] Krishna Mochi vs. State of Bihar 2002 SCC [Cri.] 1220. The above judgment is also relied on by Mr. R.S.Jamuar, learned counsel appearing for SIT.

[2] Kunju Alias Balachandran vs. State of Tamilnadu (2008)1 SCC (Cri.) 331 which was based on decision of Vadivelu Thevar v. State of Madras AIR 1957 SC 614.

[3] State of Rajasthan vs. Omprakash (2008)1 SCC (Cri.) 411 in which earlier decision in the case of Anil Phukan v. State of Assam (1993)3 SCC 282.

[4] Ravi vs. State Represented by Inspector of Police (2009)3 SCC (Cri.) 736 para-11.

[5] Gulam Sarbar vs. State of Bihar (now Jharkhand) (2014)3 SCC 401 para 19.

So far as the criminal appeal under section 391 of the Code is concerned, reliance is pleased on decision reported in 2013 JT Vol.6 in SLP [Cr.] No.2637 of 2013 decided on 03.05.2013, in which reliance is placed on Tehsildar Singh v. State of Uttar Pradesh AIR 1959 SC 1012 for Section 145 of the Evidence Act. That sting operation is not an admissible piece of evidence and it is not made before police or any statutory authority of investigating agency, as required under section 161 nor it is under Section 164 before the Magistrate.

Reference is made to Section 17 of the Evidence Act and Sections 145, 155 and 155(2) of Evidence Act with regard to definition to admission, use of previous statement for the purpose of cross-examination and contradiction and impeaching credibility and character of a witnesses. It is also submitted that once the order under Section 233(3) of the Code passed, the issue cannot be raised under Section 391 of the Code.

With regard to Section 164 of the Code, reliance is placed in the following decisions:

[1] Ram Charan vs. The State of U.P AIR 1968 SC 1270. para-8.

[2] Badri vs. State of Rajasthan (1976)1 SCC 442

[3] Ramprasad vs. State of Maharashtra (1999)5 SCC 30 and in the context of solitary witness reliance is placed on the decision in the case of Haricharan Kurmi vs. State of Bihar AIR 1964 SC 1184 that statement recorded under section 164 of the Code can be used as a corroboration for other accused. But can safely be relied against the accused if he has made such statement.

[4] State of Punjab vs. Harjadev Singh (2009)16 SCC 91 [para-13 including para 16].

Without pre-plan, a huge crime would not have been possible. Reliance is placed on the decision in the case of State vs. Shankar Sakharam Jadhav AIR 1957 Bom. 226 and in the case of Momin vs. The State of Maharashtra AIR 1971 SC 885 para-7 that direct evidence is not

necessary.

The case of Bhagwan Swarup Lal Bishan Lal v. State of Maharashtra AIR 1965 SC 682 para-8.

The case of Mohd. Jamiludin Nasir vs. State of West Bengal (2014)7 SCC 443

For sections, 147, 148 and 149 of IPC, Nanak Chand v. State of Punjab AIR 1955 SC 274 is relied on.

Baladin And Ors. vs State Of Uttar Pradesh AIR 1956 SC 181

About defective investigation, Madan Singh v. State of Bihar 2004(4) SCC 622 para 10 and 12, which referred to earlier decision reported in AIR 1956 SC 731 Chikkarange Gowda v. State of Mysore.

Dayal Singh and others Vs. State of Uttaranchal (2012)8 SCC 263 and Ganga Singh Vs. State of Madhya Pradesh (2013)7 SCC 278 [paras 24 & 25].

Rabindra Kumar Pal Alias Dara Singh vs. Republic of India 2011(2) SCC 490.

PART VII-L

Clarification and submission on behalf of prosecution about identity of Mehbub Ahmed Yusuf Hasan @Latiko is as under:

[A] It was contended on behalf of the Appellant No.8 of Criminal Appeal No. 557 of 2011 (Org. Accused No. 1 of S.C. No. 84/2009) that P.W. No. 236, Exh: 1231, Ajay Kanubhai Bariya has identify the wrong person accused Farook Ahmed Hasan instead of Mehbub Ahmed Yusuf Hasan @ Latiko.

Clarification:

[1]
Part No. 38, Page 12782, P.W. 236, Exh: 1231, Ajay Kanubhai Bariya at page : 12788, Para 7, at Sr. No. 7 this witness has identified the Accused as "Mehboob Latiko". While the name of identified accused was asked by the Hon'ble Presiding Judge, he has given his name as "Farook Ahmed Hasan (Page: 12789, Sr. No. 7) (Accused No. 4 of S.C.No. 79/09)

At that relevant time witness has drawn the kind attention of the Hon'ble Presiding Judge about accused has tried to hide his identity by giving false name.

(Whereas per Final Judgement "Sr. No. 16 of Schduled-C" Accused No. 4 of S.C.No. 79/09 is Faruq @ Haji Bhuriyo S/o Abdul Sattar Ibrahim Gaji has been convicted for "Life Imprisonment"

(Whereas per Final Judgement "Sr. No. 11 of schedule –A" Accused No. 1 of S.C. No. 84/09 is Mehbub Ahmed Yusuf Hasan @ Latiko has been convicted for "Death Sentence")

[2] Part No. 38, Page: 12845, P.W.No. 237, Exh: 1252,,

Sikkandar Mohammad Siddiq Shaikh

At Page: 12848, Para : 7 at Sr. No. 7 this witness has identified the accused as "Mehboob Latika. While the name of identified accused was asked by the Hon'ble Presiding Judge, he has given his name as "Farook Ahmed Hasan (Page: 12849, Sr. No. 7) . Again second time this accused tried become smart by giving his false name. But this Hon'ble Presiding Judge was vigilant and mark that this accused try to become smart by giving his false name and to hide his identity by giving false name before Hon'ble Court and therefore, at Page: 12849 At Sr. No. 7 the Hon'ble Presiding Judge has correctly noted as "Accused No. 1, S.C.No. 84/09 and his correct name "Mehboob Ahmed Yusuf Hasan."

[3] **Discussion of Evidence against "Accused No.1, S.C.No. 84/09 "Mehboob Ahmed Yusuf Hasan"**

Part No. Page: of Judgment :-

Hon'ble Presiding Judge has discussed about evidence against Convict:-

Having gone through the record, it appears that the evidence against this accused is as under:

P.W.No.	Exh:	Name
206	1060	Bhikha H. Bariya
236	1231	Ajay K. Bariya
237	1252	Sikaner M. Shaikh

This accused has been identified before the Court by the above mentioned P.W.No. 206, 236,237

During the T.I.Parade (Exh: 360) also, he was identified by the witness.

As discussed earlier, the presence of the above witnesses near the place of incident and the facts of opportunity of witnessing and identifying the accused are clearly established.

On careful reading, it appears that the evidence of these witnesses is reliable and trustworthy and they have no reason to implicate falsely this accused in this serious crime."

Xerox copy of the relevant pages of Discussion of Evidence against "Accused No.1, S.C.No. 84/09 "Mehbub Ahmed Yusuf Hasan" are annex herewith as **Annexure-A**"

(Conduct of the convict by giving false name and tried to hide his identity before the Hon'ble Presiding Judge)

[B]

[I] Whether the Investigating Officer has obtain the Exh: 1469, Confessional Statement of Convict Accused Jabir Binyamin Behra?

[II] If, Yes than on which date and from whom he has obtained it?

Clarification:

[1] **Part 39, Page 13129, P.W.244, Exh: 1406, Noel Volar Parmar, Investigating Officer**

<u>In Cross at Pg. 13179, Para 73, Line 7 to 9</u> In Cross Examination he has replied that:-

I have received the copy of the Confessional statement under Section 164 of Jabir Binyamin Behra on very same day i.e. dt. 5.2.2003 during 5 to 6 hours from the Court on the basis of application (Yadi) for it."

Xerox copy Certified of the Document i.e. Exh: 1469, Confessional Statement of Convict Accused Jabir Binyamin Behra Annexed herewith as **<u>Annexure-B</u>**. Looking to the document, the said document itself clarify that on dated on 5th February, 2003 an application was given by Dy. S.P., Rly, Godhra the same was allowed and on the very same date i.e. 5th February, 2003 the certified copy of the Exh: 1469, Confessional Statement of Convict Accused Jabir Binyamin Behra was given. (P.S. Rubber stamp of C.C.)

(Whereas P.W. 246, Exh: 1467, Rajnikant Khodidas Parmar, Ld. CJM, Panchmahal at Godhra has in his Cross Examination stated that: It has not happened that on that day on the basis of an application (Yadi) the copy of the statement was given to Mr. Noel Parmar.")

Hence it is clear-cut evidence of P.W. 244, Exh: 1406, Noel Volar Parmar Investigating Officer that he has obtained certified copy of the Exh; 1469 from P.W. 246, Exh: 1467,

Rajnikant Khodidas Parmar, Ld. CJM, Panchmahal at Godhra.

Date: 04/05/2015

PART VII-M

Reply by Mr. A.D.Shah, learned counsel for the defence to clarification and submissions on behalf of prosecution regarding Identification of accused No. 1 of Sessions Case No. 84 of 2009 by PW. 236/Exh. 1231 Ajay Kanubhai Bariya and PW.237/Exh.1252 Sikandar Mohammad Siddiq Shaikh

Clarification No. 1

[1] It is submitted by the prosecution that witness Ajay Kanubhai Bariya in his evidence on page 12788/Para-7 identified the accused at Sr. No. 7 as "Mehboob Latiko". It is submitted by the prosecution that when the Hon'ble Presiding Judge inquired about the name of person at Sr. No. 7 identified by Ajay Kanubhai Baria, he gave his name as Farukh Ahmed Hasan (as noted by learned judge in evidence on page 12789 Sr. No. 7).

In respect to this part of the evidence, the clarification refers to " **at that relevant time witness has drawn the kind attention of the Hon'ble Presiding Judge about accused has tried to hid his identify by giving false name."**

Reference to the evidence of Ajay Kanubhai Bariya on page-12789 there is no note made by the learned Presiding Judge on the aspect of accused while disclosing his name his name as "Farukh Ahmed Hasan", was trying to hid his identity by giving

false name or witness Ajay Kanubhai Bariya making any such statement before the Hon'ble Court. Thus, the evidence on record does not reflect the above aspect as mentioned herein above by the prosecution in clarification.

[2] Similarly, while mentioning about evidence of PW.237/Exh 1252 Sikandar Mohammad Siddiq Shaikh in his evidence on page 12848/Para-7 identifying the person at Sr. No. 7 as accused Mehboob Latika. The learned Judge while noting this aspect about identification on page 12849 Sr. No. 7 on inquiry, the accused gave his name as “Farukh Ahmed Yusuf Hasan.”

It is submitted by he prosecution “**Again second time this accused tried become smart by giving his false name. But the Hon’ble Presiding Judge was vigilant and marked that this accused tried to become smart by giving his false name and to hid his identity by giving false name before the Hon’ble Court.”** This interpretation or inference is not justifiable, more particularly the learned judge has not made any noting about this aspect while recording evidence. The inference which the prosecution wants to try from recording of accused number against Sr. No. 7 in evidence on page-12789 and 12849 clearly reflect that even Presiding Judge was not sure about the correct name of the accused and identification.

During evidence of Ajay Kanubhai Bariya on page-12789 after recording name as “Farukh Ahmed Hasan” at Sr. No. 7, the learned judge mentioned “accused No. 4 of Sessions Case No. 79 of 2009. While recording the evidence of PW. 237/Exh. 1252 Sikandar Mohammad Siddiq Shaikh on page-12849 at Sr. No. 7

name as 'Farukh Ahmed Yusuf Hasan." The learned Judge noted "accused No. 1 the Sessions Case No. 84 of 2009 (Mehboob Ahmed Yusuf Hasan).

Reference No. 2

[3] Consideration of case against accused no. 1 of Sessions case No. 84 of 2009-Page-15343-Volume-44 reveals that three witness,

(i) PW.206/Exh. 1060 Bhikhabhai H. Bariya

(ii) PW.236/Exh.1231 Ajay Kanubhai Bariya; and

(iii) PW.237/Exh.1252 Sikandar Mohammad Siddiqui Shaikh,

identified this accused before the Court and at T.I.Parade. The Learned Judge placed reliance on the statement recorded under Section 164 of Cr.P.C. of P.W.232 Illiyas Mulla and PW 234 Anwar Kalandar where " **the name of this accused and role played by him is clearly mentioned." .** Both these witnesses have been treated hostile by the prosecution and statement under Section 164 of Cr.P.C. being previous statement case be used for the purpose of contradiction and/or corroboration and it is not substantive piece of evidence. Thus, both these witnesses having not supported the prosecution case their substantive evidence before the Court is rendered unreliable and statement under Section 164 Cr.P.C. cannot be resorted to as substantive piece of evidence to consider the identify and role played by him as mentioned in those statements. The panchnama of T.I.Parade (exh.360/P.10315) clearly reflect that only two witnesses, namely, Ajay Kanubhai Bariya and Sikandar Mohammad Siddiq

Shaikh had been taken for T.I.Parade on 20/02/2006. Thus, the witness Bhikhabhai Harmanbhai identified accused for the first time before the Court.

However, the learned Judge has not taken into consideration the statement of accused recorded under Section 313 of Cr.P.C. on page-23402. The accused in answer to question No. 863 clearly stated that his real name is Farukh Ahmed Hasan and submitted further written statement dated 28/072010. His statement on page-23577 he has explained the circumstances in which he has been involved and has produced School Leaving Certificate (Page-23578) letter dated 11/9/1981 for the admission of Farukh Ahmed Yusuf Hasan S/o Ahmed Yusuf Hasan (Page-23579), Progress report of the year 1984-1985 and marriage registration certificate (Page 23581). Thus, it is case of the accused that he has been wrongly arrested as Mehboob Ahmed Hasan or Mehboob Latiko. The learned Judge has not considered these aspects emerging from the statement on page -23577 and documents.

[4] Thus, emphasis by prosecution on “conduct of the convict by giving false name and tried to hid his identity before the Hon’ble Presiding Judge” in view of statement under Section 313 as well as document produced by the accused raises a serious consideration about the aspect of false involvement by the prosecution.

[5] The clarification note and submission, (i) whether the Investigating Officer has obtained the Exh.1469, confessional statement of convict accused Jabir Bin Yamin Behra?, (ii) If, yes then on which date and from whom he has obtained it”. It is

mentioned on this aspect by referring to the evidence of PW. 244/Exh. 1406 Noel Volar Parmar in respect of cross examination on page-13179 Para-73. The evidence of this witness (Page-13138/Para-18) witness clearly referred “took note of telephonic information about recording of statement under Section 164 of Cr.P.C. of accused Jabir Bin Yamin Behra by Chief Judicial Magistrate and had informed on phone to S.P. (Western Railway) Shri J.K. Bhatt and Shri Rakesh Asthana. Thus, the witness in his examination-in-chief nowhere referred to his receiving certified copy of the confessional statement in view of Yadi written by him. However, witness is cross-examination clearly stated that on 05/02/2003 between 5 to 6 p.m. he had obtained copy of statement of accused Jabir Bin Yamin Behra recorded under Section 164 on the basis of Yadi written by him and thereafter he had discussion about the facts contained in the statement with his Superior Officer . The witness did not produce certified copy of the said statement purported to have been obtained on 05/02/2003. The witness further, in cross examination (para-131/Page 13220), clearly stated that he had read the statement of accused Jabir recorded under Section 164 and he cannot say as to whether the said statement of accused was verbatim the same to his earlier video recorded statement of not.

The prosecution examined PW.246/Exh.1467 Rajnikant Khodidas Parmar (P. 13307) Chief Judicial Magistrate who deposed that the confessional statement was personally placed in a cover and after sealing the same, the same was forwarded to Sessions Court. (P. 13309). This witness in cross examination clearly deposed (P.13313)- “while recording statement no copy of statement was prepared by putting carbon. The said statement

was put in cover and the procedure of sealing the same was in my presence immediately. While doing the process of putting the statement in cover and sealing the same Shri Noel Parmar was not present in the Court. Similarly, at that time PSI Shri S.B.Patel was also not in the Court room. When this cover containing statement was sealed till that, no Xerox copy was taken out. The cover after sailing was sent to Sessions Court on that very day". The witness further stated that " It has not happened that on the basis of Yadi copy of statement was given to Noel Parmar o that day. It has also not happened that he had given seal cover to Shri Noel Parmar. Even after this cross examination and more particularly when it was clearly emerging that no copy was given to Shri Noel Parmar, the prosecution did not produce certified copy of confessional statement which is now produced with written clarification submitted on 04/05/2015.

Had this statement been produced during trial by Shri Noel Parmar, then obviously the defence could have cross examined Shri Noel Parmar, Shri S.B.Patel and Shri Chief Judicial Magistrate R.K.Parmar on various aspects. The prosecution even did not seek any clarification about supply of certified copy of statement recorded under Section 164 of Cr.P.C. of accused Jabir Bin Yamin Behra (Exh.1469) during the evidence of either Noel Volar Parmar or Chief Judicial Magistrate Rajnikant Khodiadas Parmar. This would clearly reflect about the collection of evidence by the I.O. Thus, this evidence is sought to be introduced during hearing of the appeal and thereby depriving the defence of material cross-examination of the witnesses on this aspect. Thus, these aspects may also be taken into consideration while considering "Clarification and submission" on behalf of the prosecution.

PART VIII-A

1 **Mr. J.M.Panchal, learned Special Public Prosecutor has prayed to set aside the acquittal of the following accused persons in Criminal Appeal No.743 of 2011 against acquittal:**

[1] Yah Mohammad Safi Mohammad Chhakada, A-18, Sessions Case No.69 of 2009.

[2] Abdul Ashu Mistry, A-17, Sessions Case No.69 of 2009.

[3] Rafiq Mohammad Jamnu, A-21, Sessions Case No.69 of 2009.

[4] Ahmed Abdulrahim Hathibhai, A-22, Sessions Case No.69 of 2009.

[5] Samsherkhan Sultan Khan Pathan, A-23, Sessions Case No.69 of 2009.

[6] Idris Abdullah Umarji Shaikh, A-23, Sessions Case No.69 of 2009.

[7] Azgarali Kamruddin Ohraji, A-26, Sessions Case No.69 of 2009.

[8] Kamal Badshah Mohmad Sharif Musalman, A-27, Sessions Case No.69 of 2009.

[9] Taiyab Abdul Haq Khoda, A-28, Sessions Case No.69 of 2009.

[10] Mohamad Mushrafkhan Ashrafkhan Pathan, A-30, Sessions Case No.69 of 2009.

[11] Habidbhai Karimbhai Shaikh, A-31, Sessions Case No.69 of 2009.

[12] Mohammad Ibrahim Shaikh, A-32, Sessions Case No.69 of 2009.

[13] Hussain Abdulsattar Durvesh, A-33, Sessions Case No.69 of 2009.

[14] Shoukat Mohammad Shaikh @Dagal, A-34, Sessions Case No.69 of 2009.

[15] Ahmed Abdul Rahim Kala Shaikh, A-35, Sessions Case No.69 of 2009.

[16] Asfi @Babu Siddik Kadear, A-36, Sessions Case No.69 of 2009.

[17] Abdul Rahim Ibrahim Kalu, A-37, Sessions Case No.69 of 2009.

[18] Anwar Hussain Ahmed Pittal Shaikh.

[19] Mohammad Abdul Salam Giteli, A-39, Sessions Case No.69

of 2009.

[20] Salim Abdul Gaffar Shaikh, A-41, Sessions Case No.69 of 2009.

[21] Mohammad Hussain Abdul Rahim Kalota, A-42, Sessions Case No.69 of 2009.

[22] Abdulgani Ahmed Sheikh, A-43, Sessions Case No.69 of 2009.

[23] Zabir Abdullah Kala, A-44, Sessions Case No.69 of 2009.

[24] Abdul Rauf Ahmed Yaymin, A-45, Sessions Case No.69 of 2009.

[25] Abdul Razak Abdul Rahim Dhantiya Razak Dungariya, Sessions Case No.69/2009

[26] Abdulrazak Yakub Ismail Wala@Moto, A-52, Sessions Case No.69 of 2009.

[27] Mohd. Sayed Abdul Salam Badam, A-53, Sessions Case No.69 of 2009.

[28] Ishak Mohd. Ghanchi Mamdu, A-54, Sessions Case No.69 of 2009.

[29] Shabbir @Bhupat no Bhrio Abdul Rahim Badam, A-1, Sessions Case No.70 of 2009.

[30] Mohd. Hanif @Moto Chamro Abdulrahim Bhatuk, A-71, Sessions Case No.71 of 2009.

[31] Muzafar Usman Hayat, A-6, Sessions Case No.71 of 2009.

[32] Idris Ibrahim Charkha @Saka, A-1, Sessions Case No.72 of 2009.

[33] Idris Yusuf Ismail Mafat Idris Ravan, A-2, Sessions Case No.73 of 2009.

[34] Habib @Badshah Binyamin Bahera, A-2, Sessions Case No.75 of 2009.

[35] Rafik Ahmed Alam @New Muslim, A-3, Sessions Case No.75 of 2009.

[36] Roll @Ruhul Amin Hussein Hathila, A-4, Sessions Case No.75 of 2009.

[37] Yakub Abdul Sattar Shakla, A-1, Sessions Case No.76 of 2009.

[38] Abdul Karim Haji Husen Badam, A-2, Sessions Case No.76 of 2009.

[39] Usmangani Mohd. Ibrahim Coffeewala, A-4, Sessions Case No.78 of 2009.

[40] Rafiq Mohd. S/o. Abdulmajjid Umar Kalander @Rafiq Bhopo, A-2, Sessions Case No.79 of 2009.

[41] Siddiq Abdulrahman Abdulsattar Bakkar, A-1, Sessions Case No.80 of 2009.

[42] Rais Hussain Ismail Mitha, A-1, Sessions Case No.81 of 2009.

[43] Idris @Thus Abdulgani Abdulmajid Ranta, A-1, Sessions Case No.86 of 2009.

[44] Siddik Ibrahim Umar Hathila, A-1, Sessions Case No.80 of 2009.

[45] Ibrahim Adam Dhantiya, A-1, Sessions Case No.204 of 2009.

2 **Mr. Vijay Patel, learned counsel, appearing appellants - victims and complainants against the order of acquittal passed by the trial court also relied on same set of evidence as relied on by Mr. J.M.Panchal, learned Special Public Prosecutor.**

3 **In all these appeals against acquittal 61 accused came to be acquitted for which the state of Gujarat has preferred appeal against acquittal of 45 accused under Section 378 of the Code, 1973 and criminal appeals filed by the Victim of incident.**

4 At this stage, reliance is placed by learned Special Public Prosecutor on the evidence of arrest of the accused with stick, iron rods,

iron pipes and some of them were identified in Test Identification Parade and also in their testimonies before the trial court. Eye witnesses are PW-199 Prabhatbhai, GRP constable; PW-173 Karansinh Yadav, PRF constable; PW-152 Mahendrasinh Mahida, GRP constable; PW-164 Shrimohan Yadav RPF constable, PW-171 Ambishkumar Sanke, PRF constable, who are almost common in naming accused A-18, A-17, A-21, A-22, A-23, A-24, A-27, A-28 of Sessions Case No.69 of 2009. A-32, A-31, were named by PW-151 Dipakkumar N. Soni, local resident and A-31 was identified by PW-175 Gayatri Panchal, an injured passenger. That PW-151 Dipakkumar N. Soni also named and identified A-32 and A-33 of Sessions Case No.69 of 2009. A-34 was again identified by local resident PW-159 Rajesh Darji. A-35 was identified by PW-208 Murlidhar Mulchand, local resident. A-36 and A-37 again were identified by local resident PW-154 Chandrashankar Sheniya; PW-172 Nitinkumar H. Pathak; PW-139 Jashvant Baria GTP constable, PW-173 Karansinh Yadav, RPF constable.

A-39, A-41 and A-42 were seen in the mob and identified by PW-155 Manoj Hiralal Advani, local resident; PW-208 Murlidhar Mulchandani, local resident and other panchas of GTP constables. Likewise, PW-167 Harsukh Advani, local resident, named and identified A-43, A-44 and A-45. A-47 is identified by PW-208 Murlidhar Mulchandani, local resident, A-52 by PW-168 Mandakani Bhatiya, injured passenger, PW-148 Hemendra R. Das, GRP constable and PW-230 Mohhabatsinh Jhala, PSI GRP. A-53 and A-54 are identified by injured passengers and GRP constables PW-150 and 146 and PW-139 and PW-143. All the above accused belong to Sessions Case No.69 of 2009.

A-1 of Sessions Case No.70 of 2009 was identified by

injured passenger PW-124 and PW-160 and local resident PW-203.

A-5 and A-6 of Sessions Case No.71 of 2009 were identified by local resident PW-149 and passenger PW-109 and PW-161, ASI, GRP.

A-1 of Sessions Case No.72 of 2009 was named in deposition by PW-233.

A-2 of Sessions Case No.73 of 2009 named and identified by local resident PW-149.

A-1, A-2 and A-3 of Sessions Case No.75 of 2009 were identified by local residents and also identified other accused viz. PW-159, PW-175, injured passenger, PW-208 and PW-172 respectively.

A-1 and A-2 of Sessions Case No.76 of 2009 were identified by PW-149, PW-208, local resident.

A-4 of Sessions Case No.78 of 2009 was identified by local resident PW-172 and injured passenger PW-168.

A-2 of Sessions Case No.79 of 2009 was identified by PW-149 local resident.

A-1 of Sessions Case No.80 of 2009 was identified b y PW-163 PW-236 and PW-199.

A-1 of Sessions Case No.81 of 2009 was identified by local resident and injured passenger PW-149 and PW-150.

A-1 of Sessions Case No.83 of 2009 was identified by PW-146 GRPO constable.

A-1 of Sessions Case No.86 of 2009 was identified by two injured passengers viz. PW-168 and PW-170 and local resident PW-172.

A-1 of Sessions Case No.204 of 2009 was identified by PW-172 local resident.

In the form of documentary evidence in cases of all the above accused of different sessions cases, various panchnamas were relied on to which detailed reference is made by Mr. J.M.Panchal, learned Special Public Prosecutor.

PART VIII-B

Set of Evidence in brief relied on by Mr. J.M.Panchal, learned Special Public Prosecutor is as under:

CONFIRMATION CASE No.1/2011 TO 10/2011

NAMES OF THE WITNESSES	NAME OF THE ACCUSED	Page no./vol.no./REMARKS
	A-CUTTING OF VESTIBULES	
Pw.236 Ex.1231 Ajay Baria	1. Mehboob Latiko	12782/38
PW. 237 Ex.1252 Sikander Shaikh	1. Mehboob Latiko	12845/39
Confession Statement of Ex.1469	1. Mehboob Latiko	13335/39
	B-FORCIBLE OPENING OF SLLIDING DOOR	
Pw. 236 Ex.1231 Ajay Baria	1. Mehboob Latiko	12782/38
Confession Statement of	1. Mehboob Latiko	13335/39

Ex.1469		
	C-ACCUSED WHO ENTERED S-6 BY SLIDING DOOR	
Pw.236 Ex.1231 Ajay Baria	1. Mehboob Latiko 2. Jabi bin Yamin 3. Shaukat Ahmed Charkha @ lalu (Absconding)	12782/38
Pw.237 Ex. 1252 Sikander Shaikh	1. Mehboob Latiko 2. Jabi bin Yamin 3. Shaukat Ahmed Charkha @ lalu (Absconding)	12845/38
Confession Statement of Jabir Ex.1469	1. Mehboob Latiko 2. Jabi bin Yamin 3. Shaukat Ahmed Charkha @ lalu (Absconding)	13335/39
	D-ACCUSED PERSON WHO WENT INSIDE S-6 BY SLIDING DOOR WITH CARBOYS	
Pw. 237 Ex.1231 Ajay Baria	1. Mehboob Latiko 2. Jabi bin Yamin 3. Shaukat Ahmed Charkha @ lalu (Absconding)	12782/38
Pw.237 Ex. 1252 Sikander Shaikh	1. Mehboob Latiko 2. Jabi bin Yamin 3. Shaukat Ahmed Charkha @ lalu (Absconding)	12845/38
Confession Statement of Jabir Ex.1469	1. Mehboob Latiko 2. Jabi bin Yamin 3. Shaukat Ahmed Charkha @ lalu (Absconding)	13335/39 No reference to carboy
	E-ACCUSED PERSON WHO OPENED THE DOOR OF ONSIDE OF S-6	
Pw. 237 Ex.1231 Ajay Baria	1. Shaukat Ahmed Charkha @ lalu (Absconding)	12782/38
Confession Statement of Jabir Ex.1469	1. Shaukat Ahmed Charkha @ lalu (Absconding)	13335/39
Pw.237 Ex. 1252 Sikander Shaikh	Deposed that after they went inside onside door opened	12845/38 does not name
	F-ACCUSED PERSONS WHO WENT INSIDE S-6 THROUGH THE DOOR OF ON-SIDE	

Pw.236 Ex.1231 Ajay Baria	1. Rafik Bhatuk 2. Irfan Bhobho 3. Imran Sheru (Absconding)	12782/38
Pw.237 Ex.1252 Sikander Shaikh	1. Rafik Bhatuk 2. Irfan Bhobho 3. Imran Sheru (Absconding)	12845/38
Confession Statement of Jabir Ex.1469	1. Rafik Bhatuk 2. Irfan Bhobho 3. Imran Sheru (Absconding)	13335/39
	G-ACCUSED WHO USED INFLAMMABLE FROM OUTSIDE	
Pw.236 Ex.1231 Ajay Baria	1. Hassan Ahmed Charkha @ Lalu 2. Irfan Pataliya 3. Ramzani bin Yamin	12782/38
Pw.237 Ex.1252 Sikander Shaikh	1. Hassan Ahmed Charkha @ Lalu 2. Irfan Pataliya 3. Ramzani bin Yamin	12845/38
Confession Statement of Jabir Ex.1469	1. Hassan Ahmed Charkha @ Lalu 2. Irfan Pataliya 3. Ramzani bin Yamin	13335/39
	H-ACCUSED POURING INFLAMMABLE IN S-6 FROM ON-SIDE WINDOW ON VADODARA SIDE	
Pw.236 Ex.1231 Ajay Baria	1. Razak Kurkur 2. Salim Panwala (Abscond)	12782/38 Supporting by lifting carbo
Pw.237 Ex.1252 Sikander Shaikh	1. Razak Kurkur 2. Salim Panwala (Abscond)	12782/38 Supporting by lifting carbo
	I-ACCUSED THROWING BURNING RAG IN S-6	
Pw.236 Ex.1231 Ajay Baria	1. Hassan Ahmed Charkha @ Lalu	12782/38
Pw.237 Ex.1252 Sikander Shaikh	1. Hassan Ahmed Charkha @ Lalu	12845/38
Confession Statement of Jabir Ex.1469	1. Hassan Ahmed Charkha @ Lalu	13335/39
	J-ACCUSED PERSONS	

	ENGAGED IN THE ACT OF VIOLENCE ON S-6 COACH	
Pw.236 Ex.1231 Ajay Baria	1. Yakub Pataliya 2. Aiyub Pataliya 3. Mehboob Popa 4. Shoeb Kalandar 5. Anwar Bala 6. Ibrahim 7. Babu Pataliya	12782/38
Pw.237 Ex.1252 Sikander Shaikh	1. Yakub Pataliya 2. Aiyub Pataliya 3. Razak Kurkur 4. Billal Badam 5. Hani Badam 6. Sddik Badam 7. Kadar Pataliya 8. Irfan Pataliya 9. Rauf Kamli 10. Farukh (Razak no Banvevi)	12782/38
Pw.206 Ex.1060 Ajay Baria	1. Hasan Lalu 2. Shaukat Lalu 3. Mohd. Lalu 4. Kadar Pataliya 5. Babu Patalia (Juvenile) 6. Shoeb Kalandar 7. Yunus Ghadiyali 8. Mehboob Popa 9. Salim Panwalo (abscond) 10. Shaukat Bibino 11. Shaukat Bhano 12. Ramzani Bibino	12308/38
Pw. 233 Ex. 1219 Dilip Gaimal Chelani	1. Abdul Razak (Kurur) 2. Haji Billal 3. Billal Badam 4. Shaukat Badam 5. Siddik Badam 6. Irfan Bhopo 7. Sattar Gaddi 8. Shaukat Ahmed Lalu 9. Kasam bhamir 10. Tiger	12724/37

CONFIRMATION CASE NO.1/2011 TO 10/2011

Evidence for the Conspiracy and corroboration:

1. Confessional Statement of Jabir:	Ex:1649	Page No:13339/vol;39

Corroborating evidences:

1. Purchase of Petrol in large quantity on 26.2.2002 night

Corroboration

a) PW 224 Ranjit Jodha Patel	Ex:1139	Page No.12488/vol 37
b) PW 231 Prabhat Gulab Patel	Ex:1206	Page No.12684/vol 37

2. Loading of Carboys in the Tempy on 27.2.2002 and taking to Ali Masjid near A-Cabin

Corroboration

a) PW 236 Ajay Kanu Bariya	Ex:1231	Page No.12782/vol 38

3. Cutting of Vestibule

Corroboration

a) PW 236 Ajay Kanu Bariya	Ex:1231	Page No.12782/vol 38
b) PW 237 Sikandar Mohd. Shaikh	Ex:1252	Page No.12845/vol 38

4. Forcibly opening of the Sliding Door

Corroboration

a) PW 236 Ajay Kanu Bariya	Ex:1231	Page No.12782/vol 38
b) PW 237 Sikandar Mohd. Shaikh	Ex:1252	Page No.12845/vol 38
c) PW 88 Shantibhai Patel	Ex:642	Page No.11143/vol 33
d) PW 93 Shardaben Patel	Ex:657	Page No.11161/vol 33
e) PW 99 Prakash Taili	Ex:674	Page No.11209/vol 33
f) PW 102 Rampal Jigilal	Ex:680	Page No.11224/vol 33
g) PW 114 Subhash Mishra	Ex:719	Page No.11304/vol 33
h) Panchnama of the Sliding Door	Ex:220	Page No.10040/vol 28
i) Rough Notes dt 11.7.02 of FSL of Site Visit	Ex:1160	(Not in P.B.)
j) Report dt. 20.7.02 of the FSL	Ex:1159	Page No.12544/vol 37
k) 15-photos by FSL	Ex:796	(Not in P.B.)

5. Accused Entering with carboys S-6 Coach through sliding Door

Corroboration

a) PW 236 Ajay Kanu Bariya	Ex:1231	Page No.12782/vol 38
b) PW 237 Sikandar Mohd. Shaikh	Ex:1252	Page No.12845/vol 38

6. On-Side Door of S-6 of opened and Accused enter S-6 with carboys

Corroboration

a) PW 236 Ajay Kanu Bariya	Ex:1231	Page No.12782/vol 38
b) PW 237 Sikandar Mohd. Shaikh	Ex:1252	Page No.12845/vol 38

7. Inflammable Liquid thrown inside the coach S-6

Corroboration

a) PW 236 Ajay Kanu Bariya	Ex:1231	Page No.12782/vol 38
b) PW 237 Sikandar Mohd. Shaikh	Ex:1252	Page No.12845/vol 38
c) PW 79 Amar Tiwari	Ex:619	Page No.111070/vol 32 Fire back side
d) PW 80 Gyanprasad	Ex:621	Page No.11078/vol 32 Fire back side
e) PW 81 Puja Kushwaha	Ex:625	Page No.11084/vol 32
f) PW 85 Rakesh Patel	Ex	Page No.11118/vol 32
g) PW 86 Hariparasad Joshi	Ex:638	Page No.11130/vol 33
h) PW 94 Bachu Ladva	Ex:662	Page No.11167 /vol 33 Fire back side
i) PW 113 Radhesham Mishra	Ex:715	Page No.11297 /vol 33
j) PW 114 Shubash Mishra	Ex:719	Page No.11304 /vol 33
k) PW 119 Punam Kumari	Ex:729	Page No.11837 /vol 33
l) PW 118 Ashwin Ggovind	Ex:727	Page No.11327 /vol 33
m) PW 107 Pursottam Patel	Ex:690	Page No.11253 /vol 33
n) PW 110 Bhupat Dave	Ex:696	Page No.11275 /vol 33
o) PW 123 Rambhai Patel	Ex:734	Page No.11358 /vol 33 Fire back side
p) PW 124 Dilip J Patel	Ex:738	Page No.11362 /vol 33
q) PW 149 Janak Dave	Ex:810	Page No.11644 /vol 34
r) PW 151 Dipak	Ex:814	Page No.11665 /vol 34
s) PW 154 Chandrashankar Soniya	Ex:823	Page No.11743 /vol 34
t) PW 155 Manoj Advani	Ex:825	Page No.11757 /vol 34
u) PW 157 Savitaben Sadhu	Ex:828	Page No.11801 /vol 35
v) PW 159 Rajesh Darji	Ex:834	Page No.11813 /vol 35
w) PW 167 Harsukh Advani	Ex:862	Page No.11934 /vol 35
x) PW 168 Mandakiniben	Ex:867	Page No.11955 /vol 35 Fire back side
y) PW 170 Pravin Amtha Patel	Ex:873	Page No.11999 /vol 35
z) PW 172 Nitin Pathak	Ex:878	Page No.12026 /vol 35
aa) PW 208 Murli Mulchandani	Ex:1067	Page No.12335 /vol 36
bb) Panchnama of scene of offence	Ex:85	Page No.9785 /vol 27
cc) Panchnama of Coach S-6	Ex:86	Page No.97909/vol 27
dd) FSL report dt. 20.3.02	Ex:1173	Page No.12571/vol 37
ee) PW 240 M. S. Dahiya FSL Expert	Ex:1347	Page No.12982 /vol 38
ff) Rough Notes of Site visit of PW:240	Ex:1348	(Not in P.B.)
gg) 18 Photos by Pw.240 of S-6	Ex:1828-1845	(Not in P.B.)
hh) Reply to queries of SIT	Ex:1354	Page No.13012 /vol 38

8. Throwing of Burning Rag in S-2

Corroboration

a) PW 216 Mohd. Imad	Ex:1115	Page No.12428/vol 37

9. Assault on passenger and snatching of golden chain and rings

Corroboration

a) PW 170 Pravin Amtha	Ex:873	Page No.11999/vol 35

10. One passenger surrounded by accused and he replies to be an army man and shows paper disclosing his name as Govindsingh

Corroboration

a) PW 202 Govind Ratan Panda	Ex:1024	Page No.12248/vol 36

EVIDENCE OF PW.236 AJAY BARIYA EX:1231 PAGE NO.12782/VOL 38.

1. Carboys taken to Ali masjid nr. A-cabin Tempy on 27.2.02

Corroboration

a) Confession Statement of Jabir	Ex.1469	Page No.13335/vol 39
b) Panchnama of Seizure of Tempy	Ex:377	Page No.10350 /vol 29
c) Panchnama of Identification of Tempy	Ex:228	Page No.10058 /vol 28
d) Rehearsal of the Tempy	Ex:1014	Page No.12239 /vol 36

2. Cutting of Vestibule between coaches S-6 and S-7

Corroboration

a) PW 237 Sikandar Mohd. Shaikh	Ex:1252	Page No.12845/vol 38
b)Confession Statement of Jabir	Ex.1469	Page No.13335/vol 39

3. Forcible opening of the Sliding Door between coaches S-6 and S-7 and entering S-6

Corroboration

a) PW 237 Sikandar Mohd. Shaikh	Ex:1252	Page No.12845/vol 38
b)Confession Statement of Jabir	Ex.1469	Page No.13335/vol 39

4. On-side door of S-6 opened and accused entering S-6

Corroboration

a) PW 237 Sikandar Mohd. Shaikh	Ex:1252	Page No.12845/vol 38
b)Confession Statement of Jabir	Ex.1469	Page No.13335/vol 39

5. Accused throwing Petrol from outside in S-6 Coach

Corroboration

a) PW 237 Sikandar Mohd. Shaikh	Ex:1252	Page No.12845/vol 38
b)Confession Statement of Jabir	Ex.1469	Page No.13335/vol 39
c) PW 79 Amar Tiwari	Ex:619	Page No.111070/vol 32 Fire back side
d) PW 80 Gyanprasad	Ex:621	Page No.11078/vol 32 Fire back side
e) PW 81 Puja Kushwaha	Ex:625	Page No.11084/vol 32
f) PW 85 Rakesh Patel	Ex	Page No.11118/vol 32
g) PW 86 Hariparasad Joshi	Ex:638	Page No.11130/vol 33

h) PW 94 Bachu Ladva	Ex:662	Page No.11167 /vol 33 Fire back side
i) PW 113 Radhesham Mishra	Ex:715	Page No.11297 /vol 33
j) PW 114 Shubash Mishra	Ex:719	Page No.11304 /vol 33
k) PW 119 Punam Kumari	Ex:729	Page No.11837 /vol 33
l) PW 118 Ashwin govind	Ex:727	Page No.11327 /vol 33
m) PW 107 Pursottam Patel	Ex:690	Page No.11253 /vol 33
n) PW 110 Bhupat Dave	Ex:696	Page No.11275 /vol 33
o) PW 123 Rambhai Patel	Ex:734	Page No.11358 /vol 33 Fire back side
p) PW 124 Dilip J Patel	Ex:738	Page No.11362 /vol 33
q) PW 149 Janak Dave	Ex:810	Page No.11644 /vol 34
r) PW 151 Dipak	Ex:814	Page No.11665 /vol 34
s) PW 154 Chandrashankar Soniya	Ex:823	Page No.11743 /vol 34
t) PW 155 Manoj Advani	Ex:825	Page No.11757 /vol 34
u) PW 157 Savitaben Sadhu	Ex:828	Page No.11801 /vol 35
v) PW 159 Rajesh Darji	Ex:834	Page No.11813 /vol 35
w) PW 167 Harsukh Advani	Ex:862	Page No.11934 /vol 35
x) PW 168 Mandakiniben	Ex:867	Page No.11955 /vol 35 Fire back side
y) PW 170 Pravin Amtha Patel	Ex:873	Page No.11999 /vol 35
z) PW 172 Nitin Pathak	Ex:878	Page No.12026 /vol 35
aa) PW 208 Murli Mulchandani	Ex:1067	Page No.12335 /vol 36
bb) Panchnama of scene of offence	Ex:85	Page No.9785 /vol 27
cc) Panchnama of Coach S-6	Ex:86	Page No.97909/vol 27
dd) FSL report dt. 20.3.02	Ex:1173	Page No.12571/vol 37
ee) PW 240 M. S. Dahiya FSL Expert	Ex:1347	Page No.12982 /vol 38
ff) Rough Notes of Site visit of PW:240	Ex:1348	(Not in P.B.)
gg) 18 Photos by Pw.240 of S-6	Ex:1828-1845	(Not in P.B.)
hh) Reply to queries of SIT	Ex:1354	Page No.13012 /vol 38

6. Inflammable liquid being poured in S-6 on Vadodara side by standing on the Steps of S-6.

Corroboration

a) PW 237 Sikandar Mohd. Shaikh	Ex:1252	Page No.12845/vol 38
b) PW 81 Puja Kushwaha	Ex:625	Page No.11084/vol 32

7. Throwing of burning Rags in S-6 Coach

Corroboration

a) PW 237 Sikandar Mohd. Shaikh	Ex:1252	Page No.12845/vol 38

b) General Corroboration by the 50 passengers who are eye witnesses to the incident.

8. Pelting of Stones on the Train near A-cabin

Corroboration

a) PW 237 Sikandar Mohd. Shaikh	Ex:1252	Page No.12845/vol 38

b) General Corroboration by the 50 passengers who are eye witnesses to the incident.

c) PW 233 Dilip Gaimal Chelani	Ex.1219	Page No.12724/vol 37
d) PW 127 R.P. Meena ASM A-Cabin	Ex.744	Page No.11391/vol 33
e) PW 128 Akhil Sharma	Ex.748	Page No.11399/vol 33

f) PW 131 Mukesh Pachori Co-Driver	Ex.760	Page No.11442/vol 33
g) PW 135 S.N. Verma	Ex.777	Page No.11475/vol 34
h) PW 136 Sajjan Ranival TTE	Ex.780	Page No.11488/vol 34
i) PW 228 Rajendra Rao Driver	Ex.1189	Page No.12612/vol 37
j) PW 171 Ambishkumar RPF	Ex.876	Page No.12017/vol 35
k) PW 173 Karansinh RPF	Ex.885	Page No.12050/vol 35
l) PW 140 Punja Bavji GRP	Ex.786	Page No.11532/vol 34
m) PW144 Manish Vasava GRP	Ex.793	Page No.11581/vol 34
n) PW 146 Laxman Nansinh GRP	Ex.799	Page No.11605/vol 34
o) PW 148 Hemendra Das GRP	Ex.802	Page No.11625/vol 34
p) PW 161 Indrasinh GRP	Ex.841	Page No.11849/vol 35
q) PW 166 Dalabhai GRP	Ex.852	Page No.11918/vol 35
r) PW 199 Prabahat Bhoi GRP	Ex.986	Page No.12194/vol 36
s) PW 230 M.J. Jhala GRP Psi	Ex.1196	Page No.12634/vol 37

9. Breaking of Windows of S-6 Coach

Corroboration

a) PW 237 Sikandar Mohd. Shaikh	Ex:1252	Page No.12845/vol 38
b) General Corroboration by the 50 passengers who are eye witnesses to the incident.		
c) PW 233 Dilip Gaimal Chelani	Ex.1219	Page No.12724/vol 37
d) PW 127 R.P. Meena ASM A-Cabin	Ex.744	Page No.11391/vol 33
e) PW 128 Akhil Sharma	Ex.748	Page No.11399/vol 33
f) PW 131 Mukesh Pachori Co-Driver	Ex.760	Page No.11442/vol 33
g) PW 135 S.N. Verma	Ex.777	Page No.11475/vol 34
h) PW 136 Sajjan Ranival TTE	Ex.780	Page No.11488/vol 34
i) PW 228 Rajendra Rao Driver	Ex.1189	Page No.12612/vol 37
j) PW 171 Ambishkumar RPF	Ex.876	Page No.12017/vol 35
k) PW 173 Karansinh RPF	Ex.885	Page No.12050/vol 35
l) PW 140 Punja Bavji GRP	Ex.786	Page No.11532/vol 34
m) PW144 Manish Vasava GRP	Ex.793	Page No.11581/vol 34
n) PW 146 Laxman Nansinh GRP	Ex.799	Page No.11605/vol 34
o) PW 148 Hemendra Das GRP	Ex.802	Page No.11625/vol 34
p) PW 161 Indrasinh GRP	Ex.841	Page No.11849/vol 35
q) PW 166 Dalabhai GRP	Ex.852	Page No.11918/vol 35
r) PW 199 Prabahat Bhoi GRP	Ex.986	Page No.12194/vol 36
s) PW 230 M.J. Jhala GRP Psi	Ex.1196	Page No.12634/vol 37
t) Panchnama of Coach S-6	Ex. 86	Page No.7909/vol 27
u) PW 162 Gangaram Railway	Ex. 845	Page No.11867/vol 35

EVIDENCE OF PW.237 SIKANDER MOHD. SHAIKH EX.1252 PAGE NO.12782/VOL38.

1. Cutting of Canvas vestibule between S-6 and S-7 coaches

Corroboration

a) PW 236 Ajay Kanu Baria	Ex:1231	Page No.12782/ vol38
b)Confession Statement of Jabir	Ex.1469	Page No.13335/vol 39

2. Pouring of the Inflammable inside S-6 by climbing on Steps of Coach

a) PW 236 Ajay Kanu Baria	Ex:1231	Page No.12782/ vol38
b)PW 81 Puja Kushwaha	Ex:625	Page No.11084/vol 32

3. On-side Door of S-6 opened and accused entering S-6 with carboys

Corroboration

a) PW 236 Ajay Kanu Baria	Ex:1231	Page No.12782/ vol38
b)Confession Statement of Jabir	Ex.1469	Page No.13335/vol 39

4. Accused persons pouring/throwing Inflammable from windows

Corroboration

a) PW 237 Sikandar Mohd. Shaikh	Ex:1252	Page No.12845/vol 38
b)Confession Statement of Jabir	Ex.1469	Page No.13335/vol 39
c) PW 79 Amar Tiwari	Ex:619	Page No.111070/vol 32 Fire back side
d) PW 80 Gyanprasad	Ex:621	Page No.11078/vol 32 Fire back side
e) PW 81 Puja Kushwaha	Ex:625	Page No.11084/vol 32
f) PW 85 Rakesh Patel	Ex	Page No.11118/vol 32
g) PW 86 Hariparasad Joshi	Ex:638	Page No.11130/vol 33
h) PW 94 Bachu Ladva	Ex:662	Page No.11167 /vol 33 Fire back side
i) PW 113 Radhesham Mishra	Ex:715	Page No.11297 /vol 33
j) PW 114 Shubash Mishra	Ex:719	Page No.11304 /vol 33
k) PW 119 Punam Kumari	Ex:729	Page No.11837 /vol 33
l) PW 118 Ashwin govind	Ex:727	Page No.11327 /vol 33
m) PW 107 Pursottam Patel	Ex:690	Page No.11253 /vol 33
n) PW 110 Bhupat Dave	Ex:696	Page No.11275 /vol 33
o) PW 123 Rambhai Patel	Ex:734	Page No.11358 /vol 33 Fire back side
p) PW 124 Dilip J Patel	Ex:738	Page No.11362 /vol 33
q) PW 149 Janak Dave	Ex:810	Page No.11644 /vol 34
r) PW 151 Dipak Soni	Ex:814	Page No.11665 /vol 34
s) PW 154 Chandrashankar Soniya	Ex:823	Page No.11743 /vol 34
t) PW 155 Manoj Advani	Ex:825	Page No.11757 /vol 34
u) PW 157 Savitaben Sadhu	Ex:828	Page No.11801 /vol 35
v) PW 159 Rajesh Darji	Ex:834	Page No.11813 /vol 35
w) PW 167 Harsukh Advani	Ex:862	Page No.11934 /vol 35
x) PW 168 Mandakiniben	Ex:867	Page No.11955 /vol 35 Fire back side
y) PW 170 Pravin Amtha Patel	Ex:873	Page No.11999 /vol 35
z) PW 172 Nitin Pathak	Ex:878	Page No.12026 /vol 35
aa) PW 208 Murli Mulchandani	Ex:1067	Page No.12335 /vol 36
bb) Panchnama of scene of offence	Ex:85	Page No.9785 /vol 27
cc) Panchnama of Coach S-6	Ex:86	Page No.97909/vol 27
dd) FSL report dt. 20.3.02	Ex:1173	Page No.12571/vol 37
ee) PW 240 M. S. Dahiya FSL Expert	Ex:1347	Page No.12982 /vol 38
ff) Rough Notes of Site visit of PW:240	Ex:1348	(Not in P.B.)
gg) 18 Photos by Pw.240 of S-6	Ex:1828-1845	(Not in P.B.)
hh) Reply to queries of SIT	Ex:1354	Page No.13012 /vol 38

5. Throwing of burning Rags in S-6 Coach

Corroboration

a) PW 236 Ajay Kanu Baria Ex:1231 Page No.12782/ vol38
b) General Corroboration by the 50 passengers who are eye witnesses to the incident.

PART VIII-C

LIST OF CITATIONS RELIED ON BY MR JM PANCHAL, LEARNED SPECIAL PUBLIC PROSECUTOR ARE AS UNDER:

Sr. No.	Parties	Citation	Issue
1	Vinod Kumar vs. State of Haryana	(2015)3 SCC 138 [para 24] 1637	Minor discrepancies to be ignored and also against principles to be born in mind in a case under Sections 378 and 386 of the Code of Criminal Procedure Code – acquittal.
2	State of Karnataka vs. Suvarnamma	(2015)1 SCC 323 [Para 12.4]	Appreciation of Evidence
3	Om Prakash vs. State of Haryana	(2014)5 SCC 753	Sections 302/149 and 148 – Vicarious liability – common object to murder.
4	Chandra Prakash v. State of Rajasthan	2014 AIR SCW 3055 [paras 69, 70 & 73]	Section 120B – criminal conspiracy – as conspiracy is never hatched in open – evaluation of proved circumstances play a vital role in establishing the criminal conspiracy.
5	Gulam Sarbar vs. State of Bihar (now Jharkhand)	(2014)3 SCC 401 [paras 11 to 24] [para 19 more imp.]	Sec.134 – Number of witnesses – Test is whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise – conviction

			can even be based on testimony of a sole witness, if same inspires confidence.
6	Gurmail Singh vs. State of Punjab	(2013)4 SCC 228 [para-49]	Unlawful assembly – Common object – vicarious / constructive liability – applicability of provisions of Sec.149 will come into play and cover every member of unlawful assembly when; firstly there must be in existence an unlawful assembly within the meaning of S.141; secondly an offence must have been committed by a member of unlawful assembly; thirdly the office committed must be in prosecution of a common object of unlawful assembly or must be such as the members of unlawful assembly knew to be likely to be committed in prosecution that object.
7	Thoti Manohar vs. State of Andhra Pradesh.	(2012)7 SCC 723 [para 38]	Minor discrepancies not touching the core of the matter are not relevant & prosecution case cannot be discarded on the basis of such discrepancies, inconsistencies, contradictions, etc
8	Mano Dutt vs. State	(2012)4 SCC 79	for credibility of

	of U.P.	[paras 30 & 31]	injured witnesses
9	Santosh Kumar Singh vs. State through CBI	(2010) 9 SCC 747 [para 68]	-do-
10	Baij Nath Sah v. State of Bihar	(2010)6 SCC 736	Sec.164 statement is not substantive evidence and can be utilised only in corroborate or contradict the witness vis-a-vis statement made in court.
11	Akhtar vs. State of Uttaranchal	(2009)13 SCC 722	With regard to Section 294(3) of Code, 1973.
12	Vishnu & Ors. vs. State of Rajasthan	(2009)10 SCC 477 [para-34]	When a person receives injuries in course of occurrence, there can be hardly any doubt regarding his presence at spot of incident – Injured witnesses would not spare real assailants and falsely involve innocent persons.
13	Ravi vs. State Represented by Inspector of Police	(2009)3 SCC (Cri.) 736 [paras 18 to 20]	Section 134 of Evidence Act.
14	Kunju Alias Balachandran vs. State of Tamilnadu	(2008)1 SCC (Cri.) 331	Sole testimony of PW-2 was not liable to be interfered with – Sec. 134 of Evidence Act.
15	Sheo Prasad Bhor Alias Sri Prasad vs. State of Assam	(2007)2 SCC (Cri.) 45	Section 149 – unlawful assembly – Joint liability – Held not nec736essary that each person of the assembly should be assigned independent part in the commission of crime.

16	Sunil Kumar vs. State of Rajasthan .	2005 SCC [Cr.] 1230 [paras 7, 8, 9 & 17]	Prosecution need not establish over act done by each accused – unlawful assembly.
17	Ram Bali v. State of U.P.	(2004)10 SCC 598	Record of proceedings – happenings in court – what transpired at the hearing in court – statement recorded in the judgment in respect - held, is conclusive and cannot be contradicted on affidavit or by other evidence.
18	State of Madhya Pradesh v. Sanjay Rai	(2004)10 SCC 570] [para 17]	That opinion and books on the subject have no evidentiary value unless put to expert / witness
19	Devender Pal Singh vs. State (NCT of Delhi)	2002(5) SCC 234 [paras 43 and 44]	Criminal conspiracy – Section 120-A and 120-B – essential ingredient is agreement to commit an offence – it can also be inferred from conduct of the parties – overt act in furtherance of, by all the conspirators not necessary.
20	Ramanbhai Naranbhai Patel & Ors. vs. State of Gujarat	2000 SCC (Cri.LJ) 113	for identification in court is sufficient and not holding Test Identification Parade would not be fatal for prosecution and there is no dishonesty nor any malafide by prosecution
21	Mehbub Samsuddin Malek v. State of	1996 SCC(Cri) 1353 [para-37]	Section 120-A and 120-B – criminal conspiracy

	Gujarat		– communal riot.
22	Shamshul Kanwar vs. State of U.P.	1995(4) SCC 430 [para-10]	Case diary – Section 172 of Code, 1973.
23	Ajay Agarwal v. Union of India -	AIR 1993 SC 1637 [paras 9, 11, 12, 13, 16, 22, 24 & 25]	Conspiracy – continuing offence.
24	Malkiat Singh vs. State of Punjab	(1991)4 SCC 341 [para 11]	About importance of case diary of investigation vis-a-vis section 172 of Code
25	Madi Ganga v. State of Orissa	AIR 1981 SC 1165	Confession made to Magistrate – Evidentiary value.
26	Yash Pal Mittal v. State of Punjab	AIR 1977 SC 2433 [paras 9 & 10]	Section 120-A – Criminal conspiracy - ingredients
27	Piara Singh vs. State of Punjab	[AIR 1977 SC 2274] [para 7]	When there are two conflicting medical opinions, the opinion of that expert which supports the direct evidence must be accepted.
28	Ram Kishan Singh v. Harmit Kaur	(1972)3 SCC 280	A statement under Section 164 of the Code is not sustainable evidence. It can be used to corroborate the statement of a witness and to contradict a witness.
29	The State of U.P. v. Rajju & Ors..	AIR 1971 SC 708	In case of on the spot arrest of the accused, no Test Identification parade is required unless requested by accused.
30	Bhagwan Das vs. State of Rajasthan	[AIR 1957 SC 589] [para 13]	On Sections 45 and 46 of the Evidence Act.
31	State of NCT of	Special Leave to	Sting Operation

	Delhi v. Mukesh	Appeal [Cr.] No.2637 of 2013	
32	Pargan Singh v. State of Punjab	Criminal Appeal No.47 of 2014 [paras 14 to 19]	Identification before the Court
33	Anup Lal Yadav v. State of Bihar	Criminal Appeal No.775 of 2007 [paras 15, 16, 19 & 20]	Overt Act – Section 149

PART VIII-D

SUBMISSIONS OF MR RS JAMUAR, LEARNED COUNSEL FOR SIT

1 Mr. Jamuar, learned counsel for SIT by and large adopted submissions of Mr. J.M.Panchal, learned Special Public Prosecutor and produces on record orders dated 26.03.2008 and 01.05.2009 of the Apex Court in the case of National Human Rights Commission v. State of Gujarat reported in **AIR 2009 SC Supp. 318** about constitution of SIT, object behind that and directions contained therein and finally satisfaction expressed by the Apex Court about investigation carried out by SIT for the subject matter.

2 Section 391 of the Code application is not available to the accused – convicts as they had not availed remedy under Section 311 of the Code before the trial Court and sting operation cannot be taken into consideration. Reliance is placed on decision in the case of Ashok Bhutia vs. State of Sikkim dated 25.02.2011 of Apex Court.

PART VIII-E

LIST OF CITATIONS RELIED ON BY MR RS JAMUAR, LEARNED SENIOR COUNSEL FOR THE SIT ARE AS UNDER:

Sr. No.	Parties	Citation	Issue

1	Krishna Mochi vs. State of Bihar	2002 SCC [Cri.] 1220	For imposition of death sentence upon conviction under Section 302 of the IPC, when conspiracy is proved
2	Kunal Majumdar v. State of Rajasthan	2012 Cri. LJ 4635	Upon death reference, special and onerous responsibility is caste upon the High Court while deciding the death reference.
3	Jinnappa Subbappa Gabannayar	1961(2) Cri LJ 250 [Vol.63, C.N.76]	That failure of the Magistrate to append certificate, as required under Sub-section (3) of Section 164 of the Code is only an irregularity and curable under Section 537 of the Code and the duty cast upon the Magistrate while commencing recording of the statement that the accused was in the free atmosphere on a Magistrate court is not a rule of law, but a rule of caution.
4	Ashok Tshering Bhutia v. State of Sikkim	Criminal Appeal No.945 of 2003	That an additional evidence can be taken at the appellate stage in exceptional circumstances to remove irregularity, where the circumstances so warrant in public interest.
5	Mohd. Maniar v. State of Bihar	1994(2) BLJR 1433	About Section 164 of the Code, 1973 to

			apply judicial mind by the Magistrate.
6	State of Kerala v. Ammini	AIR 1985 SC 823	About reflection time to be given under Section 164 of the Code, 1973.

PART VIII-F

SUBMISSIONS OF MR. BHARAT NAIK FOR VICTIMS

1 Mr. B.B.Naik, learned Senior Advocate appearing with Mr. H.M.Prachchhak, Mr. Harnish V. Darji, Mr. Pravin Gondalia, Mr. Jayesh A. Dave, Mr. Samir J. Dave, Mr. Bharat K. Dave, Mr. Sudhanshu S. Patel, Mr. Suresh B. Bhatt, Mr. Yatin Soni and Mr. Nirav C. Thakkar for victims fully supported the case of the prosecution and adopted the submissions made by Mr. J.M.Panchal, learned Special Public Prosecutor.

2 Mr. Naik, learned Senior Counsel relied on a chart prepared containing list of evidence against acquitted accused which was not properly appreciated by the trial court and, therefore, acquittal order is passed which deserves to be interfered with. That contents of the above chart containing evidence are almost similar to that of the evidence relied on by Shri J.M.Panchal, learned Special Public Prosecutor appearing for the State of Gujarat in Criminal Appeal No.743 of 2011 filed against acquittal of accused to which detailed reference is made in Part VII-A of this judgment and, therefore, we do not propose to reproduce the same.

3 About persons joining conspiracy subsequently are equally liable for the offence as held by the Apex Court in the case of Shivanarayan Laxminarayan Joshi v. State of Maharashtra AIR 1980 SC

439 and on the submission that procedural lacuna or defect in recording statement under Section 164 of the Code can be cured in view of provisions of Section 463(1) of the Code in the case of Ram Singh vs. Sonia [(2007)3 SCC 1]. Another decision relied on the line is 2000(6) SCC 269, para-17, in which the statement under Section 164 was recorded after about one month.

4 That custody of Jabir - accused was authorized and legal for the period between 29th January to 3rd February, 2002 as per order passed by the Chief Judicial Magistrate, Godhra and his testimonies. Further reliance is placed in the case of R. Shaji vs. State of Kerala (2013)14 SCC 266 [paras 26 to 29] for Section 164 of the Code.

5 Reverting to conspiracy, decision in the case of State of Kerala vs. Ammini AIR 1985 SC 823 paras 54 and 55 is relied on; and also (2010)6 SCC 1, Siddharth Vasisth Alias Manu Sharma vs. State [NCTG of Delhi] [paras 97 and 295].

6 Thus, overall evidence and conjoint reading establish conspiracy execution thereof, violent unlawful assembly and order of conviction is not to be disturbed while acquittal to be reversed and compensation under Section 357 of the Code to be accorded to the victims.

7 Learned counsel Mr. Vijay Patel appearing for Mr. Suresh Bhatt submitted a written note emphasizing complaint lodged by driver of the trail which reveal assailants were apprehended by police, but not knowing their names and acquitting such accused by the trial court as per the reasoning at page 424 and 425 of the judgment is illegal.

PART VIII-G

LIST OF CITATIONS RELIED ON BY MR BB NAIK, LEARNED SENIOR COUNSEL FOR VICTIMS ARE AS UNDER:

Sr. No.	Parties	Citation	Issue
1	Mohd. Jamiludin Nasir v. State of West Bengal	(2014)7 SCC 443	
2	R. Shaji vs. State of Kerala	(2013)14 SCC 266 [paras 26 to 29, 33 to 37, 54 to 56]	Sec.120-B – circumstantial evidence – motive – relevance of – held existence of motive is important in a conviction based on circumstantial evidence though in a case where there are direct eyewitnesses, absence or inadequacy of motive cannot stand in the way of conviction.
3	Vyas Ram Alias Vyas Kahar v. State of Bihar	(2013)12 SCC 349	Sec. 149 – Unlawful assembly – constructive or vicarious liability – common object.
4	Ganga Singh Vs. State of Madhya Pradesh	(2013)7 SCC 278 [para-17]	Reiterated, when prosecution proves its case beyond reasonable doubt, acquittal of accused on ground of defective investigation is impermissible. It only if defects in investigation cast serious doubt on prosecution case, would accused be entitled to acquittal

			due to such doubt.
5	Dayal Singh and others Vs. State of Uttaranchal	(2012)8 SCC 263	Defective or illegal investigation – investigation and doctor's report coloured with motivation – power of trial court to issue directions for disciplinary and other actions against them. Role of the Trial court is to achieve the object of `fair trial'.
6	Ranjit Singh v. State of Madhya Pradesh	(2011)4 SCC 336 [para-27]	In a fit case court may believe a reliable sole eyewitness if in his testimony he makes specific reference to identity of individual and his specific overt acts in the incident – section 302/149 and 148 – Sole eye witness – injured eye witness – due weightage to be given to that testimony.
7	Rabhindra Kumar Pal Alias Dara Singh v. Republic of India	(2011)2 SCC 490 [paras 51 & 52]	Sectin 164 of the Code, 1973. Principles enumerated.
8	Siddharth Vasisth Alias Manu Sharma vs. State [NCTG of Delhi]	(2010)6 SCC 1 [paras 97 and 295].	Delayed examination of witnesses does not necessarily discredit their testimonies.
9	State of Punjab vs. Harjadev Singh	(2009)16 SCC 91 [para-13 including para 16]	Confessional Statement under Section 164 – procedural lapse can be cured.
10	Mohd. Amin v. CBI	(2008)15 SCC 49	Confession under – Evidentiary value / admissibility /

			applicability to co-accused / co-conspirator / abettors – S.15 confession is admissible not only against the maker but also against co-accused / co-conspirators / abettors provided such person has been tried together with the maker of confession and safeguards against misuse of S.15 are complied with.
11	Ram Singh vs. Sonia	[(2007)3 SCC 1 paras 18 to 25, 27 to 33	Circumstances to award death penalty.
12	Ramesh Singh Alias Photti v. State of A.P.	(2004)11 SCC 305 [para-6]	Sec.164 – Evidence of witness whose statements are recorded by Magistrate – held that by itself would not discredit the said evidence.
13	Madan Singh v. State of Bihar	2004(4) SCC 622	Section 149 – "Common object" – meaning – distinguished from "common intention" – words and phrases – "common", "object", "common object, "common intention".
14	Krishna Mochi & Ors. v. State of Bihar	2002 SCC [Cri.] 1220	
15	Ramprasad vs. State of Maharashtra	(1999)5 SCC 30 [para-15]	A statement recorded by a Magistrate under Sec. 164 becomes usable to corroborate the witnesses as

			provided in Sec.157 of the Evidence Act or to contradict him as provided in Sec.155 thereof.
16	State of Maharashtra v. Damu s/o. Gopinath Shide	(2006)6 SCC 269 [17 to 25, 42 to 46]	Sec. 164 of the Code, 1973. Even if accused is produced from police custody, such confession cannot be discriminated.
17	State of U.P. v. Krishna Gopal	(1998)4 SCC 302	Witnesses – public servant – investigating officer – testimony of should not be rejected merely on ground of being interested in success of the prosecution case.
18	Ajay Agarwal v. Union of India	AIR 1993 SC 1637 [paras 9, 11,l12, 13, 16, 22 & 24]	Section 120A of the IPC
19	Henry Westmuller Roberts etc. v. State of Assam	AIR 1985 SC 823 paras 54 and 55	Section 164 of the Code, 1973.
20	Bhe Ram V. State of Haryana	AIR 1980 SC 957	In case of rioting under S.149 it is not necessary that any specific act falsus in uno falsus is not applicable to criminal trials – witnesses have recognized appellants rightly no ground to distrust their evidence.
21	Shivanarayan Laxminarayan Joshi v. State of Maharashtra	AIR 1980 SC 439 [para-14]	A conspiracy is always hatched in secrecy and it is impossible to adduce direct evidence of the same. The offences can be only proved largely from the

			inference drawn from acts or illegal omission committed by the conspirators in pursuance of a common design.
22	Badri vs. State of Rajasthan	(1976)1 SCC 442	Recording of statement of a witness by Magistrate during police investigation – held by itself does not affect the credibility of the witness.
23	Momin vs. The State of Maharashtra	AIR 1971 SC 885 para-7	U/s. 120B mere agreement is sufficient – conspiracy need not be proved by direct evidence.
24	Ram Charan vs. The State of U.P	AIR 1968 SC 1270 para-8	A statement of a witness is previously recorded under Section 164, it leads to an inference that there was a time when the police thought the witness may change but if the witness sticks to the statement made by him throughout, the mere fact that his statement was previously recorded under Section 164 will not be sufficient to discard it. The court, however, ought to receive it with caution and if there are other circumstances on record which lend support to the truth of the evidence of such witnesses it can be

			acted upon.
25	Bhagwan Swarup Lal Bishan Lal v. State of Maharashtra	AIR 1965 SC 682 para-8	Section 120-A of IPC – proof of criminal conspiracy – scope and applicability of Section 10 of Evidence Act.
26	Major E.G.Barsay v. State of Bombay	AIR 1961 SC 1761 [para-78]	Sections 120B & 34 of the IPC
27	State vs. Shankar Sakharam Jadhav	AIR 1957 Bom. 226	Section 120A IPC and Section 20 of Evidence Act.
28	Nanak Chand v. State of Punjab	AIR 1955 SC 274	Section 149 creates specified offence but Section 34 does not – distinction between Sections 149 and 34 pointed out.

VOLUME-II

PART IX

SUMMARY OF THE TRIAL COURT JUDGMENT

In para [24] [page 14715] of the impugned judgment, the learned Sessions Judge under the head Prosecutorial Proposition and Perception and Defence of the Accused, has recorded factual aspects and submissions made on law under sub-heads [A] and [B] in brief are reproduced herein below:

> "PROSECUTORIAL PROPOSIOTNS AND PERCEPTIONS & DEFENCE OF THE ACCUSEDD [Sec.234 & 314 Cr.P.C.]
>
> [A] Mr.J.M.Panchal Ld. Special Public Prosecutor, while arguing on factual aspects and on the law points, has made submission, mainly on the following points:
>
> "The occurrence of incident is clearly established by the prosecution.

-The FIR came to be lodged by the Engine Driver without any undue delay.

-Looking to the facts situation, delay of one hour in lodging FIR cannot be said to be intentional.

-Even otherwise, no serious prejudice is caused to the accused because of delay in lodging FIR.

-Copy of the FIR was sent to the Ld. Magistrate (Railway), on the same day, by the PSO.

-No undue advantage has been taken by prosecution, either of delay in lodging FIR or sending copy thereof, to the Ld. Magistrate.

-The Panchnama of place of occurrence and Inquest panchnama, both, were drawn simultaneously on the same day, in presence of panchas by different officers.

-Seized articles were also sent to FSL by special messenger without any undue delay and the same were received intact.

-As the incident was of mass casualty, autopsy on dead bodies, came to be done, by team of different Medical Officers of the District, in the open space of Railway Yard.

-Dead bodies then, sent to Civil Hospital Sola, Ahmedabad for DNA Test.

-Injured persons, first took the treatment at Civil Hospital Godhra and then, most of them, at Civil Hospital, Ahmedabad.

-P.M. Notes and injury certificates duly proved.

-Injured passengers and Karsevaks have supported the prosecution case.

-After receipt of intimation, the police officials immediately rushed to the spot, and made all efforts to disperse the mob.

-15 assailants came to be apprehended armed with deadly weapons, from the spot by the police.

-The police officials who were serving in Railway Police Station knew some of the assailants by name and by face.

-Remaining were arrested subsequently.

-Discovery panchnamas duly proved, by evidence of panchas and police officials.

-T.I. Parade panchnamas are also duly proved.

-Panchnama of the Coach S-6 was drawn on 28-2-2002, and seized articles were sent to FSL.

-Residues of petrol (Hydro carbons) were noticed on articles seized from place and coach, in scientific examination by FSL.

-FSL Reports, correspondence etc. duly proved.

-There is no reason to disbelieve the Expert's opinions.

-Even in muddamal articles Carboys, seized from accused, presence of petrol noticed.

-To ascertain source of petrol, samples of nearby Petrol-Diesel pumps, were taken and sent to FSL.

-Revealing of facts of conspiracy hutched by some of the accused persons, on the previous night, provisions of POTA came to be invoked.

-However, after repealing of the POTA, the Committee constituted therein, opined that the incident does not fall within the provisions of the POTA.

-Even the POTA Committee has not denied occurrence of incident, in the report.

-The opinion given by the Review Committee and the decision of the Hon'ble High Court thereon, have been challenged by the prosecution, before the Hon'ble Supreme Court by way of Special Leave Petition and the said proceedings is still pending.

-To ascertain possibility of pouring inflammable liquid, from inside the Coach, officers of the FSL were invited for spot and Coach inspection/examination. After visit and inspection, as per their suggestion, experiments also came to be made by placing similar kind of Coach, on the track, on the same place and throwing water from outside and, then pouring approximately 60 litres water from inside the Coach.

-The experts opinions support the prosecution case of conspiracy.

-Confessional Statements made by the accused and witnesses also duly proved.

-Confessional Statements of co-accused persons recorded under Section-32 of the POTA, should also be taken into consideration while appreciating evidence.

-Presence of employees of Fire Fighter not denied / challenged therefore, their evidence about preventing of tanker by accused from reaching to the spot in time and damages caused to tanker, by pelting stones should not be ignored.

-Theory of having evidence of minimum two or three witnesses, in riots cases, cannot be made applicable, since this is not a riot case at all, and accused should be held guilty even on the basis of evidence of solitary reliable witness.

-Forming of unlawful assembly, knowledge of assault, injuries etc. can be said to be duly established by the prosecution.

-In such type of case, overt act by any particular member of unlawful assembly, is not the requirement of law.

-There may be some defects, or lapses in investigation, but merely on this ground alone, the prosecution case should not be thrown overboard.

- Mr. Panchal, in support of the above submission has also

placed
reliance on the decisions of the Hon'ble Supreme Court and the Hon'ble High Court and cited more than 80 reported judgments, which will be taken into consideration, in the later part of the judgment, while dealing with particular subject.

[B] Mr. A.A.Hasan, Mr. A.D.Shah, Mr. Y.A. Charkha, Mr. L.R. Pathan, Mr. I.M. Munshi and Mr. S.M.Dadi, Ld. Advocates appearing for the accused persons, on the other hand, in defence of the accused, have argued the matter at length individually and then, Mr.A.D.Shah, Mr.I.M.Munshi and Mr.Y.A.Charkha, have also submitted notes of their respective arguments at Exh.1576.

Exh. 1587 and 1663.

Their arguments / contentions in defence, may be summarized as under:

-There was delay in lodging FIR, though the Railway Police Station is hardly 1 k.m. away from the place of incident and the police officers had already reached to the spot.

-In fact the FIR came to be lodged after 12.30 noon, but the time of lodging FIR as 9.30 a.m. is wrongly noted in the FIR.

-There is manipulation and some facts with regard to arrest of assailants from the spot have been added subsequently.

-In the same way, timings of Inquest panchnama and autopsy on dead bodies are also found to be in correct.

-In the Inquest panchnama, details with regard to articles, which were found on the dead bodies have not been noted with perfection.

-There is no mention, in the Inquest panchnama, either in positive or in negative, about presence of any inflammable liquid like petrol, diesel, kerosene, acid etc on the dead bodies or articles thereon.

-Autopsy on dead bodies came to be conducted in very

hazardous manner without any sufficient equipments and then, PM Notes came to be prepared on similar lines, mostly showing the external and internal parts of all the bodies as "charred/roasted", all the injuries as "ante-mortem" and cause of death as "Shock due to extensive burn injuries".

-Injured persons though sustained very simple injuries, without any further requirement, unnecessarily transferred to Civil Hospital, Ahmedabad for further treatments.

-Almost all the Karsevaks were traveling in the train unauthorizedly and that too, sitting in reserved Coaches.

-Karsevaks themselves, misbehaved with Tea-hawkers and Muslim girls at Godhra Railway Station on platform No.1 and beaten Tea-hawkers.

-Gathering of crowd was spontaneous and not as a part of conspiracy as alleged.

-Theory of conspiracy, purchase of petrol, its storage etc. is table story concocted subsequently.

-Story of presence of VHP workers of Godhra at Railway Station for welcoming and offering tea-breakfast etc. is also created other thought.

-In the same way story of preventing of Fire Fighter and attack on it, by stone pelting is also concocted later on, only with a view to ruin the political career of the accused Mohmad Kalota and Bilal Haji.

-The evidence of nine VHP workers is not reliable and trustworthy.

-Not a single person was apprehended from the spot, but during a joint combing operation, innocent persons came to be arrested by Railway police and Godhra Town Police and then, shown them as accused in both the cases.

-The accused persons have been falsely implicated, because of political or business rivalry.

-Employees of petrol pump and witnesses Ajay Kanubhai

Bariya and Sikandar Shaikh are the planted witnesses.

-Confessional statements of accused persons came to be recorded under threats and the same were retracted, at the earliest opportunity.

-Confessional statements recorded under the POTA, cannot be taken into consideration, in the present regular trial proceedings.

-T.I. Parades came to be conducted, in complete breach of established procedure and the provisions of law.

-Signatures of panchas were taken on ready recovery/discovery panchnamas subsequently.

-Most of the panch witnesses of Godhra, belong to Sindhi Community.

-Witnesses of nearby area, though available, have not been examined.

-Even statements of passengers and karsevaks, under Section- 161 CrPC were recorded, after much delay.

-No attempt was made, by the Investigating Officer, to get verified the place of occurrence and Coach S-6, through FSL officers on the same day or on the next day.

-Subsequently, suitable reports of the FSL officers, came to obtained in form of expert opinion.

-The prosecution has changed their own story of throwing inflammable liquid, on Coach from out side and then, created a new story of pouring 140 liters petrol entering into coach from sliding door, after cutting vestibule of corridor.

-Investigation, at different stage, by different Investigating Officers, came to be made hazardously, in a routine manner, as per the instructions, given to them by their Superior Officers and other political persons.

-Principle of identification of accused by minimum three

witnesses, as applicable to riots cases should be applied as a rule of caution.

-There are material contradictions-omissions etc. in the prosecution evidence.

-As there is no sufficient material on record, to hold guilty to any of the accused, all of them, should be acquitted, from all the charges.

-Ld. Advocates appearing for the accused persons, have also drawn attention of this Court, to more than 100 decisions of the Apex Court which will be dealt with, at appropriate stages, in the later part of this judgment".

In para [25] of the impugned judgment, the learned Sessions Judge, framed 11 points for determination, which reads as under:

"[25] POINTS FOR DETERMINATION:
From the facts and evidence on record, the following points have been arisen, for just determination.

1. Whether the prosecution proves beyond reasonable doubt that the alleged incident was occurred on 27-2-2002 at about 7.45 a.m.?

2. Whether the prosecution further proves beyond reasonable doubt that the alleged incident was occurred at Godhra Railway Station, near 'A' Cabin (towards Vadodara), at about 1 k.m. away from the platform?

3. Whether the prosecution further proves beyond reasonable doubt that in all 59 persons, including females and children died, out of which 58 expired on the spot, in the Coach S-6 itself, and more than 48 others, sustained simple/grievous burn/other injuries during the alleged incident?

4. Whether the prosecution further proves beyond reasonable doubt that a mob consisting of more than 900 persons of Muslim community, attacked on the passengers and karsevaks, with deadly weapons, like Iron-pipes, Iron-bars, Swords, Dhariyas, Sticks, Guptis, Stones and thereby, created such a tense atmosphere that it was difficult for the

passengers, to escape from the coaches, more particularly from Coach S-6, to save their lives?

5. Whether the prosecution further proves beyond reasonable doubt that the members of the mob, by pelting stones, acid bottles, bulbs, burning rags etc. caused injuries to the passengers of Coach S-6, S-5, S-7, S-2 etc. and then, throwing inflammable liquid like petrol etc. from the out side and pouring petrol inside, set on fire the entire Coach S-6?

6. Whether the prosecution further proves beyond reasonable doubt that the members of the mob, by committing such illegal acts, caused damage to the tune of Rs. 17,31,250/- to the Railway Properties and also to the luggage of the passengers?

7. Whether the prosecution further proves beyond reasonable doubt that for commission of such illegal acts, conspiracy came to be hatched on the previous night on 26th February, 2002, amongst the conspirators as alleged?

8. Whether the prosecution further proves beyond reasonable doubt that for commission of that illegal act, an unlawful assembly came to be formed by the members of the mob?

9. Whether the prosecution further proves beyond reasonable doubt that the accused persons having with deadly weapons with them, in public place, committed breach of the Notification published under Section-37(1) of the Bombay Police Act?

10. Whether the prosecution further proves beyond reasonable doubt that by committing such illegal acts, the accused persons have made them liable for punishment, for the offences punishable under Sections -143, 147, 148, 149, 302, 307, 323, 324, 325, 326, 332, 395, 397, 435, 186 and 188 read with 120-B, 153-A, 212 of the I.P. Code, Sections-141, 150, 151 and 152 of the Indian Railways Act, Sections-3 and 4 of the Prevention of Damages to Public Property Act, and Section-135(1) of the Bombay Police Act?

11. What order?"

The findings on the above points are enumerated in para [26] of the impugned judgment, which read as under:

> "[26] FIJNDINGS :
>
> My findings, on the above points, are

Point No.	Answer	Relevant Para	Page
1.	In the affirmative	43	91
2.	In the affirmative	43	91
3.	In the affirmative	47, 48	100, 115
4.	In the affirmative	61 to 64	218 to 225
5.	In the affirmative	62 to 83	221 to 317
6.	In the affirmative	50	141
7.	In the affirmative	84	319
8.	In the affirmative	91	393
9.	In the affirmative partly	93	420
10.	In the affirmative partly	94	421 to 764
11.	As per Final Order.	98 to 100	779 onwards

The learned trial Judge addressed himself to settled principles for appreciation of evidence by considering 35 different decisions of the Apex Court and the High Court of Gujarat and also considered jurisdiction visited in the Court and inspection of the scene of offence and surrounding area, as required.

Pursuant to National Level Programme for Ram Yagna at Ayodhya organized by different Hindu organizations, thousands of Kar Sevaks were visiting Ayodhya from various parts of the country and even hundreds of Kar Sevaks and believers had gone to Ayodhya and returned to their native places and in one of such incidents, Kar Sevaks were returning by Sabarmati Express running between Muzaffarnagar and Ahmedabad being Train No.9166-DN. By taking note of scheduled timings of arrival of above train at Godhra Railway Station on the day of incident as it was running late than the scheduled time, which was 2:55 a.m. on 27.02.2002 arrived at 7:45 a.m at Godhra Railway Station, the learned Sessions Judge in paras 32, 33, 34 and 35 in detail described engines, coaches, guard coach and drivers, guards, Ticket Examiners, topography of railway station, platforms, tracks, bridges and surrounding areas, including buildings and offices in

the railway premises and other places of importance and named in FIR and charge sheets and have bearing on crime investigated viz. Signal Falia, Aman Guest House, Petrol Pump, Garage, A Cabin, Ali Masjid, Ali ni Chawl, Fakiro ni Chawl, etc. That on the day of incident railway staff on duty including Gujarat Railway Police [GRP] and Railway Police Force [RPF] were taken note of along with staff of fire brigade of Godhra Municipality reached at the scene of incident with fire fighter and other administrative and police officers including the District Collector and District Superintendent of Police, Panchmahals at Godhra and visit of the Hon'ble Chief Minister and Hon'ble Home Minister of the State of Gujarat. In para [42] of the judgment noted about arrival timing of Sabramati Train, etc., which reads as under:

> "[42] ARRIVAL TIME ETC. OF SABARMATI EXPRESS TRAIN:
>
> As per schedule, the usual regular arrival time of Sabarmati Express Train 9166-DN from Ayodhya side to Ahmedabad, at Godhra Railway Station was 2.55 a.m. in early morning hours(mid night). However, on the date of incident, admittedly, the said train was behind the schedule and had come to Godhra Railway Station from Dahod side at about 7.40 a.m. As per the evidence of prosecution witnesses, particularly Railway staff witnesses, the details about arrival and departure timings of this train is as under;
>
> 7.40 a.m Arrival at Godhra Railway Station on platform No.1
>
> 7.45 a.m. Departure for Vadodara
>
> 7.47 a.m. First chain pulling in Coach Nos: 83101, 5343, 51263 and 88238, when the train was on platform and just started.
>
> 7.55 a.m. Stopped near "A" Cabin (Vadodara side), approximately one k.m. away, from Godhra Railway Station platform No.1, because of automatic break system, on account of dropping of vacuum."

Para [44] of the judgment refers to First Information Report under Section 154 of Cr.P.C. and in the context of arguments advances and various decisions with regard to delay in lodging FIR and its

effect are discussed.

Para [46] is about Inquest Pachnama under Section 174 of the Cr.P.C., total 58 persons died on the spot and shifted from Railway Coaches to Railway Yard and to the hospital for autopsy etc. and law in this regard laid down by the Apex Court with regard to evidentiary value of inquest panchnama, decisions of the Apex Court were relied on.

Para [47] is about injuries and cause of death, viz. 58 persons expired on the spot in coach S/6 itself and more than 48 others sustained simple and/or grievous burn and other injuries due to the alleged incident and considering medical certificates in this regard and testimonies of 16 doctors and identification of dead bodies of 59 passengers, cause of death was shock due to excessive burns as emerged from the record about receiving burn injuries, 14 doctors / medical officers were examined and about 60 injured passengers / travelers whose injury certificates were considered in the above context and evidentiary value of medical opinion in the context of medical certificates and other papers of medical treatment, reliance was placed on 8 decisions of the Apex Court as well as Gujarat High Court. In addition to the above, DNA profile reports, FSL reports were also considered including 29 queries raised by the Superintendent of Police and investigating officer of SIT, Gandhinagar constituted by the Apex Court and damages to coaches as assessed by the technicians of Railways and another important aspect about Alarm Chain Pulling System, in para 51it is observed as under:

> "[51] ALARM CHAIN PULLING SYSTEM:
>
> In the letter dtd; 17-9-2005 (Exh. 1008) written by Section Engineer
> (C and W) Ahmedabad to the Dy.SP (WR), Vadodara, it has been clearly mentioned that at the relevant time, in the following numbers of Coaches of that train, there were two type systems of chain pulling i.e. for pulling the chain from inside the Coach, and to turn ACP Disk from out side of the Coach, for stopping of the train, in case of emergency.

No.	Coach No.	No.	Coach No.
1	4147/GS/WR	10	91217/CN/WR
2	88103/SLR/WR	11	92333/CN/WR

3	91204/CN/WR	12	86253/CN/WR
4	91229/CN/WR	13	92297/GS/WR
5	91464/CN/WR	14	88238/GS/WR
6	89226/CN/WR	15	90238CN/WR
7	89465/CN/WR	16	91263/GS/WR
8	93498/CN/WR	17	5343/GS/WR
9	87206/CN/WR	18	83101/SLR/WR

In the context of celebrated principles of appreciation of evidence in criminal cases, the learned Trial Judge considered 25 decisions of the Apex Court and Gujarat High Court relied on by the learned Special Public Prosecutor, 18 decisions relied on by various defence counsels and even reference was also made to other 73 decisions of the Apex Court and Gujarat High Court.

The learned Trial Judge has also taken into consideration police petrol party on duty on previous night deployed for security of Sabarmati Express Train from Godhra to Dahod and back, canteen hawkers and vendors at tea stalls on platforms at Godhra, slogans shouted, tea breakfast by Kar Sevaks and quarrel which took place with hawkers on the platforms and muslim ladies with whom Kar Sevaks have misbehaved and their testimonies. Further, about First Chain Pulling, stone pelting, members of unlawful assembly, weapons, slogans shouted by them, etc. were considered and for the sake of convenience para 59 of First Chain Pulling and para 62 Second Chain Pulling whereby the train had stopped near A Cabin are reproduced herein below:

> "[59] FIRST CHAIN PULLING
>
> The Complainant-Engine Driver Rajendra Rao Jadav (PW-228), in his complaint (Exh.1190) and in his deposition (Exh.1189) has clearly stated that after receiving signal, he started the train **at 7.45 a.m**., but hardly it proceeded two or three coaches further, from the platform, it stopped because of chain pulling. Then, he immediately informed the Guard.
>
> PW-126 H.F.Meena, Asst. Station Master, PW-127 Rajendraprasad M.Meena, Asst. Station Master 'A' Cabin, PW-128 A.G.Shrma Asst. Station Master 'A' Cabin, PW-131

M.R.Panchori, Asst. Driver, PW-135 S.P.Varma Guard, and PW-136 S.M.Raniwal, Ticket Examiner have also deposed about this first chain pulling.

Most of the passengers and karsevaks have also deposed in their depositions about this first chain pulling.

Thus, from oral and documentary evidence, it is crystal clear that on the day of incident, the first chain pulling, in this train came to be made at 7.47 a.m. in the Coach Nos. 83101, 5343, 51263 and 88238.

Undisputedly, after the chain pulling, the Guard Mr.Varma and Asst. Driver Mr. Panchori reached near those coaches and ACP came to be reset by them immediately.

[62] SECOND CHAIN PULLING-STOPPAGE NEAR `A' CABIN

Admittedly, the train in question was an express train and after re-set of first chain pulling near platform No.1, the Asst. Station Master who was on duty at 'A' Cabin, again gave signal and the train re-started for Vadodara. Undisputedly, there was no stoppage near 'A' Cabin nor any reason for Driver to stop the train near 'A' Cabin. Therefore, the questions are:

1: Whether this train was stopped near 'A' Cabin or not?

2: Whether it was stopped by Driver or Guard?

3: Whether it was, stopped due to any mechanical defect in engine?

4: Whether it was stopped because of non availability of power supply?

5: Whether it was stopped because of chain pulling from in-side of any coaches?

6: Whether it was stopped because of turning of Disk kept outside the coaches?

7: Whether it was stopped because of leakage of Hose-Pipe and dropping of vacuum?

ld. Advocates for the defence, in the cross-examination of Engine Driver and Guard, have not asked question about any mechanical defect in engine, non availability of power, etc. Thus, from the oral and documentary evidence, as well as **damage found on the hose-pipe**, it can be said that there was no stoppage near 'A' Cabin, lines to proceed towards Vadodara were O.K., the Driver themselves did not stop the train, there was no mechanical defect in engine, **pulling of chain was not made by any passengers from inside of any coaches**, but **the said train stopped because of dropping of vacuum, as some one turned outside Vacuum Disk or cut the Hose-Pipe**.

Paras [63] and [64] are about stone pelting near A cabin and presence of members of violent mob with weapons near railway tracks.

Para [65] is about panchnama of place of incident.

In Para [66] Panchnama of coach S/6, which was drawn on 28.02.2002 during 17:45 to 19:35 hours at Railway Track in Carriage and Wagon Yard, Godhra, details about doors, windows, compartments, toilets, damages to the coach as a whole and description of seized articles was made, which was subsequently dispatched to FSL by special messenger on 02.03.2002 and received FLS on the same day, which was examined by Mr. D.P. Talati [PW. 227], Assistant Director, FSL, Ahmedabad and report of FSL was received on 20.03.2002 [Exh.1173].

Para [67] is with regard to Structure Materials of Coach for which reliance was placed on communication between investigating officer and the then Director General / Carriage so as to focus on the fire properties of different materials used at various places of the coach. That rescue operation undertaken by the fire fighters by the employees of fire brigade, Godhra and other such things find place in para [68].

Para [69] is with regard to cause of fire as to how and why the fire had taken place and also possibility of short circuit or any accidental fire in the coach as submitted by the learned counsel

for the defence. Reliance is placed on the decision in the case of Union of India Vs. Nilkanth Tulshidas Bhatiya and ors. reported in 2006(2) GLR 952 and record available with the Railways so produced during the trial to show the entries in official records maintained by the guard, testimonies of passengers, Kar Sevaks, engine driver, ticket examiner and guard, messages conveyed by police personnel on duty, FSL report of articles seized from S/6 coach as well as from adjoining place and emitting smoke towards rear end of the coach i.e. Godhra side-seat No.72.

In paras [70] to [72] upon considering Vestibule of Coaches S-5, S-6 & S-7 and their condition, it was concluded that vestibules of both the sides of Coach S/6 were of rubber material and after cutting the canvas vestibule situated between coach S-6 and S-7 by sharp cutting instrument. It was also established that the cause of fire was not due to short circuit or any accident.

In para [73] the learned trial Judge has placed heavy reliance on injury sustained by the accused – Jabir Binyamin Behra accused No.2 in Sessions Case No.72/2009 and deposition of Juber Mohmad Yusuf Mamji PW-180 about medical treatment given to the above accused at 9:30 a.m on 27.02.2002 along with another circumstance viz. loot of ornaments para [74] of the judgment is supported by Pravinbhai Amthalal Patel PW-170/Exh.873 and other panch witnesses viz. Rajubhai Shankarbhai Thakor PW-45/Exh.380, Visandas Tarachand Samiyani PW-38/Exh.290, etc. Likewise, other panchas about recovery of the above gold chain and finally conviction statement of the above accused along with evidence of Pannda PW-202 and Suleman PW-193 about alleged loot of articles.

Para [75] is with regard to Kalabhai Petrol Pump Employees. Ranjitsinh Jodhabhai Patel PW-224 and Prabhatsinh Gulabsinh Patel PW-231/Exh.1206 about purchase of 140 liters of lose petrol by accused persons as a part of conspiracy is considered in detail and reasons for accepting the case of prosecution are summarized as under:

-Kalabhai (Hakimiya) petrol pump and Patel petrol pump which are in Signal Faliya area, were sealed by the Supply Department immediately after the incident.

-Owners of both the petrol pumps belong to Muslim Ghanchi Community.

-Statement dtd; 10-4-2002, under Section-161 of Cri.Pro.Code came to be recorded at the instance of owner of the petrol pump.

-In the articles seized from place of occurrence and Coach S-6, presence of petrol residues were noticed by the FSL.

-As per FSL Reports, inflammable liquid in huge quantity came to be used to set on fire the Coach.

-In nearby area, persons of other community are not residing.

-No allegations have been made by the prosecution, against owner or employees of Patel petrol pump which was also owned by Muslim Ghanchi Community person.

-Both these witnesses had no enmity either with owner of Petrol Pump or any of the accused persons.

-Story of payment of Rs. 50,000/- to each of this witness and that too, by an Investigating Officer is highly improbable.

-No prudent man would dare to take such a great risk of giving false evidence, against huge number of accused belong to muslim community without thinking about his entire future life.

-Nothing on record to show that any relatives of witness Ranjit Jodhabhai Patel were earlier arrested in any communal cases.

-There are no material contradictions in the evidence of these two witnesses.

-Prevailing practice/system of selling loose petrol/diesel which is still continued, can be inferred from the photographs (Exh.1865 and 1867) produced by the defence themselves wherein, it can be seen that deliveryman of this petrol pump is selling the petrol in loose(white carboy). The date and time of these photographs are – 1.3.2010 - 8.00.p.m.

> Under the above circumstances, the evidence on oath given by these prosecution witnesses in such serious matter, cannot be discarded solely on the ground that they are planted witnesses, as they agreed to depose against the accused persons accepting Rs.50,000/- by each of them from the Investigating Officer Mr. Noel Parmar. [Kalabhai Petrol Pump]

Para [76] is about Three Wheelers Tempo GJQ-8074 used for purchasing petrol in carboys from Kalabhai Petrol Pump and was taken to Aman Guest House and thereafter on the next day at the scene of offence and and demonstration panchnama drawn to show the method of usage of above Three Wheelers Tempo in carrying 7 carboys of 20 liters each on the day of incident.

In para [77] Testimonial Appraisal of Ajay Kanubhai Bariya, eye witness of the main part of incident and the above witness is considered as key eye witness of the prosecution. Para [77] reads as under:

"[77] TESTIMONIAL APPRAISAL OF AJAY KANUBHAI BARIYA

> [I] As per prosecution case, Ajay Kanubhai Bariya is the eye-witness of the main part of the incident. This witness has been cross-examined at length by five different senior Ld. Advocates for defence and his deposition which runs into 103 pages was recorded on 31-3-2010, 1-4-2010, 5-4-2010 and 6-4-2010.
>
> As the line of defence was not clear, the questions and suggestions asked by different Ld. Advocates in cross-examinations are totally contradictory to each other, in respect of one and the same fact. For example, about his presence, the following suggestions were asked:
>
> "He was not present at the Railway Station, because he had gone up to Piplod from Godhra in the Daheradoon Train for selling tea.
>
> He was at home, and he could not wake up early on that day, as he had come late on previous night i.e. on 26th after attending a marriage.

He was busy on that day i.e. 27th in the early morning between 9.00 a.m. to 11.00 a.m., in repairing the roof of neighbor Dhantiya Kaka.

He was at Railway Station on platform No.1, at particular place, at the time of quarrel took place between Hawkers and Karsevaks.

He had seen one Sikander Shaikh of Fakiro-Ni-Chawl, at the time of incident and gave his name as assailant."

[II] This Court is of the opinion that this witness as per say of prosecution is one of the key eye-witnesses and appreciation of his evidence by the Court, is very much important for both, prosecution as well as defence therefore, much care is required for scrutiny of the evidence of this key eye-witness. As per settled principles, while appreciating evidence of this witness, the following points are required to be kept in mind:

(i) Who is this key eye-witness Ajay Kanubhai Bariya?

(ii) What he was doing at the relevant time?

(iii) Whether he was present on the platform?

(iv) Whether he had opportunity to witness the incident?

(v) Whether he was in a position to identify the assailants?

(vi) Whether he has any enmity with any of the assailants?

(vii) Whether he has any other reason, to depose falsely on oath, against any of the accused in such serious crime?

(viii) Why he has stuck to his version since 2002 to 2010?

(ix) Whether any procedural defects i.e. delay in recording statement under Section-161 seriously damages to his version on oath?

(x) What are the contradictions which may be termed as major or minor?

(xi) Whether the story put forward by the defence, for giving false evidence, against accused by this witness, can be accepted by the Court of law, in such serious matter, as 'probable'?

[III] Having gone through the entire deposition (which runs into 103 pages) carefully, it can be said that the following facts are not in much disputes:

(1) Ajay Kanubhai Bariya is by Caste Hindu.

(2) At the time of deposition in the year 2010, his age was 26, means in the year 2002, he was hardly the age of 18 years.

(3) He was residing with his family in the house of one Malabhai, in Bhathiji Mohalla, situated in Signal Faliya, Godhra.

(4) Hardly four or five Hindu Families were there, in Bhathiji Mohalla and rest of the Signal Faliya was of Muslim Community.

(5) He has studied up to standard 8th.

(6) He was doing labour work, by selling tea as hawker to passengers on platform or in running train, on commission basis i.e. 50 paisa per cup of tea.

(7) At the relevant time, he was working with one Mehboob Popa whose Tea-Cabin was situated outside the Railway premises.

(8) As he was doing this type of work for long back, and was residing in Signal Faliya, was well aware about the position of Railway platforms, Tea-Stalls, Aman Guest House, Kalabhai Petrol pump, Ali

Masjid, Railway Garnala (under bridge), Compound wall, Fencing, 'A' Cabin and the surrounding area thereof.

(9) He had no enmity either with Malabhai, owner of their house, or Mehboob Popa, with whom he was working, or any of the accused persons.

(10) No injury was caused to him or his family members/relatives or damage to their house/property by the accused during the incident.

(11) He is not connected with any political party, even at local level.

(12) After incident dtd; 27-2-2002, he himself had not made any efforts to lodge complain or to disclose information which he was possessing to any police officials till 2-7-2002.

(13) He and his family members had left Signal Faliya after the incident and ultimately, vacated the rented house in the year 2006. The owner Malabhai paid Rs. 10,000/- to his family for vacating this rented house.

(14) For the first time, he was called by police to Godhra Railway Station on 2-7-2002.

(15) Then, he was also called on the next day i.e. on 3-7-2002.

(16) Inquiry was made by Investigating Officer and two other Senior Officers on both these days asking him about the incident and his own involvement therein.

(17) No statement under Section-161 was recorded either on 2-7-2002 or 3-7-2002, but as per say of this witness, only rough note was being made by police.

(18) On 4-7-2002 his first statement under Section-161 came to be recorded at Godhra Railway Police Station.

(19) On 5-7-2002, his further statement was recorded at Godhra Railway Police Station.

(20) In the first statement dtd; 4-7-2002, the name of assailants which were given by him were short, incomplete or nick-names.

(21) In the Further Statement dtd; 5-7-2002, he had furnished full names of assailants.

(22) On 9-7-2002, his statement under Section-164 of the Cr.Pro.Code came to be recorded by Railway Magistrate, Camp at Anand.

(23) Then, on 3-8-2002, 6-9-2002 and 25-11-2002 his father statements under Section-161 came to be recorded.

(24) Thereafter, he had gone to the office of Executive Magistrate for T.I. Parade held on the following dates: 25-11-2002, 3-3-2003, 7-7-2003, 31-7-2004, 16-8-2004, 1-9-2004, 19-11-2004, 24-12-2004,3-7-2005, 1-8-2005, 20-2-2006,

(25) On 31-3-2010, during his examination-in-chief, he has identified in all 18 accused persons as assailants.

(26) He has admitted that there is compound wall, in some part between Railway premises and Signal Faliya Road and then, iron fencing up to Garnala (under bridge).

(27) He has admitted that there is slope behind “A’ Cabin and a dirty water drainage (Neek) after that slope.

(28) Police protection of two police guards has been provided to this witness since July, 2002.

[IV] Now, the submissions have been made by the Ld. Advocates appearing for the defence, to discard the entire evidence of this witness mainly on the following grounds:

(i) No attempt was made by this witness voluntarily to lodge complain or disclose the facts to any police officials up to 2-7-2002.

(ii) There is delay in recording his statement under Section-161 Cr.PC.

(iii) Though, this witness was called on 2-7-2002 and 3-7-2002, no statement under Section-161 Cr.PC came to be recorded during those two days period.

(iv) Statement under Section-164 Cr.PC came to be recorded, at the instance of the Investigating Agency.

(v) In the first statement dt; 4-7-2002, only short and incomplete names of assailants were given and on the next day i.e. on 5-7-2002, full names were given after the details furnished by police to him.

(vi) He has intentionally avoided to identify the assailant Sikander Shaikh during T.I. Parade.

(vii) There are material contradictions in his evidence.

(viii) Financial supports have been provided to this witness by the Investigating Officer Mr. Noel Parmar, in form of cash, two wheeler vehicle, service in a private company etc.

[V] Therefore, the question is as to whether there is any substance in the aforesaid grounds and if yes, then the said grounds can be said to be sufficient to discard the evidence of this witness in its entirety.

As regards the first ground of non discloser of facts up to 2-7-2002, it is the prosecution case that threats were given to this witness by the accused persons and as per say of defence, the witness himself had apprehension of his arrest by police for involvement in this offence. Admittedly, the witness was hardly 18 years old, he was residing in entirely muslim area and also doing labour at Godhra Railway Station where most of hawkers belonged to muslim

community, he was well aware about the attack on train and how and in which manner passengers killed. In the circumstances, when there was no personal injury or damage to the property of this witness, one cannot expect from him immediate discloser of facts. The defence raised by the accused, if accepted that he himself had an apprehension of his arrest, it also goes against the accused, because impliedly, they accept the presence of witness near Aman Guest House and 'A' Cabin.

So far as delay in recording statement under Section- 161 Cr.PC is concerned, it is well settled proposition of law that this ground alone, can never be said sufficient to discard the evidence of witness in its entirety, but at the most, the Court should scrutinize such evidence more carefully. As regards statement under Section-164, assuming for the sake of argument that the statement of this witness under Section-164 Cr.PC came to be recorded at the instance of the Investigating Agency, in my view, it would make no difference. On the contrary, it is clear that while recording statement of witness under Section-164, the Magistrate is required to inquire as to whether his statement under Section-161 was earlier recorded or not, more particularly when the witness concerned, directly approached the Magistrate. In the circumstances, even if the Investigation Agency had taken interest in recording of statement under Section-164 in my view, it would not be beneficial in any way to the accused. Further, in the case of N. Somashekar (Dead) by LRS Vs. State of Karnataka reported in AIR 2005 SC 1510, the Hon'ble Supreme Court has held that; " Merely because the statement of witnesses is recorded under Section-164 of the CrPC, that does not automatically dilute the worth of his evidence."

As regards incomplete names in first statement dtd; 4-7-2002 and then, giving of full names, addresses in second statement dtd; 5-7-2002 also, in my view, this fact also goes against the accused. If this witness had been planted/got up witness and the Investigating Agency itself, well aware about the full names and role played by each one, who prevented the Investigating Officer in mentioning full names, address with details in the first statement dtd; 4-7-2002 more particularly when this witness was interrogated for two days i.e. in 2-7-2002 and 3-7-2002. Further, this

witness even after his statement dtd; 5-7-2002, again had given short names in his statement dtd; 9-7-2002 before the Ld. Magistrate. Not only that even in his examination-in-chief though he was well aware about the full name of his owner, has made reference by short name as "Malabhai". Usually, it is our practice to make reference in normal course by short name or, nick-name. Even otherwise, assuming that he was not aware about full names, even though this point looses its importance, as he had identified the assailants in TI Parade and before the Court also.
So far as identification of assailant Sikander Shaikh is concerned, it may be noted that no where in the first two statements dtd; 4-7-2002 and 5-7 2002 and even in statement dtd; 9-7-2002 before Ld. Magistrate, there was any mention of this Sikander Shaikh about his presence on platform, near Aman Guest House or near 'A' Cabin or train, nor any mention about role played by this Sikander Shaikh. Under the circumstances, the explanation furnished by this witness that he had seen him from his back only and he was not sure and therefore, could not identify him, cannot be said to be improbable or false explanation.

With regard to financial help to this witness by the Investigating Officer Mr. Noel Parmar in form of Cash, two wheeler vehicle or service in private company, nothing has been produced to substantiate these allegations therefore, such vague allegations cannot be accepted as sufficient to throw overboard the evidence of witness.

So far as contradictions are concerned, I have minutely perused the entire deposition and statement dtd; 9-7-2002 (Exh.1233) recorded under Section-164 Cr.PC, and I am of the opinion that there are no contradictions particularly about material fact like his presence on platform, near Aman Guest House and Cycle Store, in three wheeler Tempo and near 'A' Cabin and also about the role played by the assailants in commission of crime. So far as other minor contradictions, it bound to be in such lengthy 103 pages deposition and cross made by different advocates on different points by forming questions in different manner and mode.

However, in any case, no prudent man, after careful reading of his entire evidence, would be in a position to say that this

witness was not present at all and he did not witness the incident as alleged."

In para [78] evidence of another key witness [hawker] Sikander Mohmmad Siddiq Shaikh is analyzed. In para [79] Evaluation of Evidence of Prosecution Witnesses Hawker-Bhikhabhai Harmanbhai Bariya PW-206/Exh.1060 is made.

"[78] ANALYSIS OF EVIDENCE OF KEY WITNESS [HAWKER] SIKANDER MOHMMAD SIDDIQ SHAIKH

[I] The prosecution to establish the facts of alleged attack on the train by the members of the mob and set on fire the Coach S-6, has also examined one another eye-witness Sikander Mohmmad Shaikh (PW-237/ Exh.1252) who was residing just near the place of incident.

Admittedly, this witness Sikander Shaikh originally belonged to Indore, Rajasthan, but his family was shifted to Godhra, when he was 10 years of age.

Undisputedly, this witness, his mother, brother and sister, at the relevant time were residing in Fakiro-Ni-Chawl, which is just near the Ali Masjid and 'A' Cabin.

This witness has deposed on oath that prior to the incident, he was doing labour as hawker with one Bilal Badam at Godhra Railway Station. This fact has not been seriously challenged, on the contrary, some questions/ suggestions were asked in his cross-examination about the quarrel in pantry-car of the train and registration of offence against him, which has been denied by the witness. Thus, from the evidence, it appears that prior to the incident, this witness was working as hawker with Bilal Badam at Godhra Railway Station.

As regards his presence, it is not the case of defence that at the time of incident, this witness was not at his home. As discussed earlier, a mob of more than 1000 persons gathered near 'A' Cabin, they were shouting slogans, announcement was being made on loud speaker about the attack etc. from Ali Masjid also. Under these circumstances, can it be believed that despite of such situation, he could not awake or did not come out of his home? Thus, from the

evidence and circumstances, the presence of this witness at the time of incident, near 'A' Cabin is also clearly established.

[II] Now, the question is as to whether this PW-237 Mr. Shaikh was in fact, witness of the incident or he was assailant. It may be noted that none of the prosecution witnesses except Ajay Kanubhai Bariya, in their statements disclosed name of Sikander. Even Ajay K. Bariya had also not stated name of 'Sikander' in his first two statements dtd; 4-7-2002 and 5-7-2002 and also in statement dtd; 9-7-2002 recorded by the Magistrate under Section-164 Cr.P.Code. Thus, it can be said that even Ajay Kanubhai Bariya was also not sure about assailant 'Sikander'. In the T.I. Parade also, this witness Ajay Kanubhai Bariya did not identify this witness Sikander Shaikh, as the same 'Sikander'. Thus, in absence of any other corroborative evidence, it would not be safe to believe that this witness PW-237 Sikander Shaikh is the same person whose reference has been made by the witness Ajay Kanubhai Bariya in his statement dtd; 3-8-2002 as assailant. In other wards, presence of this PW-237 Mr. Shaikh as witness, at the place of incident is clearly established.

[III] Then, the next question is, as to whether he had an opportunity to witness the incident and to identify any of the assailants or not. Now, the cross-examination of this witness itself, suggests that Fakiro-Ni-Chawl where he was residing with his family, is just behind the 'A' Cabin and near the Ali Masjid. It may be mentioned that as per timings disclosed by the Railway staff, this train started from platform, after first chain pulling at 7.55 a.m. It means, it must be reached near 'A' Cabin at about 7.58 or 7.59 a.m. Therefore, the time approximately 8.00 a.m. mentioned in the statement by this witness cannot be said to be incorrect. This witness has clarified that hearing shouts, he firstly rushed towards Ali Masjid, instead of going directly towards Railway track. In my view, this explanation cannot be said to be improbable.

[IV] In the, cross-examination of this witness, much has been asked by the defence, about financial help provided by Mr. Noel Parmar and the State Government to this witness from very beginning i.e. from the time of his shifting from

Godhra till the date. If that was the position, his statement could have been recorded much earlier by the police. Except the vague allegations, nothing has been brought on record to substantiate these allegations of financial help to this witness by the Investigating Officer Mr. Noel Parmar.

[V] As regards reference made by this witness about Maulvi Yakub Punjabi in his statements before police and Ld. Magistrate, it may be noted that as per his say, he heard the announcement from loud speaker and the said voice was of Maulvi Yakub Panjabi and when he was returning from 'A' Cabin, he saw one person on the terrace of the Ali Masjid and as per his say, he was Maulvi Yakub Panjabi. That means, this witness had no opportunity to see that person closely. In the circumstances, mistake might have been occurred or on the basis of his earlier knowledge and experience, he might have believed that the person who was standing on the terrace was Maulvi Yakub Pinjabi. However, in any case, merely on this ground alone, his evidence on oath, cannot be discarded in its entirety, but at the most careful scrutiny is required.

[VI] So far as whereabouts of this witness, in paragraph-31 of the cross-examination, it has been asked by the Ld.Advocate for the defence that on the day of 'Raksha Babdhan' Police Officer Karim Polra and Police Informer Kalu Ahmad, came Surat and brought this witness, in a Jeep from Surat to Vadodara, which suggestion has been denied by the witness. Thus, how the Investigating Officer could trace out this witness could be inferred from this suggestion.

[VII] Nothing on record to show that this witness had any enmity with any of the accused persons or any other valid reason to depose against them. The contradiction or omissions are not in material aspect. Mentioning of age '19' years or '25' years or address of Godhra in statements, makes no deference in accepting substantial part of his evidence on oath. In view of settled legal position, the delay in recording statement under Section-161 Cr.P.C. cannot be said to be valid ground to discard the evidence of this witness, more particularly, when the delay was not intentional and the Investigating Agency was not aware about the whereabouts of this witness.

> Further, there is difference between, to search out a genuine/truthful witness, and to create a bogus witness. In any case, as mentioned earlier, where the presence of this witness is clearly established, it can never be accepted that this witness is a bogus witness, created by the Investigating Agency subsequently".

Collectively it is concluded that court was not in a position to discard their evidence and they were found as reliable, credible and trustworthy.

In para [81] confession by Jabir Binyamin Behra under Section 164 of the Cr.P.C. is considered in the context of contention raised by learned counsel for the defence about its truthfulness, etc. and by relying on provisions of Section 164 of the Cr.P.C., paras 34, 35 and 36 of Criminal Manual and various decisions of the Apex Court, summary of judgments was made in Clause [XI] and in the context of grounds raised by learned counsel appearing for the defence in Clause [XII] it was held that the confessional statement looking to the contents there was voluntarily, true and they are reliable. Clauses [XI] and [XII] reads as under:

> "[XI] Thus, the law relating to confessional statement may be summarized as under:
>
> -Under the general law of the land as reflected in the Indian Evidence Act, no confession made to police officer can be proved against an accused.
>
> -"Confessions" - which is terminology used in criminal law is a species of "admissions" as defined in Section-17 of the Indian Evidence Act.
>
> -An admission is a statement - "oral or documentary", which enables the Court to draw an inference as to any fact in issue or relevant fact.
>
> -Every confession must necessarily be an admission, but every admission does not necessarily amount to a confession.
>
> -While Sections-17 to 23 deal with admissions, the law as to

confessions, is embodied in Sections-24 to 30 of the Evidence Act.

-Section-25 bars proof of a confession made to a police officer.

-Section-26 goes a step further and prohibits proof of confession made by any person while he is in the custody of a police officer, unless it be made in the immediate presence of a magistrate.

-Section-24 lays down the obvious rule that a confession made under any inducement, threat or promise becomes irrelevant in a Criminal Proceedings.

-Such inducement, threat or promise need not be proved to the hilt.

-If it appears to the Court that the making of the confession was caused by any inducement, threat or promise proceeding from a person in authorities, the confession is liable to be excluded from evidence.

-The expression 'appears' connotes that the Court need not go to the extent of holding that the treat etc has fact been proved.

-If the facts and circumstances emerging from the evidence adduced make it reasonably probable that the confession could be the result of threat, inducement or pressure, the Court will refrain from acting on such confession, even if, it be a confession made to a Magistrate or a person other than police officer.

-Confessions leading to discovery of fact which is dealt with under Section-27, is an exception to the rule of exclusion of confession made by an accused in the custody of a police officer.

-Consideration of a proved confession, against the person making it, as well as the Co-accused is provided for by Section-30.

-Confessions are considered highly reliable because no

rational person would make admission against his interest unless prompted by his conscience to tell the truth.

-Deliberate and voluntary confessions of guilt, if clearly proved are among the most effectual proofs in law.

-However, before relying upon a confession, the Court must be satisfied that it was freely and voluntarily made.

-A confession by hope or promise of advantage, reward or immunity or by force or by fear induced by violence or threats of violence cannot constitute evidence against the maker of confession.

-The Confession should have been made with full knowledge of the nature and consequences of the confession.

-If any reasonable doubt is entertained by the Court that these ingredients are not satisfied, the Court should eschew the confession from consideration.

-So also, the authority regarding the confession, be it a Magistrate or some other statutory functionary at the Pre-trial stage, must address himself to the issue whether the accused has come forward to make the confession in an atmosphere free from fear, duress or hope of some advantage or reward induced by the person in authority.

-Recognizing the stark reality of the accused being enveloped in a state of fear and panic, anxiety and despair while in police custody, the Indian Evidence Act has excluded the admissibility of a confession make to the police officer.

-Section-164 of Cri.Pro.Code, is a salutary provision which lays dawn certain precautionary rules to be fallowed by the Magistrate recording a confession so as to ensure the volunteers of the confession and the accused being placed in a situation free from threat or influence of the police.

[XII] Ld. Advocates appearing for the accused have raised mainly the following six grounds:

[1] On 4-2-2003, when the accused was produced before the Ld. Chief Judicial Magistrate Godhra, he was not informed by the Ld. Magistrate that he was 'chief Judicial Magistrate.'

[2] On 4-2-2003, the Ld. Judicial Magistrate had not asked the accused as to since how long, he was in police custody.

[3] on 4-2-2003, the Ld. Chief Judicial Magistrate had not informed the accused that he was not bound to make confessional statement.

[4] On 4-2-2003, the Ld. Chief Judicial Magistrate had also not inquired as to whether any confessional statement was made before the police or as to whether any videography of the same during police custody was done.

[5] On 4-2-2003, the Ld. Chief Judicial Magistrate while sending back the accused in judicial custody, wrote a letter (Yadi) to central Jail, Vadodara instructing to hand over the custody of the accused to Mr. S.B.Patel, Police Inspector, Railway to produce him before the Court on 5-2-2003 at 11.00 a.m. Not only that copy of that letter (Yadi) was also forwarded to the Dy.SP, (WR), Vadodara for information.

[6] On 5-2-2003, during 5.00 a.m. to 6.00 p.m., copy of the confessional statement was obtained by the Investigation Officer.

First Ground: As regards the first ground, it may be noted that the accused Jabir Binyamin Behra is a habitual offender and in past, he was involved in many theft/loot cases, his name was already disclosed in the First charge-sheet but he was remained absconding for a period of about one year, after arrest he was on police remand, produced before Ld. Magistrate, Railway, Dahod Camp and then produced in open Court of Ld. Chief Judicial Magistrate on 4-2 2003 and 5-2-2003 with full police protection and the Court compound was full of not only by the persons belonged to muslim community, and advocates, but the media persons and other general public . Not only that both times, at the time of preliminary inquiry, and recording of statement, the entire procedure came to be conducted in open Court by the Ld.Chief Judicial Magistrate sitting on Dais wearing

Uniform prescribed in the Manual therefore, how it can be believed or accepted by this Court of Session that the accused was not aware about the position or status of the person who recorded his statement. Further, the accused himself has not raised such dispute in his Further Statement or he has not stated that he believed the person who recorded his statement to be a Priest of a Church or a Maulvi of a Masjid. Therefore, in my view there is no substance in this contention. Even otherwise, the position of law is very much clear in this regard and for that reference may be made to the decision in the case of State of Tamil Nadu Vs.Kutty@ Laxmi Narsinhan reported in AIR 2001 SC 2778, wherein the Hon'ble Supreme Court has held that:

> "A very frail point has been raised that the Magistrate did not inform the accused at the initial stage that he was a Magistrate. Record shows that the accused was well aware that he was in the Court of Magistrate. On perusal of record, there is no scope for any contention that accused was unaware that the person who recorded the confession was a Magistrate."

Second Ground: So far as the second ground, question does arise to ask such question, as the accused was not in police custody when he was produced first time on 4-2-2003 before the Ld. Chief Judicial Magistrate, because he was in judicial custody since 29-1 2003.

Third Ground: As regards third ground, there is specific mention in the endorsement made below the confessional statement that:

> "it was explained to the accused that he was not bound to make confession."

Even otherwise, questions with regard to voluntariness were asked on both the days, i.e. 4-2-2003 and 5-2-2003, not only that but time of 24 hours was also given for reflection which shows that it was clearly conveyed to the accused before recording his confessional statement that it was not compulsory for him to make confession and he was free in this regard, either to make confession or not. Therefore, this Court is of the firm opinion that this ground is not available to the accused.

Fourth Ground: Admittedly, no such question with regard to confession before police or videography was asked by the Ld. Chief Judicial Magistrate, but looking to the facts situation prevailing at the time of year-2003, and relevant provisions of Evidence Act and the Criminal Manual, asking of such question was not mandatory and in any case, it cannot be termed as 'fatal' to the confessional statement which is otherwise legal and valid.

Fifth Ground: Undisputedly, the accused Jabir Binyamin Behra was in Judicial custody since 29-1-2003, authorised by Railway Magistrate and kept in Central Jail, Vadodara. Admittedly, an application for getting recorded statement under Section-164 Cr.P.C. was given by the Investigating Officer. It is not in dispute that 24 hours time for reflection was given to the accused and during this period, he was in judicial custody i.e. in Central Jail, Vadodara. In the circumstance, merely because he was produced by jail authority through P.I.Mr. S.B.Patel, Western Railway, Vadodara, as per the Yadi of the Court, it can never be presumed that the confessional statement was not voluntary. It may be noted that no complain was made on 5-2-2003, before Ld. Chief Judicial Magistrate in this regard. Further, neither on 4-3-2002 nor on 5-2-2003, Mr. S.B.Patel was allowed to remain present in the Court room at the time of inquiry or recording statement. One another important aspect is that the matter was sensitive and for maintaining law and order, not only Mr. S.B.Patel was possessing custody, but many other police officials were there during the travelling and production before the Court. Therefore, in absence of any material, it cannot be presumed that the accused was pressurised by Mr. S.B. Patel for confessional statement.

Sixth Ground: As regards obtaining copy of the confessional statement by the Investigating Officer, in my view, no discussion is required at all in this regard, more particularly at the time of dealing with the genuineness of confessional statement, because it has no relevancy at all, as the copy came to be obtained after completion of entire procedure of recording confession in open Court.

Under there circumstance, this Court is of the firm opinion

> that none of the above mentioned grounds are available to the accused persons and it is crystal clear that no breach was committed of any mandatory provisions or guidelines by the Ld. Chief Judicial Magistrate, Godhra at the time of either preliminary inquiry or recording confessional statement. In other wards, the confessional statement, looking to the contents therein, can definitely said to be voluntary and true.

In para [84], theory of conspiracy was considered threadbare by learned trial Judge by adverting to the law of conspiracy, its definition, essential feature and prove by taking recourse to the decision by relying on the learned Special Public Prosecutor as well as learned counsel for the defence in clause [V] following points were taken into consideration :

> "[V] Under the above circumstances, to make the issue of conspiracy narrow, the following points, are required to be taken into consideration:
>
> Point-1 Whether First chain pulling was done? If yes, by whom?
>
> Point-2 Whether stone pelting came to be done? If yes, by whom?
>
> Point-3 Whether Second chain pulling came to be done? If yes, by whom?
>
> Point-4 Whether there was any mob? If yes, of which community?
>
> Point-5 Whether Second time, stone pelting near 'A' Cabin came to be done? If yes, by whom?
>
> Point-6 Whether the members of mob had any weapons? If yes, the same were used or not?
>
> Point-7 Whether the members of the mob were shouting slogans or not?
>
> Point-8 Whether announcement from Ali Masjid on loud speaker
> instigating the crowd against Hindus was being done or

not?

Point-9 Whether window shutters etc. came to be broken? If yes, by whom?

Point-10 Whether damaged to almost all the Coaches more particularly window glasses, frames and shutters came to be done? If yes, by whom?

Point-11 Whether acid bottles-bulbs, burning-rags etc. were thrown from outside? If yes, by whom?

Point-12 Whether vestibule of between two Coaches S-6 and S-7
came to be cut? If yes, by whom?

Point-13 Whether sliding door of Coach S-6, (eastern side towards Godhra) came to be opened? If yes, by whom?

Point-14 Whether the East-South corner door of Coach S-6 (Southern side door towards Godhra) came to be opened? If yes, by whom?

Point-15 Whether any of the assailants came from onside to offside of the train? If yes, how and when?

Point-16 Whether the cause of fire was short circuit or in any way, it was an accidental?

Point-17 Whether there was any damage due to fire in Coach No.S-2 and it was also accidental or due to short circuit?

Point-18 Whether the fire originated in Coach S-6 on front side (near Seat No 1 to 10), in middle portion (Seat No. 31 to 40) or on rear side (Seat No. 61 to 72)?

Point-19 Whether any inflammable liquid came to be used for setting on fire Coach No. S-6? If yes, whether it was petrol, diesel or kerosene? And, in how much quantity, half litre, litre or more?

Point-20 Whether residues of petrol was found in the clothes of

passengers, seized from off side of the train? If yes, how why?

Point-21 Whether the petrol in loose form came to be purchased? If yes, by whom from where, in how much quantity, and where the same was stored or kept?

Point-22 Whether the petrol pump situated in Signal Faliya came to be sealed on the next day by Supply Department? If yes, why?

Point-23 Whether statements of employees of Kalabhai petrol pump were recorded on 10-4-2002? If yes, why and at whose instance?

Point-24 Whether the statement of the employees of Day-Shift of that pump were recorded? If no, why?

Point-25 Whether there was any possibility or chances for passengers of Coach S-6 for easy escape from the Coach, during short span of time, because of stone pelting and sudden fire?

Point-26 Whether gathering of crowd was spontaneous and the subsequent part of incident was a simple reaction of quarrel took place on platform?

Point-27 Whether such small quarrels are not being occurred, day in and day out, in the Country, more particularly in over-crowed area, like Railway Stations, Bus Stations, Markets, Heavy Traffic areas etc?

Point-28 Whether there are any incidents of such serious reactions of such small quarrel and that too, of train travelling?

Point-29 Whether any such quarrel took place earlier at Rudroli or Dahod Railway Stations between karsevaks and muslims?

Point-30 Whether there was any such serious reactions of those small quarrels? If no, why?

Point-31 Whether any such attack was made at Godhra

Railway
Station on that day on any other train passengers? If no, why?

Point-32 What is the past Communal history of Godhra?

Point-33 Whether some muslim Ghanchi of Godhra are communal minded persons?

Point-34 Whether earlier the incident of similar kind of fire and death of many persons took place in Sofiya Madresha School?

Point-35 Whether the subsequent conduct of members of mob, other muslims and leaders of Godhra, abscondance of accused, providing of help to under trial prisoners and their families etc can be taken into consideration or not? (Instructions issued by the Government at the relevant time are on record.)

Point-36 What is the meaning of " Pre-planned'? Whether storing of Petrol in huge quantity, in a nearby place, can be termed as "Pre-Plan" ?

In the earlier part of the judgment, the answers with regard to all the above referred to questions, have been given with reasons, discussing all the relevant available material on record therefore, now at this stage, it is suffice to say that it would not have been possible for the assailants to gather near the place of incident, to make assault with deadly weapons, to set the Coach S-6 on fire and to kill 59 persons and to cause burn injuries to 48 others, within a short span of 20 minutes time, stopping the train at a lonely place and pouring the petrol approximately 140 liters inside the said Coach, if there was no pre-planned at all and no conspiracy amongst the assailants."

Thus, conspiracy was believed to have been established by the prosecution.

Para [85] is about T.I.Parade in the context of Section 9 of Evidence Act and again it is discussed with the law laid down by Apex Court in various decisions.

In para [86] Recovery / Discovery of Muddamal Articles etc. under Section 27 of the Evidence Act and was discussed in detail along with law laid down by the Apex Court in various decisions.

Para [89] is about Reliability–Credibility of 9 VHP workers, Godhra, which was not believed.

In para [90] Principles on Solitary Witness under Section 134 of the Evidence Act were discussed in detail in context of Section 134 of the Evidence Act with the aid of decisions of the Apex Court and this Court and it was held that instances for minimum three or four witnesses to prove assailant's guilt was found not justifiable.

Para [91] is about Unlawful Assembly under Section 149 of the IPC was considered as per provisions contained Cr.P.C. and decision of the Apex Court relied on by the learned Special Public Prosecutor as well as defence and it was held common object of the members of the mob was to attach on the train passengers particularly on the Kar Sevaks and to fulfill common object, the mob had attached with deadly weapons caused simple as well as grievous injuries, burn injuries to the passengers and set the coach on fire.

"[95] SUMMARY OF MATERIAL MATRIX & CONCLUSION:

P.10 Whether the prosecution further proves beyond reasonable doubt that by committing such illegal acts, the accused persons have made them liable for punishment, for the offences punishable under Sections -143, 147, 148, 149, 302, 307, 323, 324, 325, 326, 332, 395, 397, 435, 186 and 188 read with 120- B, 153-A, 212 of the I.P. Code, Sections- 141, 150, 151 and 152 of the Indian Railways Act, Sections- 3 and 4 of the Prevention of Damages to Public Property Act, and Section- 135(1) of the Bombay Police Act?

ANS: In the affirmative partly [Para-95]

[1] As discussed earlier, it is crystal clear that in the year 2002, a National level programme "Ram Yanga" was organized by different Hindu Organizations VHP, RSS, Bajrang Dal etc. at Ayodhya and for that karsevaks were invited from different parts of the Country. From Gujarat also, hundreds of Hindus (karsevaks) had gone to Ayodhya

to attend this Yagna.

[2] At the relevant time, "Sabarmati Express Train" was running between Ahmedabad and Mujaffarnagar, the Godhra Railway Station is a junction and it was declared as "Official stoppage" for this train. The regular arrival time of this Sabarmati Express Train- 9166 DN, from Mujaffarnagar to Ahmedabad, on platform No.1 of Godhra Railway Station, was 2.55 a.m. (midnight).

[3] Mr. Rajendra Rao R. Jadav was Driver, Mr. Mukesh Panchori, Mr. Vora were Asst. Drivers, whereas Mr. S.P.Varma was Guard and Mr. S.M.Raniwal was as Ticket Examiner in this train.

[4] Mr. Khatija was as Station Superintendent, Mr. Saiyed and Mr. Sujala were as Dy. Station Superintendent whereas, Mr. Harimohan Meena was the Asst. Station Master, Mr. Rajandra Meena and Mr. Akhilkumar Meena both were Asst. Station Master and at the relevant time their duty was at "A' Cabin.

[5] Mr. Raju Bhargav was DSP, Smt. Jayanthi Ravi was a Collector, whereas, Mr. Mohmad Husen Kalota (Accused) was a President of Godhra Nagar Palika.

[6] On the date of incident, i.e. on 27-2-2002, this train was behind the schedule and came late at Godhra Railway Station, on platform No.1 at 7.40 a.m.

[7] This train was overcrowded by passengers and karsevaks. On the platform, when the passengers and karsevaks got down for tea-breakfast etc, they were shouting slogans "Jai Shri Ram" and some quarrel took place on platform between karsevaks and Hawkers in respect of payment of price of tea-breakfast and compelling for speaking of slogan "Jai Shri Ram".

[8] Not only that some karsevaks had also misbehaved with the muslim girls Sofiya etc on the platform.

[9] When the train departed for Vadodara at 7.45 a.m., first chain pulling came to be done in Coach No. 83101, 5343, 51263 and 88238.

[10] At that time, stone pelting started by the members of the mob of muslim community, from behind Parcel Office i.e. Signal Faliya and on the other hand, some karsevaks had also thrown metals towards that mob.

[11] After re-setting the system, when the train again started, second chain pulling came to be done by turning the outside Disk of ACP of the coaches and the train was stopped again, near "A'Cabin, a lonely area.

[12] Immediately, a mob consisting of more than 900 muslim persons of nearby area, attacked on the train with weapons like Sticks, Iron-pipes, Iron-rods, Dhariyas, Guptis, shouting slogans and also started pelting stones, acid bulbs-bottles, burning rags etc on the train coaches. At the same time, crowed was instigated by making announcements on loud speaker from nearby Ali Masjid. By creating such a tense atmosphere, passengers of the train were restrained/prevented from escaping from the coaches, even on "off-side of the train".

[13] Because of such heavy stone pelting, the window glasses of almost, all the coaches, and some window frames were also broken, through which stones etc started coming into coaches also.

[14] As the assailants could not succeed in setting on fire the coach by throwing burning rags etc, some assailants found out another way and after cutting canvas vestibule of Coach S-7, succeeded in opening eastern side sliding door of Coach S-6 forcibly and after entering into the coach, the East-South corner door of Coach S-6 came to be opened, from which some others entered with Carboys containing petrol and poured petrol sufficient enough in the coach and then by a burning rag, the entire Coach S-6 set on fire.

[15] In all 58 passengers/karsevaks died on the spot in the coach itself and one injured succumbed to the injury on 3-4-2002. Amongst these 59 deceased, 29 were males, 22 females, whereas 8 were children. Not only that other 48 persons sustained burn and other injuries during the course of incident.

[16] Inquest Panchnama and Autopsy on dead bodies, came to done in open space of Railway Yard, Godhra. As opined, the cause of death was extensive burn injuries.

[17] Injured persons immediately shifted to Godhra Civil Hospital and then, to Civil Hospital, Ahmedabad for further treatment.

[18] Panchnama of place of occurrence was drawn on the same day during the period between 1.00 p.m. to 3.00 p.m. and certain articles were seized from the spot and sealed in presence of panchas. The said articles were sent to FSL on 2-3-2002 by special messenger and as per FSL Report dt; 20-3-2002 (Exh.1173), petrol residues were noticed in many articles like Under wear, Lungi, Slipper, Metals, Aluminium strips, Safety bars, Pieces of dry colour parts of the coach, Saree, Petticoat, Scraf, Clothe pieces and also in Carboys. Even acid was noticed in one Plastic bottle.

[19] On the next day i.e. on 28-2-2002 panchnama of Coach S-6 was also drawn and certain materials were seized from all the nine compartments, as also from two toilets, sealed in presence of panchas and then, sent to FSL on 2-3-2002 by special messenger. As per FSL Report dt; 20-3-2002 (Exh.1173), in these materials also petrol residues were noticed.

[20] All the four doors, locks, some safety bars etc were also came to be removed/detached from the Coach S-6, sealed in presence of panchas and then, sent to FSL for examination. As per FSL Report dt; 17-5-2002 (Exh.1154), out of four doors, only one door i.e. West-South corner of Coach S-6 must be closed whereas the remaining three doors must be opened during the course of incident. Many hit marks of stone pelting were also noticed on the outer part of the doors. [21] The cause of fire which took place in Coach S-6 was not short circuit or accidental because of any leakage of kerosene from stove of any passenger, but definitely petrol in huge quantity came to be poured inside the coach on the rear portion, after entering into coach and then using burning rag it was ignited.

[22] Damage to the tune of Rs. 17,21,250/- to coach No. S-6, Rs. 5,000/- to coach No.7, Rs. 5,000/- to coach No.5

and Rs. 31,225/- to the remaining coaches came to be caused by the assailants. Not only that valuables and luggages of the passengers of coach S-6 were also almost destroyed in the fire.

[23] Fire Fighter passing through Signal Faliya area, came to be prevented from immediate reaching to the spot.

[24] Abdul Rajak Kurkur (Accused No.2 of S.C.No.70/09) was the owner and occupant of Aman Guest House, situated just behind (Southern side) of the Railway Station, Godhra.

[25] Kalabhai Petrol Pump (Kalumiya) is also situated just behind the Railway Station, on the entrance road of Signal Faliya. Prosecution witnesses Ranjitsinh Jodhabhai Patel and Prabhatsinh Gulabbhai Patel were on duty on this Petrol Pump on 26-2-2002 in the night shift i.e. from 6.00 p.m. onwards to next day early morning i.e. upto 9.00 a.m. on 27-2-2002.

[26] Conspiracy came to be hatched on the previous day i.e. 26-2-2002 during the meeting held in Aman Guest House between the conspirators Haji Bilal, Faruk Bhana, Abdul Rajak and Salim Panwala.

[27] As per the plan, Abdul Rajak Kurkur and Salim Panwala both had gone to Kalabhai Petrol Pump on moped scooty on 26-2-2002 at about 10.00 p.m. taking with them other conspirators Salim Jarda, Shaukat Ahmed Charkha @ Lalu, Imran Ahmed Bhatuk @ Sheru, Hasan Ahmed Charkha, Mehbub Khalid Chanda and Jabir Binyamin Behra in a Three Wheelers Tempo No, GJ-6 U- 8074, and purchased 140 litres loose petrol in different 7 Carboys and then, stored it behind Aman Guest House, in the house of Abdul Rajak Kurkur. Thereafter, a meeting of these conspirators again held in the Room No.8 of the said Aman Guest House.

[28] Taking advantage of quarrel took place on platform and misbehaviour by karsevaks with muslim girls, the absconding accused coconspirator Salim Panwala and the accused Mehbub Ahmed @ Latiko raised shouts, called muslim people from nearby area of Signal Faliya etc., by misleading that karsevaks were abducting muslim girl inside

the train, and also instructed to stop the train by chain pulling.

[29] As per the said instruction the assailants by turning disk of ACP situated on the outside of the Coaches, stopped the train near `A'Cabin.

[30] Then immediately, Abdul Rajak Kurkur and absconding accused Salim Panwala taking with them a Carboy containing petrol proceeded towards `A'Cabin on a Red coloured M-80 Bajaj moped scooty.

[31] At the same time, Saukat Ahmed Charkha @ Lalu, Hasan Ahmed Charkha @ Lalu, Mehbub Ahmed Hasan @ Latiko, Imran Ahmed Bhatuk @ Sheru, Jabir Binyamin Bahera, Irfan Abdul Majid Kalander @ Irfan Bhobha, Irfan Hanif @ Hani Panwala, Rafik Husen Bhatuk and Ramjani Binyamin Behra rushed behind the Aman Guest House, picked up the Carboys containing petrol, placed in the three wheelers tempo and then proceeded towards `A'Cabin via rough road of Ali Masjid.

[32] Mehbub Yakub Mitha @ Popa, Mehbub Khalid Chanda, Ayub Abdulgani Patliya, Yunus Abdulhaq Ghadiyali etc. went near Coach S-2 with weapons and started breaking window glasses ect. and also thrown a burning rag inside the said Coach S-2.

[33] Abdul Rajak Kurkur and absconding accused Salim Panwala went near Coach S-6 and poured petrol from the broken window, just near the closed door (towards engine/front side) of the Coach S-6.

[34] Mehbub Ahmed Yusuf Hasan @ Latiko who had with him a big knife (Chharo for cutting meat) first made holes on the upper part of the Carboys and then, cut the canvas vestibule of Coach S-7, situated between the Coaches S-6 and S-7 (corridor).

[35] Mehbub Ahmed Hasan and Jabir Binyamin Behra climbed up the said corridor place and by use of force with kicks etc, opened the eastern side sliding door of Coach S-6.

[36] Mehbub Ahmed Hasan @ Latiko, Jabir Binyamin

Behra and Saukat Ahmed Charkha @ Lalu then entered into Coach S-6 from the said sliding door with Carboys containing petrol.

[37] Absconding accused Saukat Lalu opened the East-South corner door of the Coach S-6, from where the remaining three i.e. Imran Sheru, Irfan Bhobha, Rafiq Bhatuk entered in the Coach with Carboys and poured petrol.

[38] Ramjani Binyamin Behra and Hasan Lalu were throwing petrol from the outside of the Coach, towards windows.

[39] Hasan Ahmed Charkha @ Hasan Lalu put on fire coach S-6 by through burning rag (kakdo).

[40] Then all the above accused persons who were in the Coach got down from the Coach on "Off side".

[41] Jabir Binyamin Behra, Siddiq Mohmad Moriya, Saukat Faruq Abdulsattar Pataliya @ Bhano and Saukat Yusuf Mohan @ Bibino caught hold of one Govindsinh Panda (PW-202) and caused him grievous injury inflicting iron-rod blow on his head. However, these accused persons at the request of prosecution witness Suleman M. Bhatuk (PW-193) allowed to go this injured Mr. Panda. Thereafter, all these four accused persons had also caught hold of PW-170 Pravinbhai Amthabhai Patel, karsevak, on off side of the said train, caused injuries on his back, chest both hands and legs by iron pipe, iron bar etc and also snatched away cash Rs. 3,000/- as well as gold ornaments, one chain and two rings, from him.

[42] If there was no plan at all, it would have not been possible to gather muslim persons with deadly weapons within five to six minutes and to reach near "A'Cabin on the railway tracks.

[43] If the petrol was not kept ready in loose form in Carboys on previous night near Aman Guest House, it would not have been possible to reach with Carboys containing petrol in huge quantity immediately i.e. within 5 to 10 minutes near the coach S-6.

[44] The target of the assailants was not all the passengers of this train or any other train or any other Hindus, but definitely the karsevaks who were traveling in this train were only the target of the assailants.

[45] Shouting of slogans by assailants and announcement on loud speaker from nearby mosque also clearly suggest about motive and preplan.

[46] The quarrel took place on platform or misbehaviour with muslim girls by karsevaks were only the causes for spontaneous reactions can never be accepted because as per the evidence on record, such quarrel had also took place earlier at Rudroli Station and the Dahod Station. However, it was not resulted into such serious reactions.

[47] Godhra is known for its past history of communal riots.

[48] For Godhra, this is not the first incident of burning alive innocent persons belonged to Hindu community.

[49] The offence of criminal conspiracy is a technical nature and the essential ingredient of the offence is the agreement to commit an offence. The gist of the offence under Section 120-A of I.P.Code is that the agreement between two or more persons to do or cause to be done an illegal act or a legal act by illegal means.

The offence of criminal conspiracy is complete as soon as two or more persons agree to do or cause to be done an illegal act, or an act which is not illegal by illegal means. It is immaterial whether the illegal act was the ultimate object of such an agreement or was merely, incidental to that object. The agreement in itself is enough to constitute the offence.

The entire agreement must be viewed as a whole and it has to be ascertained as to what infact the conspirators intended to do or the object they wanted to achieve.

The offence of conspiracy is continuing offence. It is committed not only when the agreement is first reached but

continues as long as the agreement to effect the unlawful object continues.

In the case of law Roy Jrey Vs.Supt. Director Jail reported in AIR 1958 SC 119, the Hon'ble Supreme Court has held that: "The conspiracy to commit crime and the crime itself are two different offences. Conspiracy precedes the commission of crime and is complete before the crime is attempted or completed."

In the case of Yespal Metal Vs. State of Punjab reported in AIR 1977 SC 2433 the Hon'ble Supreme Court has held that:

> "The offence of conspiracy under Section-120-A is a distinct offence. The very agreement, concert or league is the ingredient of the offence. It is not necessary that all the conspirators must know each and every detail of the conspiracy as long as they are co-conspirators in the main object of the conspiracy. There must be unity of object or purpose but there may be plurality of means sometimes even unknown to one another. The only relevant factor is that all means adopted and illegal acts done must be and purported to be in furtherance of the object of conspiracy."

In the case of state of Himachal Pradesh Vs. Krishanlal reported in AIR 1987 SC 773 the Hon'ble Supreme Court has held that:

> "the offence of conspiracy consists in a meeting of minds of two or more persons for agreeing to do or causing to be done an illegal act or an act by illegal means, and the performance of an act in terms thereof. If pursuant to the criminal conspiracy, the conspirators commit several offences, then all of them will be liable for the offences, even if, some of them had not actively participated in the commission of the offences."

In the case of Raghuvir Sinh Vs. State of Bihar reported in AIR 1987 SC 149, the Hon'ble Supreme Court has held that:

> "It is not necessary that a person should be a participant in conspiracy from start to finish Conspirators may appear and disappear from stage to stage in course of conspiracy." The fact that some members of a conspiracy are not members from the beginning but join the conspiracy only later, does not absolve him from the liability of conviction."

In the case of Narayanan Vs. State of Kerala, reported in 1995 (1) SCC 142 the Hon'ble Supreme Court has held that: "Any person associating himself with the conspirator shall be held liable as co-conspirator accused."

In the case of R.Vasu Nair Vs. State of Trav.Cochin, reported in AIR 1955 TC 33 the Hon'ble High Court has held that:

> "Where in pursuance of the criminal conspiracy, the accused and their friends found together into an unlawful assembly, having the common object of assaulting and murdering, a Police Inspector and the Police Constables who had come to their place, and in prosecution of the common object of the unlawful assembly, they all ambushed the police party springing upon them from both sides of lane as they were proceeding through it and throwing stones at them, and also cutting and stabbing and beating the Inspector and the Police Inspector and the Police Constables, with deadly weapons such as Choppers, Knives, Daggers, Stones, Slings and Sticks as the result of which, the Inspector and a Constable died on the spot and other persons died in the Hospital. The accused are guilty of the offences punishable under Section 120-B of IPC also.

In the case of S.C.Baheri Vs. State of Bihar reported in 1994 CrLJ 3271, the Hon'ble Supreme Court has held that:

> "Where the charge of conspiracy fails, the individual accused could still be convicted for the offences committed by them and sentenced accordingly."

In the case of Bahu Singh Vs. State of Punjab reported in 1996 (8) SCC 699 the Hon'ble Supreme Court has held that:

> "Merely because the charge of conspiracy has failed, the prosecution case, in so far as, actual assault by the accused is concerned, cannot be thrown away."

[50] To determine the charge of "Conspiracy or pre-planned', all the testimonial and documentary evidence as well as surrounding circumstance are required to be taken into consideration. Considering the confessional statement of co-accused Jabir Binyamin Behra, injury sustained by him, evidence of eye-witnesses Pravinbhai A. Patel, Govindsinh Panda, evidence of other eye-witnesses Ajay Kanubhai Bariya, Sikander Shaikh, Bhikhabhai Harmanbhai Bariya, Dilipbhai Gaimal Sindhi, other prosecution witnesses, FSL Reports, place and time period of incident, and other surrounding circumstances, it can definitely be said that the alleged incident was not a simple reaction of a small quarrel took place on the platform, but it was a pre-planned attack on the karsevaks, as a part of conspiracy hatched by the conspirators on the previous day i.e. on 26th February 2002, at Aman Guest House, Godhra.

[51] As regards forming of unlawful assembly and common object thereof, the decision in the case of State of U.P. Vs. Dan Singh and ors. Reported in AIR 1997 SC 1654, is very much helpful as the facts therein, is almost similar to the case on hand. In that case 14 scheduled caste persons were killed and 7 sustained injuries, as to save them selves the door of house bolted from inside, the assailants bolted if from outside, and after making hole in the roof, they put in dried grass, sprinkled kerosene oil and put in on fire. 32 accused persons charged for offences under Sections 302, 149 etc. the trial Court acquitted all. However, the Hon'ble High Court, convicted only 10 for the offences under Section-325 r/w 34 of IPC. The Hon'ble Supreme Court ultimately held that there was an unlawful assembly which attacked the marriage partly and which had the common object of killing them, and they succeeded in their endeavour a large extent.

Thus, in the case on hand also, in view of the above decision and as discussed earlier in this judgment, it is crystal clear that unlawful assembly came to be formed, the accused persons were the member of the said assembly and well aware about its ultimate object.

[52] As discussed in detail in para-94 of this judgment, while dealing with the case accused wise and role played by each of them in alleged incident the prosecution could succeed to establish the charges against only 31 accused persons and failed to prove the allegations against the remaining 63 accused facing the present trial proceedings. In earlier part of this judgment, while dealing with the issue, relating to forming of unlawful assembly, after taking into consideration the motive common object and other surrounding circumstance, it has been clearly held that gathering of the mob was not only spontaneous, but unlawful assembly came to be formed with a view to fulfill the common object by the assailants.

[53] Thus, the charges for the offences punishable under Sections- 143, 147, 148, 302, 307, 323, 324, 325, 326, 332, 395, 397, 435, 186 and 188 read with 120-B, 149,153-A, of the I.P. Code, Sections- 141, 150, 151 and 152 of the Indian Railways Act, Sections-3 and 4 of the Prevention of Damages to Public Property Act, and Section-135(1) of the Bombay Police Act, are clearly established against the 31 accused persons. The accused No. 42 of S.C.No.69/2009, accused No.54 of S.C. No.69/2009, accused No.3 of S.C. No.70/2009, accused No.1 of S.C.No.72/2009, accused No.1 of S.C.No.74/2009, accused No.2 of S.C.No.79/2009 and accused No.1 of S.C.No.83/2009 (in all seven) are entitled to get benefit of doubt whereas, the remaining (fifty six) are entitled for acquittal"

PART X

Before we proceed to appreciate the evidence produced on record, relevant and necessary provisions of The Indian Evidence Act, 1872, Indian Penal Code, 1860, and Code of Criminal Procedure, 1973, are reproduced hereinbelow:

Relevant Sections of The Indian Penal Code, 1860

Sec. 120 Concealing design to commit offence punishable with imprisonment - Whoever, intending to facilitate or knowing it to be likely that he will thereby facilitate the commission of an offence punishable with imprisonment,

voluntarily conceals, by any act or illegal omission, the existence of a design to commit such offence, or makes any representation which he knows to be false respecting such design.

If offence be committed – if offence be not committed – shall, if the offence be committed, be punished with imprisonment of the description provided for the offence, for a term which may extend to one-fourth, and, if the offence be not committed, to one-eight, of the longest term of such imprisonment, or with such fine as is provided for the offence, or with both.

Sec. 120A Definition of criminal conspiracy - When two or more persons agree to do, or cause to be done,-

(1) an illegal act, or

(2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy:

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Sec.120B Punishment of criminal conspiracy - [1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards, shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence.

[2] Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment of either description for a term not exceeding six months, or with fine or with both.

Sec.141 Unlawful assembly - An assembly of five or more persons is designated an "unlawful assembly", if the common object of the persons composing that assembly is-

First- To overawe by criminal force, or show of criminal force, a [the Central or any State Government or Parliament or the Legislature of any State], or any public servant in the exercise of the lawful power of such public servant; or

Second- To resist the execution of any law, or of any legal process; or

Third- To commit any mischief or criminal trespass, or other offence; or

Fourth- By means of criminal force, or show of criminal force, to any person to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or

Fifth- By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.

Sec.142 Being member of unlawful assembly - Whoever, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continues in it, is said to be a member of an unlawful assembly.

Sec.143 Punishment - Whoever is a member of an unlawful assembly, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Sec.144 Joining unlawful assembly armed with deadly weapon - Whoever, being armed with any deadly weapon, or with anything which, used as a weapon of offence, is likely to cause death, is a member of an unlawful assembly, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Sec.145 Joining or continuing in unlawful assembly, knowing it has been commanded to disperse - Whoever joins or continues in an unlawful assembly, knowing that such unlawful assembly has been commanded in the manner prescribed by law to disperse, shall be punished with imprisonment of either description for a term which may extent to two years, or with fine, or with both.

Sec.146 Rioting - Whenever force or violence is used by an unlawful assembly, or by any member thereof, in prosecution of the common object of such assembly, every member of such assembly is guilty of the offence of rioting.

Sec.147 Punishment for rioting - Whoever is guilty of rioting, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Sec.148 Rioting, armed with deadly weapon - Whoever is guilty of rioting, being armed with a deadly weapon or with anything which, used as a weapon of offence, is likely to cause death, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Sec.149 Every member of unlawful assembly guilty of offence committed in prosecution of common object - If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence.

<u>Relevant Sections of The Code of Criminal Procedure, 1973</u>

Sec. 28 Sentences which High Courts and Sessions Judges may pass.-

[1] A High Court may pass any sentence authorized by law.
[2] A Sessions Judge or Additional Sessions Judge may pass any sentence authorized by law; but any sentence of death passed by any such Judge shall be subject to confirmation by the High Court.

[3] An Assistant Sessions Judge may pass any sentence authorized by law except a sentence of death or of imprisonment for life or of imprisonment for a term exceeding ten years.

Sec. 164 Recording of confessions and statements - [1] Any Metropolitan Magistrate or Judicial Magistrate may, whether or not he has jurisdiction in the case, record any confession or statement made to him in the course of an investigation under this Chapter or under any other law for the time being in force, or at any time afterwards before the commencement of the inquiry or trial.

Provided that any confession or statement made under this sub-section may also be recorded by audio-video electronic means in the presence of the advocate of the person accused of an offence:

Provided further that no confession shall be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time being in force.

[2] The Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him; and the Magistrate shall not record any such confession unless, upon questioning the person making it, he has reason to believe that it is being made voluntarily.

[3] If at any time before the confession is recorded, the person appearing before the Magistrate states that he is not willing to make the confession, the Magistrate shall not authorize the detention of such person in police custody.

[4] Any such confession shall be recorded in the manner provided in section 281 for recording the examination of an accused person and shall be signed by the person making the confession; and the Magistrate shall make a memorandum at the foot of such record to the following effect

"I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this

confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.

(Signed) A. B.
Magistrate,"

[5] Any statement (other than a confession) made under sub-section (1) shall be recorded in such manner hereinafter provided for the recording of evidence as is, in the opinion of the Magistrate, best fitted to the circumstances of the case, and the Magistrate shall have power to administer oath to the person whose statement is so recorded.

[(5A)(a) In cases punishable under Section 354, Section 354A, Section 354B, Section 354C, Section 354D, sub-section (1) or sub-section (2) of Section 376, Section 376A, Section 376B, Section 376C, Section 376D, Section 376E or Section 509 of the Indian Penal Code [45 of 1860], the Judicial Magistrate shall record the statement of the person against whom such offence has been committed in the manner prescribed in sub-section (5), as soon as the commission of the offence is brought to the notice of the police:

Provided that if the person making the statement is temporarily or permanently mentally or physically disabled, the Magistrate shall take the assistance of an interpreter or a special educator in recording the statement:

Provided further that if the person making the statement is temporarily or permanently mentally or physically disabled, the statement made by the person, with the assistance of an interpreter or a special educator, shall be videographed.

(b) A statement recorded under Clause (a) of a person, who is temporarily or permanently mentally or physically disabled, shall be considered a statement in lieu of examination-in-chief, as specified in Section 137 of the Indian Evidence Act, 1872 [1 of 1872] such that the maker of the statement can be cross-examined on such statement, without the need for recording the same at the time of trial.

[6] The Magistrate recording a confession or statement under

this section shall forward it to the Magistrate by whom the case is to be inquired into or tried.

Sec. 172 Diary of proceedings in investigation - (1) Every police officer making an investigation under this Chapter shall day by day enter his proceedings in the investigation in a diary, setting forth the time at which the information reached him, the time at which he began and closed his investigation, the place or places visited by him, and a statement of the circumstances ascertained through his investigation.

[1A] The statements of witnesses recorded during the course of investigation under section 161 shall be inserted in the case diary.

[1B] The diary referred to in sub-section (1) shall be a volume and duly paginated.

[2] Any Criminal Court may send for the police diaries of a case under inquiry or trial in such Court, and may use such diaries, not as evidence in the case, but to aid it in such inquiry or trial.

[3] Neither the accused nor his agents shall be entitled to call for such diaries, nor shall he or they be entitled to see them merely because they are referred to by the Court; but, if they are used by the police officer who made them to refresh his memory, or if the Court uses them for the purpose of contradicting such police officer, the provisions of section 161 or section 145, as the case may be, of the Indian Evidence Act, 1872, shall apply.

Sec.281 Record of examination of accused.- [1] Whenever the accused is examined by a Metropolitan Magistrate, the Magistrate shall make a memorandum of the substance of the examination of the accused in the language of the Court and such memorandum shall be signed by the Magistrate and shall form part of the record.

[2] Whenever, the accused is examined by any Magistrate other than a Metropolitan Magistrate, or by a Court of Session, the whole of such examination, including every question put to him and every answer given by him, shall be recorded in full by the presiding Judge or Magistrate himself or where he is

unable to do so owing to a physical or other incapacity, under his direction and superintendence by an officer of the Court appointed by him in this behalf.

[3] The record shall, if practicable, be in the language in which the accused is examined or, if that is not practicable, in the language of the Court.

[4] The record shall be shown or read to the accused, or, if he does not understand the language in which it is written, shall be interpreted to him in a language which he understands, and he shall be at liberty to explain or add to his answers.

[5] It shall thereafter be signed by the accused and by the Magistrate or presiding Judge, who shall certify under his own hand that the examination was taken in his presence and hearing and that the record contains a full and true account of the statement made by the accused.

[6] Nothing in this section shall be deemed to apply to the examination of an accused person in the course of a summary trial".

Sec.294 No formal proof of certain documents.- [1] Where any document is filed before any Court by the prosecution or the accused, the particulars of every such document shall be included in a list and the prosecution or the accused, as the case may be, or the pleader for the prosecution or the accused, if any, shall be called upon to admit or deny the genuineness of each such document.

[2] The list of documents shall be in such form as may be prescribed by the State Government.

[3] Where the genuineness of any document is not disputed, such document may be read in evidence in any inquiry, trial or other proceeding under this Code without proof of the signature of the person to whom it purports to be signed:

Provided that the Court may, in its discretion, require such signature to be proved.

Sec.366 Sentence of death to be submitted by Court of

Session for confirmation.- [1] When the Court of Session passes a sentence of death, the proceedings shall be submitted to the High Court, and the sentence shall not be executed unless it is confirmed by the High Court.

[2] The Court passing the sentence shall commit the convicted person to jail custody under a warrant.

Sec. 367.Power to direct further inquiry to be made or additional evidence to be taken.- [1] If, when such proceedings are submitted, the High Court thinks that a further inquiry should be made into, or additional evidence taken upon, any point bearing upon the guilt or innocence of the convicted person, it may make such inquiry or take such evidence itself, or direct it to be made or taken by the Court of Session.

[2] Unless the High Court otherwise directs, the presence of the convicted person may be dispensed with when such inquiry is made or such evidence is taken.

[3] When the inquiry or evidence (if any) is not made or taken by the High Court, the result of such inquiry or evidence shall be certified to such Court.

368.Power of High Court to confirm sentence or annul conviction.- In any case submitted under section 366, the High Court-

[a] may confirm the sentence, or pass any other sentence warranted by law, or

[b] may annul the conviction, and convict the accused of any offence of which the Court of Session might have convicted him, or order a new trial on the same or an amended charge, or

[c] may acquit the accused person:

Provided that no order of confirmation shall be made under this section until the period allowed for preferring an appeal has expired, or, if an appeal is presented within such period, until such appeal is disposed of.

The Criminal Manual

CONFESSION

Pare 33 Accused person willing to make a confession or a person willing to make statement under section 164, Code of Criminal Procedure, 1973, should be taken for the purpose before the Chief Metropolitan Magistrate, Chief Judicial Magistrate or the Judicial Magistrate, as the case may be and as far as possible, before the Magistrate who will not eventually try the case. The Chief Metropolitan Magistrate or the Chief Judicial Magistrate may record the confession or statement, himself or would assign for the purpose a Metropolitan Magistrate or Judicial Magistrate at district head-quarters, as the case may be, who would not eventually try the case. The Judicial Magistrates in taluka towns or outside district headquarters should not record confession or statement under section 164, Code of Criminal Procedure, in cases arising within their respective jurisdiction and in such cases the police should be directed to approach the Judicial Magistrate of the nearby Court.

Para 34 The following instructions are issued for the guidance of the Magistrates recording confession and statement under section 164, Code of Criminal Procedure, 1973. They are not intended to fetter the discretion given by the law of Magistrates. The only object with which they are issued is to indicate generally the manner in which the discretion may be exercised :

(i) In the absence of exceptional reasons, confession should ordinarily be recorded in open Court and during Court hours.

(ii) The examination of the accused person immediately after the Police bring him into Court, is deprecated. When the accused is produced before the Magistrate, the Police Officers should be removed from the Court-room unless in the opinion of the Magistrate, the duty of ensuring their safe custody cannot safely be left to other attendants. In that case only the minimum number of Police Officers necessary to secure the safe custody of the accused person should be allowed to remain in the Court-room.

(iii) It should be impressed upon the accused person that he is

no longer in police custody.

(iv) The Magistrate should then question the accused person whether he has any complaint to make of ill-treatment against the police or others responsible for his arrest or custody, and shall place on record the questions put and the answers given.

(v) If the accused person makes an allegation of ill-treatment, the Magistrate shall follow the same procedure as is laid down in paragraph 14(1) above.

(vi) If the accused does not complain of any ill-treatment or improper conduct or inducement on the part of the Police, or if in-spite of the alleged ill-treatment, misconduct or inducement, he adheres t his intention of making a confessional statement, the Magistrate should give the accused a warning that he is not bound to make the confession and that, if he does so , it will be taken down and may thereafter be used as evidence against him. A note of the warning given to the accused should be kept on record.

(vii) Thereafter the Magistrate should give the accused a reasonable time, which should ordinarily no to be less than 24 hours, for reflection in circumstances in which he would be free from the influence of the Police and any other person interested in having the confession recorded. The accused should be told that he is no longer in police custody and he is being sent to Magisterial custody.

(viii) After the accused is produced before the Magistrate again, it should be ascertained from him whether he is willing to make a confession. If he expresses his desire to confess, all Police Officers should be removed from the Court-room, unless in the opinion of the Magistrate the duty of ensuring his safe custody cannot safely be entrusted to other attendants. In that case only the minimum number of Police Officers necessary to secure the safe custody of the accused person should be allowed to remain in the court-room. In any case, it is not desirable that the police Officer making the investigation should be present.

(ix) The Magistrate should then question the accused person as to the length of time during which he has been in the custody of the Police. It is not sufficient to note the date and

hour mentioned in the police papers, at which the accused person is said to have been formally arrested.

(x) The provisions of Section 163 and 164 of the Code of Criminal Procedure, 1973, should be carefully adhered to. The first clause of Section 163 read with Section 24 of the Indian Evidence Act, provides that if a confession is caused by any inducement, threat or promise, offered or made, or caused to be offered or made by any Police Officer or person, then, if in the opinion of the Court the inducement, threat or promise was sufficient to give the accused person grounds, which would appear to him reasonable, for supposing that by making the confession he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him and unless in the opinion of the Court the impression caused by any sch inducement, threat or promise, has been fully removed, such confession is irrelevant, that is, it can not be used as evidence in any criminal proceeding.

(xi) Under clause (2) of Section 163, for a confession of an accused person made in the course of a police investigation to have any value, it must be one which the accused person was disposed to make of his own free will. Before recording any such confession, the Magistrate is bound to question the accused person, and unless upon that questioning he has reason to believe that the confession is voluntary, he should not make the memorandum at the foot of the record. He cannot make the memorandum, "I believe that this confession was voluntarily made" unless he has questioned the accused person, and from that questioning has formed the belief not a doubtful attitude of mind, but a positive belief, that the confession is a statement which the accused person, and from that questioning has formed the belief not a doubtful attitude of mind, but a positive belief, that the confession is a statement which the accused person was disposed to make of his own free will.

(xii) Before recording a confession, the Magistrate should question the accused with a view to ascertain the exact circumstances in which his confession is being made and the connection of Police with it, under clauses (iv), (vi), (x) and (xi) above. In particular, where more than one accused is involved in the case, he should question the accused whether he has been induced to make a confession by promises to make

him an approver in the case. Anything in the nature of cross examination of the accused is to be deprecated. It should, however, be the endeavour of the Magistrate, without having recourse to heckling or attempts to entrap the accused, to record the statement with as much details as possible regarding the circumstances under which the confession was being made, the extent to which the police had anything to do with the accused prior to this offer to make a confession, as well as the fullest possible particulars of the incidents to which the confession relates. These details are important as they furnish the material on which the value of the confession is to be estimated, and the greater the detail, the greater the chances of a correct estimate. The confession should be recorded in the manner provided in section 281, Code of Criminal Procedure, 1973, for recording the examination of the accused person. Every answer given by the accused should be recorded as far as possible in his own language, and if that is not practicable, in the language of the Court.

(xiii) The Magistrate should add to the certificate required by Section 164, Code of Criminal Procedure, a statement in his own hand, of the grounds on which he believes that the confession is genuine, the precautions which he took to remove the accused from the influence of the police, and the time, if any, given to the accused for reflection.

(xiv) The confession should be recorded in Form No. 35.

<u>The Indian Evidence Act, 1872</u>

Sec.8 Motive, preparation and previous or subsequent conduct - Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.

The conduct of any party, or of any agent to any party, to any suit or proceeding, in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact ins issue or relevant fact, and whether it was previous or subsequent thereto.

Explanation 1- The word "conduct" in this section does not

include statements, unless those statements accompany and explain acts other than statements, but this explanation is not to affect the relevancy of statements under any other section of this Act.

Explanation 2—When the conduct of any person is relevant, any statement made to him or in his presence and hearing, which affects such conduct is relevant.

Sec. 9. Facts necessary to explain or introduce relevant facts - Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity of any thing or person whose identity is relevant, or fix the time or place at which any fact issue or relevant fact happened, or which show the relation of parties by whom any such fact was transacted, are relevant in so far as they are necessary for that purpose.

Sec.10 Things said or done by conspirator in reference to common design - Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to so conspiring, as well for the purpose of providing the existence of the conspiracy as for the purpose of showing that any such person was a party to it.

Sec. 24 Confession caused by inducement, threat or promise when irrelevant in criminal proceedings - A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat for promise, having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

Sec. 25 Confession to police officer not to be proved - No confession made to a police officer shall be proved as against a person accused of any offence.

Sec. 26 Confession by accused while inProvided also that this section shall not authorize any Judge to compel any witness to answer any question or to produce any document which such witness would be entitled to refuse to answer or produce under sections 121 to 131, both inclusive, if the question were asked or the document were called for by the adverse party; nor shall the Judge.

Provided also that this section shall not authorize any Judge to compel any witness to answer any question or to produce any document which such witness would be entitled to refuse to answer or produce under sections 121 to 131, both inclusive, if the question were asked or the document were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under section 148 or 149; nor shall he dispense with primary evidence of any document, except in the cases herein before excepted. ask any question which it would be improper for any other person to ask under section 148 or 149; nor shall he dispense with primary evidence of any document, except in the cases herein before excepted. **custody of police not to be proved against him -** No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate,[17] shall be proved as against such person.

[Explanation- In this section "Magistrate" does not include the head of a village discharging magisterial functions in the Presidency of Fort St. George or else where, unless such headman is a Magistrate exercising the power of a Magistrate under the Code of Criminal Procedure, 1882 (10 of 1882).

Sec.27 How much of information received from accused may be proved - Provided that, when any fact is deposed to as discovered in consequences of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether if amounts to a confessions or not, as relates distinctly to the fact thereby discovered, may be proved.

Sec.30 Consideration of proved confession affecting person making it and others jointly under trial for same offence – When more persons than one or being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession.

Explanation - "Offence", as used in this section, includes the abetment of, or attempt to commit the offence]

Sec.45 Opinions of experts – When the Court has to form an opinion upon a point of foreign law or of science or art, or as to identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art, or in questions as to identity of handwriting or finger impressions are relevant facts.

Sec.135 Order of production and examination of witnesses - The order in which witnesses are produced and examined shall be regulated by the law and practice for the time being relating to civil and criminal procedure respectively, and, in the absence of any such law, by the discretion of the Court.

Sec.145 Cross-examination as to previous statements in writing - A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

Sec.146 Questions lawful in cross-examination - When a witness is cross-examined, he may, in addition to the questions herein before referred to, be asked any questions which tend-

[1] to test his veracity,

[2] to discover who he is and what is his position in life, or

[3] to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly

to criminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture.

Sec.147 When witness to be compelled to answer - If any such question relates to a matter relevant to the suit or proceeding, the provisions of section 132 shall apply thereto.

Sec.148 Court to decide when question shall be asked and when witness compelled to answer - If any such question relates to a matter not relevant to the suit or proceeding, except in so far as it affects the credit of the witnesses by injuring his character, the Court shall decide whether or not the witness shall be compelled to answer it, and may, if it thinks fit, warn the witnesses that he is not obliged to answer it. In exercising its discretion, the Court shall have regard to the following considerations:-

[1] Such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the Court as to the credibility of the witness on the matter to which he testifies :

[2] Such questions are improper if the imputation which they convey relates to matters so remote in time, or of such a character, that the truth of the imputation would not affect, or would affect in a slight degree, the opinion of the Court as to the credibility of the witness on the matter to which he testifies:

[3] Such questions are improper if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence:

[4] The court may, if it sees fit, draw, from the witness's refusal to answer, the inference that the answer if given would be unfavourable.

Sec.149 Question not to be asked without reasonable grounds - No such question as is referred to in section 148 ought to be asked, unless the person asking it has reasonable grounds for thinking that the imputation which it conveys is well-founded.

Sec. 150 Procedure of Court in case of question being asked without reasonable grounds - If the Court is of opinion that any such question was asked without reasonable grounds, it may, if it was asked by any barrister, pleader, vakil or attorney, report the circumstances of the case to the High Court or other authority to which such barrister, pleader, vakil or attorney is the subject in the exercise of his profession.

Sec.151 Indecent and scandalous questions - The Court may forbid any questions or inquiries which it regards as indent or scandalous, although such questions or inquiries may have some bearing on the questions before the Court unless they relate to facts in issue, or to matters necessary to be known in order to determine whether or not the facts in issue existed.

Sec. 152 Questions intended to insult or annoy - The Court shall forbid any question which appears to it to be intended to insult or annoy, or which, though proper in itself, appears to the Court needlessly offensive in form.

Sec. 153 Exclusion of evidence to contradict answers to questions testing veracity - When a witness has been asked and has answered any question which is relevant to the inquiry only in so far as it tends to shake his credit by injuring his character, no evidence shall be given to contradict him, but, if he answers falsely, he may afterwards be charged with giving false evidence.

Sec.154 Question by party to his own witness - [(1)] The Court may, in its discretion, permit the person who calls a witness to put any question to him which might be put in cross-examination by the adverse party.

[(2) Nothing in this section shall dis-entitle the person so permitted under sub-section (1), to rely on any part of the evidence of such witness.]

Sec.155 Impeaching the credit of witness - The credit of a witness may be impeached in the following ways by the adverse party, or with the permission of the Court, by the party who calls him-

[1] by the evidence of persons who testify that they, from their knowledge of the witness believe him to be unworthy of credit;

[2] By proof that the witnesses has been bribed, or has accepted the offer of a bribe, or has received any other corrupt inducement to give his evidence;

[3] By proof of former statements inconsistent with any part of his evidence which is liable to be contradicted.

Sec.157 Former statements of witness may be proved to corroborate later testimony as to same fact - In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact at or about the time when the fact took place, or before any authority legally component to investigate the fact, may be proved.

Sec. 165. Judge's power to put questions or order production - The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties about any fact relevant of irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer give in reply to any such question:

Provided that the judgment must be based upon facts declared by this Act to be relevant, and duly proved.

Provided also that this section shall not authorize any Judge to compel any witness to answer any question or to produce any document which such witness would be entitled to refuse to answer or produce under sections 121 to 131, both inclusive, if the question were asked or the document were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under section 148 or 149; nor shall he dispense with primary evidence of any document, except in the cases herein before excepted.

PART XI-A

1 The following decisions [i] **Tahsildar** Singh [supra], [ii] **Masalti** [supra], [iii] **Rabindra Kumar Pal @Dara Singh** [supra], and [iv] **Yakub Abdul Razak Memon** [Bombay Blasts, 1993][supra] are heavily relied on by learned counsels appearing for the defence as well as learned Special Public Prosecutor and learned Senior Advocate appearing for the victims.

1.1 The case of **Tahsildar Singh** [supra] is about object of Section 162 and proviso of Section 162 of Code, 1973 primarily to serve interest of accused vis-a-vis Section 145 of the Evidence Act. Section 162 of Code, 1973 enacts an absolute bar against the statement made before a police officer being used for any purpose whatsoever, it enables the accused to rely upon it for a limited purpose of contradicting a witness in the manner provided by Section 145 of the Evidence Act by drawing his attention to parts of the statement intended for contradiction. It cannot be used for corroboration of a prosecution or a defence witness or even a Court witness. Nor can it be used for contradicting a defence or a Court witness. Shortly stated, there is a general bar against its use subject to a limited exception in the interest of the accused, and the exception cannot obviously be used to cross the bar, so stated in paras 11 and 17 of the above judgment. The above paragraphs and other paragraphs 13, 19 and 22 are about procedure indicated in Section 145 of the Evidence Act for contradicting witness by confronting him with his previous statement under Section 162 of the Code, 1973. The majority view, which reflected under paras 13, 19 and 22 [head notes]. Paras 13, 19 and 22 [head notes], read as under:

"Per Majority (Sinha, Kapur, Sarkar and Subba Rao JJ.) The

procedure prescribed for contradicting a witness by his previous statement made during investigation, is that, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him. The proviso to S. 162 only enables the accused to make use of such statement to contradict a witness in the manner provided by S. 145 of the Evidence Act. It would be doing violence to the language of the proviso if the said statement be allowed to be used for the purpose of cross-examining a witness within the meaning of the first part of S. 145 of the Evidence Act. The argument that it would not be possible to invoke the second part of S. 145 of the Evidence Act without putting relevant questions under the first part thereof cannot be accepted. The second part of S. 145 of the Evidence Act clearly indicates the simple procedure to be followed. To illustrate: A says in the witness-box that B stabbed C; before the police he had stated that D stabbed C. His attention can be drawn to that part of the statement made before the police which contradicts his statement in the witness-box. If he admits his previous statement, no further proof is necessary; if he does not admit, the practice generally followed is to admit it subject to proof by the police officer. On the other hand, if the witness is asked "did you say before the police-officer that you saw a gas light ? " and he answers "yes", and then the statement which does not contain such recital is put to him as contradiction, the procedure involves two fallacies: one is, it enables the accused to elicit by a process of cross-examination what the witness stated before the police-officer. If a police-officer did not make a record of a witness's statement, his entire statement could be brought on record. This procedure, therefore, contravenes the express provision of S. 162 of the Code. The second fallacy is that there is no self-contradiction of the primary statement made in the witness-box for the witness has yet not made on the stand any assertion at all which can serve as the basis. The contradiction, under the section, should be between what a witness asserted in the witness-box and what he stated before the police-officer, and not between what he said he had stated before the police-officer and what he actually made before him. In such a case the question could not be put at all: only questions to contradict can be put and the question here posed does not contradict;

it leads to an answer which is contradicted by the police statement,

(Para 13)

Section 145 of the Evidence Act indicates the manner in which contradiction is brought out. The cross-examining Counsel shall put the part or parts of the statement which affirms the contrary to what is stated in evidence. This indicates that there is something in writing which can be set against another statement made in evidence. If the statement before the police-officer and the statement in the evidence before the Court are so inconsistent or irreconcilable with each other that both of them cannot co-exist, it may be said that one contradicts the other.

(Para 19)

The word "cross-examination" in the last line of the first proviso to S. 162 cannot be understood to mean the entire gamut of cross-examination without reference to the limited scope of the proviso, but should be confined only to the cross-examination by contradiction allowed by the said proviso.

(Para 22)"

However, according to minority view, the reference to section 145 of the Evidence Act brings in the whole of the manner and machinery of Section 145 and not merely the second part. In this process, of course, the accused cannot go beyond Section 162 or ignore what the section prohibits but cross-examination to establish a contradiction between one statement and another is certainly permissible.

According to majority view, Section 162 and the proviso of Code, 1973 "statement in writing", includes what is implied therein and does not include incidents, which are expected to be included in the statement but not included. Paras 18, 20 and 25 of head note read as under:

> **"Per Majority (Sinha, Kapur, Sarkar and Subba Rao JJ.) Looking at the express words used in S. 162, two sets of words stand out prominently which afford the key to the intention of the legislature. They are: "statement in writing", and "to contradict". "Statement" in its dictionary meaning is the act of stating or reciting. Prima facie a statement cannot take in an omission. A statement cannot include that which is not stated. But very often to make a statement sensible or self-consistent, it becomes necessary to imply words which are not actually in the statement. Though something is not expressly stated, it is necessarily implied from what is directly or expressly stated.**
>
> (Para 18)
>
> **It cannot be broadly contended that a statement includes all omissions which are material and are such as a witness is expected to say in the normal course. Unrecorded statement is completely excluded. But recorded one is used for a specified purpose.**
>
> (Para 20)
>
> **Omissions unless by necessary implication be deemed to be part of the statement, cannot be used to contradict the statement made in the witness-box; and the view that they must be in regard to important features of the incident which are expected to be included in the statement made before the police is not tenable.**
>
> (Para 25)

That views of majority as well as minority are *ad idem* so far as limitation prescribed under Section 162 of the Code, 1973 is concerned while undertaking the process viz. cross-examining the witnesses with regard to previous statement in writing or part thereof so as to bring out contradictions under section 145 of the Evidence Act and differs with regard to applying the entire gamut of cross-examination. According to the majority view the word "cross-examination" in the last line of the first proviso to Section 162 cannot be understood to mean the entire gamut of cross-examination without reference to the limited scope of the

proviso, but should be confined only to the cross-examination by contradiction allowed by the said proviso. However, according to minority view the reference to section 145 of the Evidence Act brings in the whole of the manner and machinery of Section 145 and not merely the second part. In this process, of course, the accused cannot go beyond Section 162 or ignore what the section prohibits but cross-examination to establish a contradiction between one statement and another is certainly permissible.

1.2 The case of **Masalti** [supra] is considered and followed by many other decisions and since the said case law is relied on by learned counsels appearing for the prosecution as well as defence, we may advert to the same in the later part of the judgment. In this case, reference is made to Section 3 of the Evidence Act vis-a-vis Sections 302, 141, 142, 143, 144, 145, 146, 147, 148, 149 pertaining to unlawful assembly and whether person is a member of unlawful assembly, tests to be applied and also about trustworthiness of a witness is to be judged on the criteria of trustworthiness and such trustworthy testimony can be sustained, if it is supported by two or three or more witnesses who give a consistent account of the incident and quality of the evidence that matters and not the number of witnesses, who give evidence. Paras 16 and 17 [head notes] of the above judgment read as under:

> "**It is true that under the Evidence Act, trustworthy evidence given by a single witness would be enough to convict an accused person, whereas evidence given by half a dozen witnesses which is not trustworthy would not be enough to sustain the conviction, But whereas a criminal court has to deal with evidence pertaining to the commission of an offence involving a large number of offenders and a large number of victims it is usual to adopt the test that the conviction could be sustained only if it is supported by two or three or more witnesses who give a consistent account of**

the incident. In a sense, the test may be described as mechanical; but it cannot be treated as irrational or unreasonable. It is, no doubt, the quality of the e3vidence that matters and not the number of witnesses who give evidence. But sometimes it is useful to adopt a mechanical test.

[para 16]

That the mere presence in an assembly does not make a person, who is present, a member of an unlawful assembly unless it is shown that he had done something or omitted to do something which would make him a member of an unlawful assembly, or unless the case falls under S.142, I.P.C. cannot be read as laying down a general proposition of law that unless an overt act is proved against a person who is alleged to be a member of an unlawful assembly, it cannot be said that he is a member of such an unlawful assembly. What has to be proved against a person who is alleged to be a member of an unlawful assembly is that he was one of the persons constituting the assembly and he entertained along with the other members of the assembly the common object as defined by S.141, I.P.C. An assembly of five or more persons actuated by, and entertaining one or more of the common objects specified by the five clauses of S.141, is an unlawful assembly. The crucial question to determine in such a case is whether the assembly constituted of five or more persons and whether the said persons entertained one or more of the common objects as specified by S. 141. While determining this question, it becomes relevant to consider whether the assembly consisted of some persons who were merely passive witnesses and had joined the assembly as a matter of idle curiosity without intending to entertain the common object of the assembly. In fact, S.149 makes it clear that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of committing of that offence, is a member of the same assembly, is guilty of that offence; and that emphatically brings out the principle that the punishment prescribed by S.149 is in a sense vicarious and does not always proceed on the basis that the offence has been actually committed by every member of the unlawful

assembly. The observations in [S] AIR 1956 S.C. 181, explained.

[Para 17]

1.3 In the case of **Rabindra Kumar Pal @Dara Singh**[supra], the Apex Court considered and interpreted various case laws and in paras 57 to 64 held as under:

> "57 In Bhagwan Singh v. State of M.P. (2003) 3 SCC 21, while considering these issues, it was held:
>
> > "27 .....The first precaution that a Judicial Magistrate is required to take is to prevent forcible extraction of confession by the prosecuting agency (see State of U.P. v. Singhara Singh, AIR 1964 SC 358). It was also held by this Court in the case of Shivappa v. State of Karnataka, (1995) 2 SCC 76 that the provisions of Section 164 CrPC must be complied with not only in form, but in essence. **Before proceeding to record the confessional statement, a searching enquiry must be made from the accused as to the custody from which he was produced and the treatment he had been receiving in such custody in order to ensure that there is no scope for doubt of any sort of extraneous influence proceeding from a source interested in the prosecution.**
> >
> > **28 It has also been held that the Magistrate in particular should ask the accused as to why he wants to make a statement which surely shall go against his interest in the trial. He should be granted sufficient time for reflection. He should also be assured of protection from any sort of apprehended torture or pressure from the police in case he declines to make a confessional statement. Unfortunately, in this case, the evidence of the Judicial Magistrate (PW 1) does not show that any such precaution was taken before recording the judicial confession.**
> >
> > **29 The confession is also not recorded in questions-and- answers form which is the manner indicated in the criminal court rules.**

30 It has been held that there was custody of the accused Pooran Singh with the police immediately preceding the making of the confession and it is sufficient to stamp the confession as involuntary and hence unreliable. A judicial confession not given voluntarily is unreliable, more so when such a confession is retracted. It is not safe to rely on such judicial confession or even treat it as a corroborative piece of evidence in the case. When a judicial confession is found to be not voluntary and more so when it is retracted, in the absence of other reliable evidence, the conviction cannot be based on such retracted judicial confession. (See Shankaria v. State of Rajasthan, (1978) 3 SCC 435 (para 23)"

58 In Shivappa vs. State of Karnataka (1995) 2 SCC 76, while reiterating the same principle it was held:-

"**6. From the plain language of Section 164 CrPC and the rules and guidelines framed by the High Court regarding the recording of confessional statements of an accused under Section 164 CrPC, it is manifest that the said provisions emphasise an inquiry by the Magistrate to ascertain the voluntary nature of the confession. This inquiry appears to be the most significant and an important part of the duty of the Magistrate recording the confessional statement of an accused under Section 164 CrPC. The failure of the Magistrate to put such questions from which he could ascertain the voluntary nature of the confession detracts so materially from the evidentiary value of the confession of an accused that it would not be safe to act upon the same. Full and adequate compliance not merely in form but in essence with the provisions of Section 164 CrPC and the rules framed by the High Court is imperative and its non-compliance evidence goes to the root of the Magistrate's jurisdiction to record the confession and renders the confession unworthy of credence. Before proceeding to record the confessional statement, a searching enquiry must be made from the accused as to the custody from which he was produced and the treatment he had been receiving in such custody in order to ensure that there**

is no scope for doubt of any sort of extraneous influence proceeding from a source interested in the prosecution still lurking in the mind of an accused. In case the Magistrate discovers on such enquiry that there is ground for such supposition he should give the accused sufficient time for reflection before he is asked to make his statement and should assure himself that during the time of reflection, he is completely out of police influence. An accused should particularly be asked the reason why he wants to make a statement which would surely go against his self-interest in course of the trial, even if he contrives subsequently to retract the confession. Besides administering the caution, warning specifically provided for in the first part of sub-section (2) of Section 164 namely, that the accused is not bound to make a statement and that if he makes one it may be used against him as evidence in relation to his complicity in the offence at the trial, that is to follow, he should also, in plain language, be assured of protection from any sort of apprehended torture or pressure from such extraneous agents as the police or the like in case he declines to make a statement and be given the assurance that even if he declined to make the confession, he shall not be remanded to police custody.

7 The Magistrate who is entrusted with the duty of recording confession of an accused coming from police custody or jail custody must appreciate his function in that behalf as one of a judicial officer and he must apply his judicial mind to ascertain and satisfy his conscience that the statement the accused makes is not on account of any extraneous influence on him. That indeed is the essence of a `voluntary' statement within the meaning of the provisions of Section 164 CrPC and the rules framed by the High Court for the guidance of the subordinate courts. Moreover, the Magistrate must not only be satisfied as to the voluntary character of the statement, he should also make and leave such material on the record in proof of the compliance with the imperative requirements of the statutory provisions, as would satisfy the court that sits in judgment in the case, that

the confessional statement was made by the accused voluntarily and the statutory provisions were strictly complied with.

8 From a perusal of the evidence of PW 17, Shri Shitappa, Additional Munsif Magistrate, we find that though he had administered the caution to the appellant that he was not bound to make a statement and that if he did make a statement that may be used against him as evidence but PW 17 did not disclose to the appellant that he was a Magistrate and that the confession was being recorded by him in that capacity nor made any enquiry to find out whether he had been influenced by anyone to make the confession. PW 17 stated during his deposition in court: "I have not stated to the accused that I am a Magistrate" and further admitted: "I have not asked the accused as to whether the police have induced them (Chithavani) to give the statement." The Magistrate, PW 17 also admitted that "at the time of recording the statement of the accused no police or police officials were in the open court. I cannot tell as to whether the police or police officials were present in the vicinity of the court". From the memorandum prepared by the Munsif Magistrate, PW 17 as also from his deposition recorded in court it is further revealed that the Magistrate did not lend any assurance to the appellant that he would not be sent back to the police custody in case he did not make the confessional statement. Circle Police Inspector Shivappa Shanwar, PW 25 admitted that the sub-jail, the office of the Circle Police Inspector and the police station are situated in the same premises. No contemporaneous record has been placed on the record to show that the appellant had actually been kept in the sub-jail, as ordered by the Magistrate on 21-7-1986 and that he was out of the zone of influence by the police keeping in view the location of the sub-jail and the police station. The prosecution did not lead any evidence to show that any jail authority actually produced the appellant on 22-7-1986 before the Magistrate. That apart, neither on 21-7-1986 nor on 22-7-1986 did the Munsif Magistrate, PW 17 question the appellant as to why he wanted to make the confession or as to what had prompted him to make the confession. It appears to us quite obvious that the Munsif Magistrate,

> PW 17 did not make any serious attempt to ascertain the voluntary character of the confessional statement. **The failure of the Magistrate to make a real endeavour to ascertain the voluntary character of the confession, impels us to hold that the evidence on the record does not establish that the confessional statement of the appellant recorded under Section 164 CrPC was voluntary. The cryptic manner of holding the enquiry to ascertain the voluntary nature of the confession has left much to be desired and has detracted materially from the evidentiary value of the confessional statement. It would, thus, neither be prudent nor safe to act upon the confessional statement of the appellant....."**
>
> [emphasis supplied]

59 In Dagdu v. State of Maharashtra, (1977) 3 SCC 68, the following paragraph is relevant:-

> **"51. Learned Counsel appearing for the State is right that the failure to comply with Section 164(3) of the Criminal Procedure Code, or with the High Court Circulars will not render the confessions inadmissible in evidence. Relevancy and admissibility of evidence have to be determined in accordance with the provisions of the Evidence Act. Section 29 of that Act lays down that if a confession is otherwise relevant it does not become irrelevant merely because, inter alia, the accused was not warned that he was not bound to make it and the evidence of it might be given against him. If, therefore, a confession does not violate any one of the conditions operative under Sections 24 to 28 of the Evidence Act, it will be admissible in evidence. But as in respect of any other admissible evidence, oral or documentary, so in the case of confessional statements which are otherwise admissible, the Court has still to consider whether they can be accepted as true. If the facts and circumstances surrounding the making of a confession appear to cast a doubt on the veracity or voluntariness of the confession, the Court may refuse to act upon the confession even if it is admissible in evidence. That shows how important it is for the Magistrate who**

records the confession to satisfy himself by appropriate questioning of the confessing accused, that the confession is true and voluntary. A strict and faithful compliance with Section 164 of the Code and with the instructions issued by the High Court affords in a large measure the guarantee that the confession is voluntary. The failure to observe the safeguards prescribed therein are in practice calculated to impair the evidentiary value of the confessional statements."

60 In Davendra Prasad Tiwari v. State of U.P., (1978) 4 SCC 474, the following conclusion arrived at by this Court is relevant:-

"13..... It is also true that before a confessional statement made under Section 164 of the Code of Criminal Procedure can be acted upon, it must be shown to be voluntary and free from police influence and that the confessional statement made by the appellant in the instant case cannot be taken into account, as it suffers from serious infirmities in that (1) there is no contemporaneous record to show that the appellant was actually kept in jail as ordered on September 6, 1974 by Shri R.P. Singh, Judicial Magistrate, Gorakhpur, (2) Shri R.P. Singh who recorded the so called confessional statement of the appellant did not question him as to why he was making the confession and (3) there is also nothing in the statement of the said Magistrate to show that he told the appellant that he would not be remanded to the police lock-up even if he did not confess his guilt. It cannot also be gainsaid that the circumstantial evidence relied upon by the prosecution must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused."

61 In Kalawati v. State of H.P., 1953 SCR 546 at 631, this Court held:

"12 ...In dealing with a criminal case where the prosecution relies upon the confession of one accused person against another accused person, the proper approach to adopt is to consider the other evidence against such an accused person, and if the said evidence appears to be satisfactory and the court is inclined to

hold that the said evidence may sustain the charge framed against the said accused person, the court turns to the confession with a view to assure itself that the conclusion which it is inclined to draw from the other evidence is right."

62 In State thr. Superintendent of Police, CBI/SIT vs. Nalini and Others (1999) 5 SCC 253 at 307, the following paragraphs are relevant which read as under:-

"96. What is the evidentiary value of a confession made by one accused as against another accused apart from Section 30 of the Evidence Act? While considering that aspect we have to bear in mind that any confession, when it is sought to be used against another, has certain inherent weaknesses. **First is, it is the statement of a person who claims himself to be an offender, which means, it is the version of an accomplice. Second is, the truth of it cannot be tested by cross-examination. Third is, it is not an item of evidence given on oath. Fourth is, the confession was made in the absence of the co-accused against whom it is sought to be used.**

97. It is well-nigh settled, due to the aforesaid weaknesses, that confession of a co-accused is a weak type of evidence. A confession can be used as a relevant evidence against its maker because Section 21 of the Evidence Act permits it under certain conditions. But there is no provision which enables a confession to be used as a relevant evidence against another person. It is only Section 30 of the Evidence Act which at least permits the court to consider such a confession as against another person under the conditions prescribed therein. If Section 30 was absent in the Evidence Act no confession could ever have been used for any purpose as against another co-accused until it is sanctioned by another statute. So, if Section 30 of the Evidence Act is also to be excluded by virtue of the non obstante clause contained in Section 15(1) of TADA, under what provision can a confession of one accused be used against another co- accused at all? It must be remembered that Section 15(1) of TADA does not say that a confession can be used against a co-accused. It only says that a confession would be admissible in a trial

of not only the maker thereof but a co- accused, abettor or conspirator tried in the same case.

98 Sir John Beaumont speaking for five Law Lords of the Privy Council in Bhuboni Sahu v. R., AIR 1949 PC 257 had made the following observations:

> "Section 30 **seems to be based on the view that an admission by an accused person of his own guilt affords some sort of sanction in support of the truth of his confession against others as well as himself. But a confession of a co-accused is obviously evidence of a very weak type. It does not indeed come within the definition of `evidence' contained in Section 3, Evidence Act. It is not required to be given on oath, nor in the presence of the accused, and it cannot be tested by cross-examination. It is a much weaker type of evidence than the evidence of an approver which is not subject to any of those infirmities. Section 30, however, provides that the court may take the confession into consideration and thereby, no doubt, makes it evidence on which the court may act; but the section does not say that the confession is to amount to proof.** Clearly there must be other evidence. The confession is only one element in the consideration of all the facts proved in the case; it can be put into the scale and weighed with the other evidence."

99 **The above observations had since been treated as the approved and established position regarding confession vis- `-vis another co-accused. Vivian Bose, J., speaking for a three-Judge Bench in Kashmira Singh v. State of M.P., AIR 1952 SC 159 had reiterated the same principle after quoting the aforesaid observations. A Constitution Bench of this Court has followed it in Haricharan Kurmi v. State of Bihar, AIR 1964 SC 1184."**

63 In State of **Maharashtra v. Damu (2000) 6 SCC 269**, the same principles had been reiterated which read as under:-

"19. We have considered the above reasons and the arguments addressed for and against them. We have realised that those reasons are ex facie fragile. Even otherwise, a Magistrate who proposed to record the confession has to ensure that the confession is free from police interference. Even if he was produced from police custody, the Magistrate was not to record the confession until the lapse of such time, as he thinks necessary to extricate his mind completely from fear of the police to have the confession in his own way by telling the Magistrate the true facts.

* * *

25 We may make it clear that in Kashmira Singh this Court has rendered the ratio that confession cannot be made the foundation of conviction in the context of considering the utility of that confession as against a co-accused in view of Section 30 of the Evidence Act. Hence the observations in that decision cannot be misapplied to cases in which confession is considered as against its maker. The legal position concerning confession vis-`-vis the confessor himself has been well-nigh settled by this Court in Sarwan Singh Rattan Singh v. State of Punjab as under: "In law it is always open to the court to convict an accused on his confession itself though he has retracted it at a later stage. Nevertheless usually courts require some corroboration to the confessional statement before convicting an accused person on such a statement. What amount of corroboration would be necessary in such a case would always be a question of fact to be determined in the light of the circumstances of each case."

This has been followed by this Court in Kehar Singh v. State (Delhi Admn.)"

64 The following principles emerge with regard to Section 164 Cr.P.C.:-

[i] The provisions of Section 164 Cr.P.C. must be complied with not only in form, but in essence.

[ii] Before proceeding to record the confessional

statement, a searching enquiry must be made from the accused as to the custody from which he was produced and the treatment he had been receiving in such custody in order to ensure that there is no scope for doubt of any sort of extraneous influence proceeding from a source interested in the prosecution.

[iii] A Magistrate should ask the accused as to why he wants to make a statement which surely shall go against his interest in the trial.

[iv] The maker should be granted sufficient time for reflection.

[v] He should be assured of protection from any sort of apprehended torture or pressure from the police in case he declines to make a confessional statement.

[vi] A judicial confession not given voluntarily is unreliable, more so, when such a confession is retracted, the conviction cannot be based on such retracted judicial confession.

[vii] Non-compliance of Section 164 Cr.P.C. goes to the root of the Magistrate's jurisdiction to record the confession and renders the confession unworthy of credence.

[viii] During the time of reflection, the accused should be completely out of police influence. The judicial officer, who is entrusted with the duty of recording confession, must apply his judicial mind to ascertain and satisfy his conscience that the statement of the accused is not on account of any extraneous influence on him.

[ix] At the time of recording the statement of the accused, no police or police official shall be present in the open court.

[x] Confession of a co-accused is a weak type of evidence.

[xi] Usually the Court requires some corroboration from the confessional statement before convicting the accused person on such a statement".

1.4 The Apex Court in the case of **Yakub Abdul Razak Memon** [Bombay Blasts, 1993][supra], threadbare considered and analyzed Sections 120A and Section 120B read with Section 10 of the Evidence Act ion which earlier decisions on the subject of the Apex Court were considered in the backdrop of 77 confessions recorded and corroborated with other circumstances of the case. In juxtaposition to the concept of conspiracy in criminal law, confessions and statement recorded of accused or any other person under section 164 of Code, 1973 was also analyzed and considered and princip0les emerging therein were enumerated. For better understanding of criminal conspiracy under Section 120A and confession under Section 164 of the Code, 1973, paras 125 to 157 of the above judgment are reproduced:

> **"125** Chapter VA of IPC speaks about Criminal Conspiracy. Section 120A defines criminal conspiracy which is as under:
>
> > "**Conspiracy**
> > 120A Definition of criminal conspiracy.- When two or more persons agree to do, or cause to be done,—
> >
> > [1] an illegal act, or
> > [2] an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy:
> > Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.
> > Explanation.--It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object."
>
> **126** Section 120B speaks about punishment of criminal conspiracy which is as under:
>
> > "120B. Punishment of criminal conspiracy.—
> > (1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death, imprisonment for life or rigorous imprisonment for a term of two years

or upwards, shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence.

(2) Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment of either description for a term not exceeding six months, or with fine or with both."

Objects and Reasons of the 1913 Amendment

127 The above mentioned sections were introduced by the amendment of 1913. It is important to notice the Objects and Reasons of the said amendment to understand that the underlying purpose of introducing Section 120-A was to make a mere agreement to do an illegal act or an act which is not illegal by illegal means, punishable. Objects and Reasons are as follows:

"The sections of the Indian Penal Code which deal directly with the subject of conspiracy are those contained in Chapter V and Section 121- A of the Code. Under the latter provision, it is an offence to conspire to commit any of the offences punishable by Section 121 of the Indian Penal Code or to conspire to deprive the King of sovereignty of British India or any part thereof or to overawe by means of criminal force or show of criminal force the Government of India or any Local Government and to constitute a conspiracy under this Section. It is not necessary that any act or illegal omission should take place in pursuance thereof. Under Section 107, abetment includes engaging with one or more person or persons in any conspiracy for the doing of a thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing. In other words, except in respect of the offences particularized in Section 121-A conspiracy per se is not an offence under the Indian Penal Code."

* * *

"On the other hand, by the common law of England, if two or more persons agree together to do anything contrary to law, or to use unlawful means in the carrying out of an object not otherwise unlawful, the persons, who so agree, commit the offence of conspiracy. In other

words, conspiracy in England may be defined as an agreement of two or more persons to do an unlawful act or to do a lawful act by unlawful means, and the parties to such a conspiracy are liable to indictment."

* * *

"Experience has shown that dangerous conspiracies have entered into India which have for their object aims other than the commission of the offences specified in Section 121-A of the Indian Penal Code and that the existing law is inadequate to deal with modern conditions. The present Bill is designed to assimilate the provisions of the Indian Penal Code to those of the English law with the additional safeguard that in the case of a conspiracy other than a conspiracy to commit an offence some overt act is necessary to bring the conspiracy within the purview of the criminal law. The Bill makes criminal conspiracy a substantive offence, and when such a conspiracy is to commit an offence punishable with death, or rigourous imprisonment for a term of two years or upwards, and no express provision is made in the Code, provides a punishment of the same nature as that which might be awarded for the abetment of such an offence. In all other cases of criminal conspiracy the punishment contemplated is imprisonment of either description for a term not exceeding six months or with fine, or with both."

128 Prior to the amendment of the Code and the introduction of Sections 120-A and B, the doctrine of agency was applicable to ascertain the liability of the conspirators, however, conspiracy in itself was not an offence (except for certain offences). The amendment made conspiracy a substantive offence and rendered the mere agreement to commit an offence punishable. Prior to the amendment, unless an overt act took place in furtherance of the conspiracy it was not indictable (it would become indictable by virtue of being abetment).

129 The proposition that the mere agreement constitutes the offence has been accepted by this Court in several judgments. Reference may be made to **Major E.G. Barsay V/s. State of Bombay (1962) 2 SCR 195** wherein this Court held that the

gist of the offence is an agreement to break the law. The parties to such an agreement will be guilty of criminal conspiracy, though the illegal act agreed to be done has not been done. It is not an ingredient of the offence that all the parties should agree to do a single illegal act. It may comprise the commission of a number of acts. The Court has held as under: [AIR p.1778, para 31]-

> "31….Section 120-A of the Indian Penal Code defines "criminal conspiracy" and under that definition, "When two or more persons agree to do, or cause to be done, an illegal act, or an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy." The gist of the offence is an agreement to break the law. The parties to such an agreement will be guilty of criminal conspiracy, though the illegal act agreed to be done has not been done. So too, it is not an ingredient of the offence that all the parties should agree to do a single illegal act. It may comprise the commission of a number of acts. Under Section 43 of the Indian Penal Code, an act would be illegal if it is an offence or if it is prohibited by law. Under the first charge the accused are charged with having conspired to do three categories of illegal acts, and the mere fact that all of them could not be convicted separately in respect of each of the offences has no relevancy in considering the question whether the offence of conspiracy has been committed. They are all guilty of the offence of conspiracy to do illegal acts, though for individual offences all of them may not be liable.

Theory of Agency and Conspiracy

130 An important facet of the Law of Conspiracy is that apart from it being a distinct offence, all conspirators are liable for the acts of each other of the crime or crimes which have been committed as a result of the conspiracy. This principle has been recognized right from the early judgment in **Regina V/s. Murphy (1873) 173 ER 502**. In the said judgment **Coleridge J. while** summing up for the Jury stated as follows: [ER p.508]

> "...I am bound to tell you, that although the common design is the root of the charge, it is not necessary to prove that these two parties came together and actually agreed in terms to have this common design and to

> pursue it by comroeff means, and so to carry it into execution. This is not necessary, because in many cases of the most clearly established conspiracies there are no means of proving any such thing and neither law nor common sense requires that it should be proved. If you find that these two persons pursued by their acts the same object, often by the same means, one performing one part of an act, so as to complete it, with a view to the attainment of the object which they were pursuing, you will be at liberty to draw the conclusion that they have been engaged in a conspiracy to effect that object. The question you have to ask yourselves is, 'Had they this common design, and did they pursue it by these common means — the design being unlawful?' it is not necessary that it should be proved that these defendants met to concoct this scheme, nor is it necessary that they should have originated it. If a conspiracy be already formed, and a person joins it afterwards, he is equally guilty. You are to say whether, from the acts that have been proved, you are satisfied that these defendants were acting in concert in this matter. If you are satisfied that there was concert between them, I am bound to say that being convinced of the conspiracy, it is not necessary that you should find both Mr. Murphy and Mr. Douglas doing each particular act, as after the fact of conspiracy is already established in your minds, whatever is either said or done by either of the defendants in pursuance of the common design, is, both in law and in common sense, to be considered as the acts of both."

131 Each conspirator can be attributed each others actions in a conspiracy. Theory of agency applies and this rule existed even prior to the amendment of the Penal Code in India. This is reflected in the rule of evidence u/s 10 of the Evidence Act. Conspiracy is punishable independent of its fruition. The principle of agency as a rule of liability and not merely a rule of evidence has been accepted both by the Privy Council as well as by this Court. The following judgments are relevant for this proposition:

> **131.1 Babulal V/s. Emperor, AIR 1938 PC 130, where the Privy Council** held that: [IA p.176]

> "if several persons conspire to commit offences, and commit overt acts in pursuance of the conspiracy (a circumstance which makes the act of one the act of each and all the conspirators) these acts are committed in the course of the same transaction, which embraces the conspiracy and the acts done under it..."

131.2 State of A.P. V/s. Kandimalla Subbaiah (1962) 1 SCR 194, where this Court opined that where a number of offences are committed by several persons in pursuance of a conspiracy it is usual to charge them with those offences as well as with the offence of conspiracy to commit those offences, if the alleged offences flow out of the conspiracy, the appropriate form of charge would be a specific charge in respect of each of those offences along with the charge of conspiracy.

131.3 State of H.P. V/s. Krishan Lal Pardhan, (1987) 2 SCC 17 where it was held that: [SCC pp.20-21, para 8]

> "8 The offence of criminal conspiracy consists of meeting of minds of two or more persons for agreeing to do or causing to be done an illegal act or an act by illegal means, and the performance of an act in terms thereof. If pursuant to the criminal conspiracy the conspirators commit several offences, then all of them will be liable for the offences even if some of them had not actively participated in the commission of the offences".

131.4 In Nalini (supra), this Court explained that conspiracy results in a joint responsibility and everything said written or done in furtherance of the common purpose is deemed to have been done by each of them. The Court held: [SCC pp.515-18, para 583]

> "583. Some of the broad principles governing the law of conspiracy may be summarized though, as the name implies, a summary cannot be exhaustive of the principles.
>
> **[1] Under Section 120-A IPC offence of**

criminal conspiracy is committed when two or more persons agree to do or cause to be done an illegal act or legal act by illegal means. When it is a legal act by illegal means overt act is necessary. Offence of criminal conspiracy is an exception to the general law where intent alone does not constitute crime. It is intention to commit crime and joining hands with persons having the same intention. Not only the intention but there has to be agreement to carry out the object of the intention, which is an offence. The question for consideration in a case is did all the accused have the intention and did they agree that the crime be committed. It would not be enough for the offence of conspiracy when some of the accused merely entertained a wish, howsoever horrendous it may be, that offence be committed.

[2] Acts subsequent to the achieving of the object of conspiracy may tend to prove that a particular accused was party to the conspiracy. Once the object of conspiracy has been achieved, any subsequent act, which may be unlawful, would not make the accused a part of the conspiracy like giving shelter to an absconder.

[3] Conspiracy is hatched in private or in secrecy. It is rarely possible to establish a conspiracy by direct evidence. Usually, both the existence of the conspiracy and its objects have to be inferred from the circumstances and the conduct of the accused.

[4] Conspirators may for example, be enrolled in a chain-A enrolling B, B enrolling C, and so on; and all will be members of a single conspiracy if they so intend and agree, even though each member knows only the person who enrolled him and the person whom he enrols. There may be a kind of umbrella-spoke enrolment, where a single person at the center does the enrolling and all the other members

are unknown to each other, though they know that there are to be other members. These are theories and in practice it may be difficult to tell which conspiracy in a particular case falls into which category. It may however, even overlap. But then there has to be present mutual interest. Persons may be members of single conspiracy even though each is ignorant of the identity of many others who may have diverse roles to play. It is not a part of the crime of conspiracy that all the conspirators need to agree to play the same or an active role.

[5] When two or more persons agree to commit a crime of conspiracy, then regardless of making or considering any plans for its commission, and despite the fact that no step is taken by any such person to carry out their common purpose, a crime is committed by each and every one who joins in the agreement. There has thus to be two conspirators and there may be more than that. To prove the charge of conspiracy it is not necessary that intended crime was committed or not. If committed it may further help prosecution to prove the charge of conspiracy.

[6] It is not necessary that all conspirators should agree to the common purpose at the same time. They may join with other conspirators at any time before the consummation of the intended objective, and all are equally responsible. What part each conspirator is to play may not be known to everyone or the fact as to when a conspirator joined the conspiracy and when he left.

[7] A charge of conspiracy may prejudice the accused because it forces them into a joint trial and the court may consider the entire mass of evidence against every accused. Prosecution has to produce evidence not only to show that each of the accused has knowledge of the object of conspiracy but also of the agreement. In the

charge of conspiracy the court has to guard itself against the danger of unfairness to the accused. Introduction of evidence against some may result in the conviction of all, which is to be avoided. By means of evidence in conspiracy, which is otherwise inadmissible in the trial of any other substantive offence prosecution tries to implicate the accused not only in the conspiracy itself but also in the substantive crime of the alleged conspirators. There is always difficulty in tracing the precise contribution of each member of the conspiracy but then there has to be cogent and convincing evidence against each one of the accused charged with the offence of conspiracy. As observed by Judge Learned Hand "this distinction is important today when many prosecutors seek to sweep within the dragnet of conspiracy all those who have been associated in any degree whatever with the main offenders".

[8] As stated above it is the unlawful agreement and not its accomplishment, which is the gist or essence of the crime of conspiracy. Offence of criminal conspiracy is complete even though there is no agreement as to the means by which the purpose is to be accomplished. It is the unlawful agreement which is the gravamen of the crime of conspiracy. The unlawful agreement which amounts to a conspiracy need not be formal or express, but may be inherent in and inferred from the circumstances, especially declarations, acts and conduct of the conspirators. The agreement need not be entered into by all the parties to it at the same time, but may be reached by successive actions evidencing their joining of the conspiracy.

[9] It has been said that a criminal conspiracy is a partnership in crime, and that there is in each conspiracy a joint or mutual agency for the prosecution of a common plan. Thus, if two or

more persons enter into a conspiracy, any act done by any of them pursuant to the agreement is, in contemplation of law, the act of each of them and they are jointly responsible therefore. This means that everything said, written or done by any of the conspirators in execution or furtherance of the common purpose is deemed to have been said, done or written by each of them. And this joint responsibility extends not only to what is done by any of the conspirators pursuant to the original agreement but also to collateral acts incidental to and growing out of the original purpose. A conspirator is not responsible, however, for acts done by a co-conspirator after termination of the conspiracy. The joinder of a conspiracy by a new member does not create a new conspiracy nor does it change the status of the other conspirators, and the mere fact that conspirators individually or in groups perform different tasks to a common end does not split up a conspiracy into several different conspiracies.

[10] A man may join a conspiracy by word or by deed. However, criminal responsibility for a conspiracy requires more than a merely passive attitude towards an existing conspiracy. One who commits an overt act with knowledge of the conspiracy is guilty. And one who tacitly consents to the object of a conspiracy and goes along with other conspirators, actually standing by while the others put the conspiracy into effect, is guilty though he intends to take no active part in the crime."

132 The offence under Section 120B is a crime between the parties to do a particular act. Association or relation to lead conspiracy is not enough to establish the intention to kill the deceased. To make it clear, to bring home the charge of conspiracy within the ambit of Section 120B, it is necessary to establish that there was an agreement between the parties for doing an unlawful act. It is difficult to establish conspiracy by direct evidence.

133 Since conspiracy is hatched in secrecy, to bring home the charge of conspiracy, it is relevant to decide conclusively the object behind it from the charges leveled against the accused and the facts of the case. The object behind it is the ultimate aim of the conspiracy. Further, many means might have been adopted to achieve this ultimate object. The means may even constitute different offences by themselves, but as long as they are adopted to achieve the ultimate object of the conspiracy, they are also acts of conspiracy.

134 In **Ajay Aggarwal V/s. Union of India, AIR 1993 SC 1637**, this Court rejected the submission of the accused that as he was staying in Dubai and the conspiracy was initially hatched in Chandigarh and he did not play an active part in the commission of the acts which ultimately lead to the incident, thus, could not be liable for any offence, observing: [SCC pp.616-17, para 8]

> "8…..Section 120-A of the IPC defines 'conspiracy' to mean that when two or more persons agree to do, or cause to be done an illegal act, or an act which is not illegal by illegal means, such an agreement is designated as "criminal conspiracy". No agreement except an agreement to commit an offence shall amount to a criminal conspiracy, unless some act besides the agreement is done by one or more parties to such agreement in furtherance thereof. Section 120-B of the IPC prescribes punishment for criminal conspiracy. It is not necessary that each conspirator must know all the details of the scheme nor be a participant at every stage. It is necessary that they should agree for design or object of the conspiracy. Conspiracy is conceived as having three elements: (1) agreement (2) between two or more persons by whom the agreement is effected; and (3) a criminal object, which may be either the ultimate aim of the agreement, or may constitute the means, or one of the means by which that aim is to be accomplished. It is immaterial whether this is found in the ultimate objects. The common law definition of 'criminal conspiracy' was stated first by Lord Denman in Jones case (1832) that an indictment for conspiracy must "charge a conspiracy to do an unlawful act by unlawful means….."

The Court, thus, held that an agreement between two or more

persons to do an illegal act or legal act by illegal means is criminal conspiracy. Conspiracy itself is a substantive offence and is distinct from the offence to be committed, for which the conspiracy was entered into. A conspiracy is a continuing offence and continues to subsist and is committed wherever one of the conspirators does an act or series of acts. So long as its performance continues, it is a continuing offence till it is executed or rescinded or frustrated by choice or necessity. A crime is complete as soon as the agreement is made, but it is not a thing of the moment. It does not end with the making of the agreement. It will continue so long as there are two or more parties to it intending to carry into effect the design. (Vide: Sudhir Shantilal Mehta V/s. Central Bureau of Investigation, (2009) 8 SCC 1)

135 In **Yash Pal Mittal V/s. State of Punjab, AIR 1977 SC 2433**, the rule was laid down as follows: [SCC p.543, para 9]

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

136 For an offence under Section 120B IPC, the prosecution need not necessarily prove that the conspirators expressly agreed to do or cause to be done the illegal act, the agreement may be proved by necessary implication. It is not necessary that each member of the conspiracy must know all the details

of the conspiracy. The offence can be proved largely from the inferences drawn from the acts or illegal omission committed by the conspirators in pursuance of a common design. Being a continuing offence, if any acts or omissions which constitute an offence are done in India or outside its territory, the conspirators continuing to be the parties to the conspiracy and since part of the acts were done in India, they would obviate the need to obtain the sanction of the Central Government. All of them need not be present in India nor continue to remain in India. The entire agreement must be viewed as a whole and it has to be ascertained as to what in fact the conspirators intended to do or the object they wanted to achieve. (Vide: R.K. Dalmia V/s. Delhi Administration, AIR 1962 SC 1821; Lennart Schussler & Anr. V/s. Director of Enforcement & Anr., (1970) 1 SCC 152; Shivanarayan Laxminarayan Joshi V/s. State of Maharashtra, (1980) 2 SCC 465 and Mohammad Usman Mohammad Hussain Maniyar and Another V/s. State of Maharashtra, AIR 1981 SC 1062)

137 In **Yogesh @ Sachin Jagdish Joshi V/s. State of Maharashtra, (2008) 10 SCC 394**, this Court held: [SCC p.402, para 25]

> "25 Thus, it is manifest that the meeting of minds of two or more persons for doing an illegal act or an act by illegal means is sine qua non of the criminal conspiracy but it may not be possible to prove the agreement between them by direct proof. Nevertheless, existence of the conspiracy and its objective can be inferred from the surrounding circumstances and the conduct of the accused. But the incriminating circumstances must form a chain of events from which a conclusion about the guilt of the accused could be drawn. It is well settled that an offence of conspiracy is a substantive offence and renders the mere agreement to commit an offence punishable, even if an offence does not take place pursuant to the illegal agreement."

138 In **Nirmal Singh Kahlon V/s. State of Punjab, AIR 2009 SC 984**, this Court following Ram Lal Narang V/s. State (Delhi Admn.), AIR 1979 SC 1791, held that a conspiracy may be a general one and a separate one, meaning thereby, a larger conspiracy and a smaller one which may develop in successive stages.

139 In **K.R. Purushothaman V/s. State of Kerala, (2005) 12 SCC 631**, this Court held: [SCC pp.636-37, paras 11 & 13]

> "11. Section 120-A IPC defines 'criminal conspiracy'. According to this section when two or more persons agree to do, or cause to be done (i) an illegal act, or (ii) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy.
>
> * * *
>
> 13. …..The existence of conspiracy and its objects are usually deduced from the circumstances of the case and the conduct of the accused involved in the conspiracy…"

140 In **State of Maharashtra V/s. Som Nath Thapa, AIR 1996 SC 1744**, this Court held : [SCC p.668, para 24]

> "24 …to establish a charge of conspiracy knowledge about indulgence in either an illegal act or a legal act by illegal means is necessary. In some cases, intent of unlawful use being made of the goods or services in question may be inferred from the knowledge itself. This apart, the prosecution has not to establish that a particular unlawful use was intended……The ultimate offence consists of a chain of actions, it would not be necessary for the prosecution to establish, to bring home the charge of conspiracy, that each of the conspirators had the knowledge of what the collaborator would do, so long as it is known that the collaborator would put the goods or service to an unlawful use."

141 The Apex Court again referred to the case of **Nalini [supra]** and relevant portion of paras 583 and 663 read as under:

> "583 ……[1]….. Offence of criminal conspiracy is an exception to the general law where intent alone does not constitute crime. It is intention to commit crime and joining hands with persons having the same intention. Not only the intention but there has to be agreement to carry out the object of the intention, which is an offence. The question for consideration in a case is did all the accused have the intention and did they agree that the

crime be committed. It would not be enough for the offence of conspiracy when some of the accused merely entertained a wish, howsoever horrendous it may be, that offence be committed.

* * *

[6] It is not necessary that all conspirators should agree to the common purpose at the same time. They may join with other conspirators at any time before the consummation of the intended objective, and all are equally responsible.

* * *

[7] Prosecution has to produce evidence not only to show that each of the accused has knowledge of the object of conspiracy but also of the agreement. In the charge of conspiracy the court has to guard itself against the danger of unfairness to the accused……There has to be cogent and convincing evidence against each one of the accused charged with the offence of conspiracy.

* * *

[8] it is the unlawful agreement and not its accomplishment, which is the gist or essence of the crime of conspiracy. Offence of criminal conspiracy is complete even though there is no agreement as to the means by which the purpose is to be accomplished. It is the unlawful agreement which is the gravamen of the crime of conspiracy. The unlawful agreement which amounts to a conspiracy need not be formal or express, but may be inherent in and inferred from the circumstances, especially declarations, acts and conduct of the conspirators. The agreement need not be entered into by all the parties to it at the same time, but may be reached by successive actions evidencing their joining of the conspiracy.

* * *

663 The agreement, sine qua non of conspiracy, may be proved either by direct evidence which is rarely available in such cases or it may be inferred from utterances, writings, acts, omissions and conduct of the parties to the conspiracy which is usually done. In view of Section 10 of the Evidence Act anything said, done or written by those who enlist their support to the object of conspiracy and those who join later or make their exit

> before completion of the object in furtherance of their common intention will be relevant facts to prove that each one of them can justifiably be treated as a conspirator."

[See Also: Kehar Singh & Ors. V/s. State (Delhi Admn.), AIR 1988 SC 1883]

142 In **Firozuddin Basheeruddin & Ors. V/s. State of Kerala, (2001) 7 SCC 596**, this Court held: : [SCC pp.606-08, paras 23 & 25-27]. See in para 131.8, Nalini (supra) Para 583 is reproduced

> "23 Like most crimes, conspiracy requires an act (actus reus) and an accompanying mental state (mens rea). The agreement constitutes the act, and the intention to achieve the unlawful objective of that agreement constitutes the required mental state…..The law punishes conduct that threatens to produce the harm, as well as conduct that has actually produced it. Contrary to the usual rule that an attempt to commit a crime merges with the completed offence, conspirators may be tried and punished for both the conspiracy and the completed crime. The rationale of conspiracy is that the required objective manifestation of disposition to criminality is provided by the act of agreement. Conspiracy is a clandestine activity. Persons generally do not form illegal covenants openly. In the interests of security, a person may carry out his part of a conspiracy without even being informed of the identity of his co-conspirators.
>
> * * *
>
> 25 Conspiracy is not only a substantive crime, it also serves as a basis for holding one person liable for the crimes of others in cases where application of the usual doctrines of complicity would not render that person liable. Thus, one who enters into a conspiratorial relationship is liable for every reasonably foreseeable crime committed by every other member of the conspiracy in furtherance of its objectives, whether or not he knew of the crimes or aided in their commission. The rationale is that criminal acts done in furtherance of a conspiracy may be sufficiently dependent upon the encouragement and support of the group as a whole to

warrant treating each member as a causal agent to each act. Under this view, which of the conspirators committed the substantive offence would be less significant in determining the defendant's liability than the fact that the crime was performed as a part of a larger division of labour to which the accused had also contributed his efforts.

26 Regarding admissibility of evidence, loosened standards prevail in a conspiracy trial. Contrary to the usual rule, in conspiracy prosecutions, any declaration by one conspirator, made in furtherance of a conspiracy and during its pendency, is admissible against each co-conspirator. Despite the unreliability of hearsay evidence, it is admissible in conspiracy prosecutions……

27 Thus conspirators are liable on an agency theory for statements of co-conspirators, just as they are for the overt acts and crimes committed by their confréres."

[See also: State (NCT of Delhi) V/s. Navjot Sandhu @ Afsan Guru, (2005) 11 SCC 600]

143 In **Ram Narayan Popli V/s. Central Bureau of Investigation, (2003) 3 SCC 641**, this Court held: [SCC p.778, para 342]

"**342 ...The elements of a criminal conspiracy have been stated to be: (a) an object to be accomplished, (b) a plan or scheme embodying means to accomplish that object, (c) an agreement or understanding between two or more of the accused persons whereby, they become definitely committed to cooperate for the accomplishment of the object by the means embodied in the agreement, or by any effectual means, and (d) in the jurisdiction where the statute required an overt act. The essence of a criminal conspiracy is the unlawful combination and ordinarily the offence is complete when the combination is framed. From this, it necessarily follows that unless the statute so requires, no overt act need be done in furtherance of the conspiracy, and that the object of the combination need not be accomplished, in order to constitute an**

> **indictable offence. Law making conspiracy a crime is designed to curb immoderate power to do mischief which is gained by a combination of the means. The encouragement and support which co-conspirators give to one another rendering enterprises possible which, if left to individual effort, would have been impossible, furnish the ground for visiting conspirators and abettors with condign punishment. The conspiracy is held to be continued and renewed as to all its members wherever and whenever any member of the conspiracy acts in furtherance of the common design.**"

144 In **Mohd. Khalid V/s. State of West Bengal, (2002) 7 SCC 334**, this Court held: [SCC p.356, para 27]

> "27 Where trustworthy evidence establishing all links of circumstantial evidence is available the confession of a co-accused as to conspiracy even without corroborative evidence can be taken into consideration."

145 In the present case, the conspiracy might have been started in Dubai but ultimately it continued here in India and a part of the object was executed in India and even in the conspiratorial meetings at Dubai, the matter was discussed with respect to India and amongst Indian citizens. Further, as far as the present accused is concerned, the fact that he was constantly present at Al-Hussaini building, where the major part of the plans have been made and executed, is established, and his active involvement has also emerged from the evidence on record as to how he was dealing with the so called men of Tiger, managing the ill gotten money of Tiger, booking tickets and actively working for confirming them for the conspirators. Further, there is enough evidence of meeting with co-accused and his actively working in furtherance of the conspiracy. The present accused need not be present at each and every meeting for being held to be a part of the conspiracy.

146 Section 10 of the Evidence Act further provides a unique and special rule of evidence to be followed in cases of conspiracy. Section 10 reads as under:

> "**10. Things said or done by conspirator in reference to common design**-- Where there is reasonable ground to

believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it."

Illustrations
(i) Reasonable ground exists for believing that A has joined in a conspiracy to wage war against the Government of India.
(ii) The facts that B procured arms in Europe for the purpose of the conspiracy, C collected money in Calcutta for a like object, D persuaded persons to join the conspiracy in Bombay, E published writings advocating the object in view at Agra, and F transmitted from Delhi to G at Kabul the money which C had collected at Calcutta, and the contents of a letter written by H giving an account of the conspiracy, are each relevant, both to prove the existence of the conspiracy, and to prove A' s complicity in it, although he may have been ignorant of all of them, and although the persons by whom they were done were strangers to him, and although they may have taken place before he joined the conspiracy or after he left it.

147 It is to be seen that there are three conditions in the Section. One is, before utilizing the section for admitting certain statements of the co- accused from a confession, there should be a reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong. According to this Section, only when this condition is satisfied in a given case, then only the question of utilizing the statement of an accused against the co-accused can be taken into consideration. Thus, as per Section 10, the following principles are agreed upon unanimously:-

147.1 There shall be prima facie evidence affording a reasonable ground for the Court to believe

that two or more persons were part of a conspiracy to commit a wrongful act or offence;

147.2 Once this condition was fulfilled, anything said, done or written by any of its members, in reference to their common intention, will be considered as evidence against other co-conspirators;

147.3 This fact would be evidence for the purpose of existence of a conspiracy and that the persons were a part of such conspiracy.

148 This Court, in Nalini (supra), observed as under:

148.1 Justice Thomas (SCC pp. 310-12, para 106-113)

Theory of Agency, according to him, is the basic principle which underlines Section 10 of the Evidence Act. He says that the first condition for application of Section 10 is "reasonable ground to believe" that the conspirators have conspired together based on prima facie evidence. If this condition is fulfilled, anything said by any of the conspirators becomes substantive evidence for the purpose of corroboration if the statement is in reference to their common intention (This is much wider than its English counterpart which uses the expression in furtherance of the common object). The arrest of a conspirator will not cut-off his connection with the conspiracy.

148.2 Per Justice Wadhwa [concurring], (SCC pp.511-15, para 575-581)

He was of the opinion that before considering the principle of Section 10 and applying it to the facts and circumstances, it is necessary to ascertain the period of conspiracy because any statement made before or after the conspiracy is thatched will not be admissible under the aforesaid section. It would also be relevant against a person who entered or left the time frame during the existence of conspiracy.

148.3 Justice Quadri, J. [SCC p.569, paras 663-664]

Two conditions are to be followed:- firstly, reasonable ground to believe conspiracy, and secondly, conspiracy is to commit an offence or an actionable wrong. If both the

conditions exist, then anything said or done can be used as a relevant fact against one another, to prove the existence of conspiracy and that the person was a part to it.

149 In the case on hand, the first condition for applying Section 10 of the Evidence Act is satisfied by the evidence of PWs 1 and 2 (approvers). There are 77 confessions in this case which are voluntary and are corroborated with the other circumstances of the case. These confessions contain statements inculpating the makers as well as the co-accused. A common charge of conspiracy was framed against all the co-conspirators including A-1. This is evident from the charges framed by the Special Judge which we have already extracted. On all the aforesaid charges, the appellant was found guilty by the Designated Court. The evidence in respect of A-1 is in the nature of the confessions made by the co-accused persons, the testimony of prosecution witnesses and documentary evidence on record.

150 The law on the issue emerges to the effect that conspiracy is an agreement between two or more persons to do an illegal act or an act which is not illegal by illegal means. The object behind the conspiracy is to achieve the ultimate aim of conspiracy. In order to achieve the ultimate object, parties may adopt many means. Such means may constitute different offences by themselves, but so long as they are adopted to achieve the ultimate object of the conspiracy, they are also acts of conspiracy. For an offence of conspiracy, it is not necessary for the prosecution to prove that conspirators expressly agreed to do an illegal act, the agreement may be proved by necessary implication. It is also not necessary that each member of the conspiracy should know all the details of the conspiracy. Conspiracy is a continuing offence. Thus, if any act or omission which constitutes an offence is done in India or outside its territory, the conspirators continue to be the parties to the conspiracy. The conspiracy may be a general one and a smaller one which may develop in successive stages. It is an unlawful agreement and not its accomplishment, which is the gist/essence of the crime of conspiracy. In order to determine whether the conspiracy was hatched, the court is required to view the entire agreement and to find out as in fact what the conspirators intended to do.

151 Jaspal Singh, learned senior counsel for A-1, submitted that from the evidence of PW-2 (Approver), it is evident that various meetings were held on and from 02.02.1993 till 11.03.1993 at various places in and around Bombay. By taking us through the entire evidence of PW-2, he submitted that neither PW-2 nor any other co-accused nor even any independent witness/evidence spoken to about the role of A-1 either being aware of the said meetings or being present in them or having any knowledge about what conspired in the said meetings. Though learned senior counsel has vehemently contended that A-1 was neither involved in arranging for landing of arms and ammunitions nor in conducting surveys and choosing targets nor in filling vehicles with RDX and arms nor in the meeting held at Al- Hussaini building, the specific instances as stated by various prosecution witnesses amply prove his involvement.

153 Apart from the evidence of PW-2, several accused persons in their confessional statements and other witnesses examined on the side of the prosecution clearly implicate A-1 and his involvement in all the events which we are going to discuss under various heads.

154 It also emerged from the prosecution evidence that conspiratorial meetings were also held on 06.01.1993 at Hotel Parsian Darbar, Panvel which were attended by A-136, A-90, A-102, A-134 and Md. Dosa, (AA), middle of January, 1993 at Dubai attended by A-14 and Tiger Memon (AA) and Dawood Ibrahim (AA) leading to the landing of arms and ammunitions at Dighi Jetty and Shekhadi. These meetings formed the genesis of the conspiracy and it was at these meetings that meeting of minds occurred and knowledge was obtained by the co-conspirators and their intention was expressed to further the cause of the said conspiracy. Since we have elaborately discussed the constituents relating to the conspiracy, there is no need to refer to the same in subsequent appeals before us. It is also evident that a common charge of conspiracy was framed against all the accused persons. In view of the above, we are satisfied that the prosecution has placed sufficient acceptable materials to prove the charge of conspiracy beyond reasonable doubt which we will analyse in the later part of our judgment. Confession

Confession

155 In this heading, we have to consider the confession made by accused and co-accused persons relied on by the prosecution. Before going into the acceptability or otherwise and merits of the claim made by both the parties relating to the confession of the accused and co-accused, it is useful to refer to the relevant provisions of the Code as well as TADA.

156 Section 164 of the Code speaks about recording of confession and statement which is as under:-

> "**164. Recording of confessions and statements**.--
> (1) Any Metropolitan Magistrate or Judicial Magistrate may, whether or not he has jurisdiction in the case, record any confession or statement made to him in the course of an investigation under this Chapter or under any other law for the time being in force, or at any, time afterwards before the commencement of the inquiry or trial:
>
> Provided that any confession or statement made under this sub-section may also be recorded by audio-video electronic means in the presence of the advocate of the person accused of an offence:
>
> Provided that no confession shall be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time being in force.
>
> (2) The Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him; and the Magistrate shall not record any such confession unless, upon questioning the person making it, he has reason to believe that it is being, made voluntarily.
>
> (3) If at any time before the confession is recorded, the person appearing before the Magistrate states that he is not willing to make the confession, the Magistrate shall not authorize the detention of such person in police custody.
>
> (4) Any such confession shall be recorded in the manner

provided in section 281 for recording the examination of an accused person and shall be signed by the person making the confession; and the Magistrate shall make a memorandum at the foot of such record to the following effect.

> "I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.
>
> Sd/-
> A.B.Magistrate"

(5) Any statement (other than a confession) made under sub-section (1) shall be recorded in such manner hereinafter provided for the recording of evidence as is, in the opinion of the Magistrate, best fitted to the circumstances of the case; and the Magistrate shall have power to administer oath to the person whose statement is so recorded.

(6) The Magistrate recording a confession or statement under this section shall forward it to the Magistrate by whom the case is to be inquired into or tried."

157 Insofar as interpretation relating to Section 164 of the Code, particularly, recording of the same and procedures to be adopted, this very Bench in Rabindra Kumar Pal @ Dara Singh V/s. Republic of India (2011) 2 SCC 490 after considering large number of judgments on the issue laid down the following principles: [SCC pp.521-22, para 64]

> "**(i) The provisions of Section 164 CrPC must be complied with not only in form, but in essence.**
>
> **(ii) Before proceeding to record the confessional statement, a searching enquiry must be made from the accused as to the custody from which he was produced and the treatment he had been receiving in**

such custody in order to ensure that there is no scope for doubt of any sort of extraneous influence proceeding from a source interested in the prosecution.

(iii) A Magistrate should ask the accused as to why he wants to make a statement which surely shall go against his interest in the trial.

(iv) The maker should be granted sufficient time for reflection.

(v) He should be assured of protection from any sort of apprehended torture or pressure from the police in case he declines to make a confessional statement.

(vi) A judicial confession not given voluntarily is unreliable, more so, when such a confession is retracted, the conviction cannot be based on such retracted judicial confession.

(vii) Non-compliance with Section 164 CrPC goes to the root of the Magistrate's jurisdiction to record the confession and renders the confession unworthy of credence.

(viii) During the time of reflection, the accused should be completely out of police influence. The judicial officer, who is entrusted with the duty of recording confession, must apply his judicial mind to ascertain and satisfy his conscience that the statement of the accused is not on account of any extraneous influence on him.

(ix) At the time of recording the statement of the accused, no police or police official shall be present in the open court.

(x) Confession of a co-accused is a weak type of evidence.

(xi) Usually the court requires some corroboration from the confessional statement before convicting the accused person on such a statement."

[See also Kalawati & Anr. V/s. State of H.P. AIR 1953 SC 131; Dagdu & Ors. V/s. State of Maharashtra (1977) 3 SCC 68; Davendra Prasad Tiwari V/s. State of U.P. (1978) 4 SCC 474; Shivappa V/s. Stae of Karnataka (1995) 2 SCC 76; Nalini (supra) (1999) 5 SCC 253; State of Maharashtra V/s. Damu (2000) 6 SCC 269; Bhagwan Singh & Ors. V/s. State of M.P. (2003) 3 SCC 21; Gurjinder Singh V/s. State of Punjab (2011) 3 SCC 530; Surender Koli V/s. State of Uttar Pradesh & Ors. (2011) 4 SCC 80; Kulvinder Singh & Anr. V/s. State of Haryana (2011) 5 SCC 258; and Inspector of Police, T.N. V/s. John David (2011) 5 SCC 509.]

Law relating to Confessions under TADA

Death Sentence: Paras 854 to 873

PART XI-B

Discussion of case law relied on by Mr. J.M.Panchal, learned Special Public Prosecutor

1 On the question of credibility of injured witnesses reliance is placed on **Mano Dutt & Anr.** [supra] and paras 30 and 31 in which the Apex Court considered earlier decision for the weightage to be attached by the court to the testimony of an injured witness. Paras 30, 31 and 33 of the judgment read as under:

> "30. Salik Ram was examined as PW2 and his statement is cogent, coherent, reliable and fully supports the case of the prosecution. However, the other injured witness, Nankoo, was not examined. In our view, non-examination of Nankoo, to which the accused raised the objection, would not materially affect the case of the prosecution. Normally, an injured witness would enjoy greater credibility because he is the sufferer himself and thus, there will be no occasion for such a person to state an incorrect version of the occurrence, or to involve anybody falsely and in the

bargain, protect the real culprit. **We need not discuss more elaborately the weightage that should be attached by the Court to the testimony of an injured witness. In fact, this aspect of criminal jurisprudence is no more res integra, as has been consistently stated by this Court in uniform language.**

31 We may merely refer to the case of *Abdul Sayeed v. State of Madhya Pradesh [(2010) 10 SCC 259]*, where this Court held as under:

> "28 The question of the weight to be attached to the evidence of a witness that was himself injured in the course of the occurrence has been extensively discussed by this Court. **Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone.** "Convincing evidence is required to discredit an injured witness." [Vide Ramlagan Singh v. State of Bihar [(1973)3 SCC 881], Malkhan Singh v. State of U.P. [[(1975)3 SCC 311], Machhi Singh v. State of Punjab [(1983)3 SCC 470], Appabhai v. State of Gujarat [1988 Supp. SCC 241], Bonkya v. State of Maharashtra [(1995)6 SCC 447], Bhag Singh v. State of Punjab [(1997)7 SCC 712], Mohar v. State of U.P. [(2002)7 SCC 606](SCC p. 606b-c), Dinesh Kumar v. State of Rajasthan [(2008)8 SCC 270], Vishnu v. State of Rajasthan [(2009)10 SCC 477], Annareddy Sambasiva Reddy v. State of A.P. [(2009)12 SCC 546] and Balraje v. State of Maharashtra [(2010)6 SCC 673].
>
> 29 While deciding this issue, a similar view was taken in Jarnail Singh v. State of Punjab [(2009)9 SCC719] where this Court reiterated the special evidentiary status accorded to the testimony of an injured accused and relying on its earlier judgments held as under: (SCC pp. 726-27, paras 28-29)
>
> "28 Darshan Singh (PW 4) was an injured witness. He had been examined by the doctor. His testimony could

not be brushed aside lightly. He had given full details of the incident as he was present at the time when the assailants reached the tubewell. **In Shivalingappa Kallayanappa v. State of Karnataka [1994 Supp (3) SCC 235] this Court has held that the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies, for the reason that his presence on the scene stands established in case it is proved that he suffered the injury during the said incident.**

29 In State of U.P. v. Kishan Chand [(2004)7 SCC 629] a similar view has been reiterated observing that the testimony of a stamped witness has its own relevance and efficacy. **The fact that the witness sustained injuries at the time and place of occurrence, lends support to his testimony that he was present during the occurrence.** In case the injured witness is subjected to lengthy cross-examination and nothing can be elicited to discard his testimony, it should be relied upon (vide Krishan v. State of Haryana [(2006)12 SCC 459]). Thus, we are of the considered opinion that evidence of Darshan Singh (PW 4) has rightly been relied upon by the courts below."

30 The law on the point can be summarised to the effect that the testimony of the injured witness is accorded a special status in law. This is as a consequence of the fact that the injury to the witness is an inbuilt guarantee of his presence at the scene of the crime and because the witness will not want to let his actual assailant go unpunished merely to falsely implicate a third party for the commission of the offence. Thus, the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies therein."

"33 The Court can convict an accused on the statement of a sole witness, even if he was a relative of the deceased and thus, an interested party. The condition precedent to such an order is that the statement of such witness should satisfy the legal

> **parameters stated by this Court in a catena of judgments. Once those parameters are satisfied and the statement of the witness is trustworthy, cogent and corroborated by other evidence produced by the prosecution, oral or documentary, then the Court would not fall in error of law in relying upon the statements of such witness. It is only when the Courts find that the single eye-witness is a wholly unreliable witness that his testimony is discarded in toto and no amount of corroboration can cure its defect. Reference in this regard can be made to the judgment of this Court, in the case of Anil Phukan v State of Assam [(1993) 3 SCC 282]".**
>
> [emphasis supplied]

1.1 Thus, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone. Unless convincing evidence is available to discredit an injured witness the court would rely the testimony of such witness as trustworthy and reliable. Even, when the statement of sole witness, even if such evidence is a relative of the deceased and interested party if legal parameters are satisfied and the statement of such interested and relative witness is found trustworthy, cogent and corroborated by other evidence produced by the prosecution, oral or documentary then the court would not fall into error of law in relying upon the statement of such witness as held in Balraje v. State of Maharashtra [(2010)6 SCC 673.

2 That the very aspect about evidentiary value of testimony of injured witness or relevant witness is considered in another decision in the case of **Thoti Manohar** [supra] and in paras 30 to 37 of the judgment, the Apex Court held as under:

"30. The second submission of the learned counsel for the appellant is that all the witnesses, being relatives, are interested witnesses. The occurrence in part took place inside the house and the rest of it slightly outside the premises of the deceased. Under these circumstances, the family members and the close relatives are bound to be the natural witnesses. They intervened and sustained injuries. Their sustaining of injuries has got support from the ocular evidence as well as the medical evidence. The same has been dislodged and if we allow ourselves to say so, not even a fragile attempt has been made to dislodge the same. By no stretch of imagination, it can be said that they are chance witnesses. In the obtaining factual matrix, they are the most natural witnesses.

31 In this context, we may refer with profit the decision of this Court in Dalip Singh v. State of Punjab[AIR 1953 SC 364], wherein Vivian Bose, J., speaking for the Court, observed as follows: [AIR p.366, para 25] -

"25 We are unable to agree with the learned Judges of the High Court that the testimony of the two eye-witnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in Rameshwar v. The State of Rajasthan (1952) SCR 377 at p. 390 = (AIR 1952 SC 54 at page 59)."

32 In the said case, it was further observed that :[Dalip Singh case, AIR p.366, para 26]

> "26 A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true that when feelings run high and there

> is personal cause for enmity, there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth".

33 In Masalti v. State of U.P. [AIR 1965 SC 202], it has been ruled that normally close relatives of the deceased would not be considered to be interested witnesses who would also mention the names of the other persons as responsible for causing injuries to the deceased.

34. In Hari Obula Reddi v. State of A.P. [(1981)3 SCC 675] [SCC pp. 683-84, para 13], a three-Judge Bench has held that evidence of interested witnesses is not necessarily unreliable evidence. Even partisanship by itself is not a valid ground for discrediting or rejecting sworn testimony. It cannot be laid down as an invariable rule that interested evidence can never form the basis of conviction unless corroborated to a material extent in material particulars by independent evidence. All that is necessary is that the evidence of interested witnesses should be subjected to careful scrutiny and accepted with caution. If on such scrutiny, the interested testimony is found to be intrinsically reliable or inherently probable, it may, by itself, be sufficient, in the circumstances of the particular case, to base a conviction thereon.

35 In Kartik Malhar v. State of Bihar [(1996)1 SCC 614] [SCC p.621, para 15], it has been opined that a close relative who is a natural witness cannot be regarded as an interested witness, for the term 'interested' postulates that the witness must have some interest in having the accused, somehow or the other, convicted for some animus or for some other reason.

36 In Pulicherla Nagaraju alias Nagaraja Reddy v. State of Andhra Pradesh [(2006)11 SCC 444], while dealing with the liability of interested witnesses who are relatives, a two-Judge Bench observed that : [SCC p.453, para 16]

> "16. ... it is well settled that evidence of a witness

> cannot be discarded merely on the ground that he is either partisan or interested or close relative to the deceased, if it is otherwise found to be trustworthy and credible."

The said evidence only requires scrutiny with more care and caution, so that neither the guilty escapes nor the innocent is wrongly convicted. If on such careful scrutiny, the evidence is found to be reliable and probable, then it can be acted upon.

> " ... If it is found to be improbable or suspicious, it ought to be rejected. Where the witness has a motive to falsely implicate the accused, his testimony should have corroboration in regard to material particulars before it is accepted. [Pulicherla case, SCC p.453, para 16].

37 Tested on the anvil and touchstone of the aforesaid principles, we find that the evidence of the injured witnesses who are close relatives to the deceased have really not embellished or exaggerated the case of the prosecution. They are the most natural witnesses and there is nothing on record to doubt their presence at the place of occurrence. By no stretch of imagination, it can be stated that the presence of the said witnesses at the scene of the crime and at the time of occurrence was improbable. Their version is consistent and nothing has been suggested to bring any kind of inherent improbabilities in their testimonies".

The Apex Court referred to various decisions, including the decision in the cases of Rameshwar v. State of Rajasthan, AIR 1952 SC 54 and Masalti v. State of U.P., AIR 1965 SC 202]

In the above judgment, it is also held that minor discrepancies not touching the core of the case of the prosecution, which are not relevant cannot be discarded on the basis of such discrepancies. The Apex Court in paras 38 to 40 held as under:

"38 The learned counsel for the appellant has

endeavoured hard to highlight certain discrepancies pertaining to time, situation of the land, number of persons, etc., but in our considered opinion, they are absolutely minor in nature. The minor discrepancies on trivial matters not touching the core of the matter cannot bring discredit to the story of the prosecution. Giving undue importance to them would amount to adopting a hyper-technical approach. The Court, while appreciating the evidence, should not attach much significance to minor discrepancies, for the discrepancies which do not shake the basic version of the prosecution case are to be ignored. This has been so held in State of U.P. v. M.K.Anthony [(1985)1 SCC 505]; Appabhai and another v. State of Gujarat [1988 Supp. SC 241]; Rammi alias Rameshwar v. State of Madhya Pradesh [(1999)8 SCC 649]; State of H.P. v. Lekh Raj [(2000)1 SCC 247] and Laxman Singh v. Poonam Singh [(2004)10 SCC 94] and Dashrath Singh v. State of U.P.[(2004)7 SCC 408].

39 **No evidence can ever be perfect for man is not perfect and man lives in an imperfect world. Thus, the duty of the court is to see with the vision of prudence and acceptability of the deposition regard being had to the substratum of the prosecution story**. In this context, we may reproduce a passage from the decision of this Court in State of Punjab v. Jagir Singh [(1974)3 SCC 277], wherein H.R. Khanna, J., speaking for the Court, observed thus : [SCC pp. 285-86, para 23]

> **"23 A criminal trial is not like a fairy tale wherein one is free to give flight to one's imagination and phantasy. It concerns itself with the question as to whether the accused arraigned at the trial is guilty of the crime with which he is charged. Crime is an event in real life and is the product of interplay of different human emotions. In arriving at the conclusion about the guilt of the accused charged with the commission of a crime, the court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Every case in the final analysis would have to depend upon its own facts. Although the benefit of every reasonable doubt should be given to the accused, the courts should not at the same time reject evidence which is ex facie trustworthy on grounds which are fanciful or in the nature of**

conjectures."

40 In view of our aforesaid analysis, we are unable to accept the submission of the learned counsel for the appellant that the evidence of the eye witnesses should be rejected solely on the ground that they are close relatives and interested witnesses".

3 Case of **Suvarnamma & Anr.** [supra] was relied on in the context of well known principles for appreciation of evidence in the backdrop of the court dealing with a criminal trial and its role while ascertaining the truth from the material before it and to punish the guilty and to protect innocent. The above judgment is pressed into service on the point that any lapse on the part of the investigating agency though expected to be fair and efficient, any lapse on its part cannot *per se* be a ground to throw out the prosecution case, when convincing evidence to prove case is available. Paras 12, 12.1 to 12.5 of the judgment read as under:

"12 We may refer to the well known observations from decisions of this Court :

12.1 Shivaji Sahabrao Bobade vs. State of Maharashtra[(1973)2 SCC 793] : [SCC p.801, para 8]

"8. Now to the facts. The scene of murder is rural, the witnesses to the case are rustics and so their behavioural pattern and perceptive habits have to be judged as such. The too sophisticated approaches familiar in courts based on unreal assumptions about human conduct cannot obviously be applied to those given to the lethargic ways of our villages. When scanning the evidence of the various witnesses we have to inform ourselves that variances on the fringes, discrepancies in details, contradictions in narrations and embellishments in inessential parts cannot militate against the veracity of the core of the testimony provided there is the impress of truth and

conformity to probability in the substantial fabric of testimony delivered. The learned Sessions Judge has at some length dissected the evidence, spun out contradictions and unnatural conduct, and tested with precision the time and sequence of the events connected with the crime, all on the touchstone of the medical evidence and the post-mortem certificate. Certainly, the court which has seen the witnesses depose, has a great advantage over the appellate Judge who reads the recorded evidence in cold print, and regard must be had to this advantage enjoyed by the trial Judge of observing the demeanour and delivery, of reading the straightforwardness and doubtful candour, rustic naivete and clever equivocation, manipulated conformity and ingenious unveracity of persons who swear to the facts before him. Nevertheless, where a Judge draws his conclusions not so much on the directness or dubiety of the witness while on oath but upon general probabilities and on expert evidence, the court of appeal is in as good a position to assess or arrive at legitimate conclusions as the Court of first instance. Nor can we make a fetish of the trial Judge's psychic insight."

12.2 Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat [(1983)3 SCC 217] : [SCC pp. 222-23, para 5]

"**5. …….We do not consider it appropriate or permissible to enter upon a reappraisal or reappreciation of the evidence in the context of the minor discrepancies painstakingly highlighted by learned Counsel for the appellant. Overmuch importance cannot be attached to minor discrepancies. The reasons are obvious :**

[1] By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.

[2] Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an

element of surprised. The [pic]mental faculties therefore cannot be expected to be attuned to absorb the details.

[3] The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part of another.

[4] By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape-recorder.

[5] In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess-work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person.

[6] Ordinarily a witness cannot be expected to recall accurately the sequence of events which takes place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.

[7] A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross-examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub- conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him — Perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment."

12.3 Appabhai vs. State of Gujarat [1988 Supp. SCC 241] : [SCC pp. 246-47, para 13]

> **"13. .....The court while appreciating the evidence must not attach undue importance to minor discrepancies. The discrepancies which do not shake the basic version of the prosecution case may be discarded. The discrepancies which are due to normal errors of perception or observation should not be given importance. The errors due to lapse of memory may be given due allowance. The court by [pic]calling into aid its vast experience of men and matters in different cases must evaluate the entire material on record by excluding the exaggerated version given by any witness. When a doubt arises in respect of certain facts alleged by such witness, the proper course is to ignore that fact only unless it goes into the root of the matter so as to demolish the entire prosecution story. The witnesses nowadays go on adding embellishments to their version perhaps for the fear of their testimony being rejected by the court. The courts, however, should not disbelieve the evidence of such witnesses altogether if they are otherwise trustworthy. Jaganmohan Reddy, J., speaking for this Court in Sohrab v. State of Madhya Pradesh [(1972)3 SCC 751] observed: [SCC p. 756, para 8 : SCC (Cri) p. 824, para 8]**
>
> > "8 ...This Court has held that falsus in uno falsus in omnibus is not a sound rule for the reason that hardly one comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishments. In most cases, the witnesses when asked about details venture to give some answer, not necessarily true or relevant for fear that their evidence may not be accepted in respect of the main incident which they have witnessed but that is not to say that their evidence as to the salient features of the case after cautious scrutiny cannot be considered....."

12.4 State of Haryana vs. Bhagirath [(1999)5 SCC 96] : [SCC pp. 100-01, paras 8-11]

"8 It is nearly impossible in any criminal trial to prove all the elements with a scientific precision. A criminal court could be convinced of the guilt only beyond the range of a reasonable doubt. Of course, the expression "reasonable doubt" is incapable of definition. Modern thinking is in favour of the view that proof beyond a reasonable doubt is the same as proof which affords moral certainty to the Judge.

9 **Francis Wharton**, a celebrated writer on criminal law in the United States has quoted from judicial pronouncements in his book Wharton's Criminal Evidence (at p. 31, Vol. 1 of the 12th Edn.) as follows:

> **"It is difficult to define the phrase 'reasonable doubt'. However, in all criminal cases a careful explanation of the term ought to be given. A definition often quoted or followed is that given by Chief Justice Shaw in the Webster case. He says: 'It is not mere possible doubt, because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that consideration that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge. "**

10 In the treatise **The Law of Criminal Evidence authored by H.C. Underhill it is stated (at p. 34, Vol. 1 of the 5th Edn.)** thus:

> "**The doubt to be reasonable must be such a one as an honest, sensible and fair-minded man might, with reason, entertain consistent with a conscientious desire to ascertain the truth. An honestly entertained doubt of guilt is a reasonable doubt. A vague conjecture or an inference of the possibility of the innocence of the accused is not a reasonable doubt. A reasonable doubt is one which arises from a consideration of all the evidence in a fair and**

> **reasonable way. There must be a candid consideration of all the evidence and if, after this candid consideration is had by the jurors, there remains in the minds a [pic]conviction of the guilt of the accused, then there is no room for a reasonable doubt.**"

11 In Shivaji Sahabrao Bobade v. State of Maharashtra [(1973) 2 SCC 793)] this Court adopted the same approach to the principle of benefit of doubt and struck a note of caution that the dangers of exaggerated devotion to the rule of benefit of doubt at the expense of social defence demand special emphasis in the contemporary context of escalating crime and escape. This Court further said: (SCC p. 799, para 6)

> **"6 The judicial instrument has a public accountability. The cherished principles or golden thread of proof beyond reasonable doubt which runs through the web of our law should not be stretched morbidly to embrace every hunch, hesitancy and degree of doubt."**

12.5 Leela Ram vs. State of Haryana [(1999)9 SCC 525] : [SCC pp. 532-33, para 9-10]

> **"9 Be it noted that the High Court is within its jurisdiction being the first appellate court to reappraise the evidence, but the discrepancies found in the ocular account of two witnesses unless they are so vital, cannot affect the credibility of the evidence of the witnesses. There are bound to be some discrepancies between the narrations of different witnesses when they speak on details, and unless the contradictions are of a material dimension, the same should not be used to jettison the evidence in its entirety. Incidentally, corroboration of evidence with mathematical niceties cannot be expected in criminal cases. Minor embellishment, there may be, but variations by reason therefor should not render the evidence of eyewitnesses unbelievable. Trivial discrepancies ought not to obliterate an otherwise acceptable evidence. In this context, reference may be made to the decision of this Court in State of U.P. v.**

M.K. Anthony (1985) 1 SCC 505). In para 10 of the Report, this Court observed: (SCC pp. 514-15)

> **"10 While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hypertechnical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. If the court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details. Even honest and truthful witnesses may differ in some details unrelated to the main incident because power of observation, retention and reproduction differ with individuals."**

10 In a very recent decision in Rammi v. State M.P with Bhura v. State of M.P. (1999) 8 SCC 649) this Court observed: (SCC p. 656, para 24)

> **"24. When an eyewitness is examined at length it is quite possible for him to make some discrepancies. No true witness can possibly escape from making some discrepant details. Perhaps an untrue witness who is well tutored can successfully make his testimony totally non-discrepant. But courts should bear in mind that it is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the court is justified in jettisoning his evidence. But too serious a view to be adopted on mere variations falling in the narration of an incident (either as between the evidence of two witnesses or as between two statements of the same witness) is an unrealistic approach for judicial scrutiny."**

This Court further observed: (SCC pp. 656-57, paras 25-27)

> "25. It is a common practice in trial courts to make out contradictions from the previous statement of a witness for confronting him during cross-examination. Merely because there is inconsistency in evidence it is not sufficient to impair the credit of the witness. **No doubt Section 155 of the Evidence Act provides scope for impeaching the credit of a witness by proof of an inconsistent former statement. But a reading of the section would indicate that all inconsistent statements are not sufficient to impeach the credit of the witness. The material portion of the section is extracted below:**
>
> "155. Impeaching credit of witness.—The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the court, by the party who calls him—
>
> * * *
>
> [1]-[2]
>
> [3] by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted;'
>
> 26 A former statement though seemingly

> inconsistent with the evidence need not necessarily be sufficient to amount to contradiction. **Only such of the inconsistent statement which is liable to be 'contradicted' would affect the credit of the witness. Section 145 of the Evidence Act also enables the cross-examiner to use any former statement of the witness, but it cautions that if it is intended to 'contradict' the witness the cross-examiner is enjoined to comply with the formality prescribed therein. Section 162 of Code also permits the cross-examiner to use the previous statement of the witness (recorded under Section 161 of the Code) for the only limited purpose i.e. to 'contradict' the witness.**
>
> **27. To contradict a witness, therefore, must be to discredit the particular version of the witness. Unless the former statement has the potency to discredit the present statement, even if the latter is at variance with the former to some extent it would not be helpful to contradict that witness (vide Tahsildar Singh v. State of U.P. (AIR (1959) SC 1012)."**

3.1 In the above decision, the Apex Court revisited earlier decisions in the cases of Shivaji Sahabrao Bobde v. State of Maharashtra, [(1973)2 SCC 793], Bharwada Bhoginbhai Hirjibhai v. State of Gujarat, [(1983)3 SCC 217], Appabhai v. State of Gujarat [1988 Supp. SCC 241], Tahsildar Singh v. State of U.P. [AIR 1959 SC 1012].

4 That on the question of identification of accused for the first time in the court by eye witnesses when they do not know him earlier and particularly when no Test Identification parade had held, such evidence though may be treated to be a week in nature, the Apex Court in the case of **Ramanbhai Naranbhai Patel** [supra] held that it is not totally irrelevant or inadmissible. For better appreciation of the above decision, we reproduce paras 18, 19 and 20 of the said judgment, which

read as under:

> "18 So far this point is concerned, we have gone through the relevant evidence on record, as noted by the Trial Court as well as by the High Court. It is true that the injured eyewitnesses Bhogilal Ranchhodbhai-P.W.2 and Karsanbhai Vallabhbhai-P.W.14 tried to identify the accused only in the Court and they were not knowing them earlier. Another witness Niruben also did not know them earlier as deposed to by her. It is equally true that the identification parade was not held but that would not mean that the witnesses who suffered grievous injuries were out to rope in wrong accused leaving out real culprits. So far as witnesses Bhogilal Ranchhodbhai and Karsanbhai Vallabhbhai are concerned, their evidence cannot be treated to be totally non est due to absence of identification parade. The said evidence may be treated to be one of a weak nature but cannot be said to be totally irrelevant or inadmissible. In this connection, we may refer to recent decision of this Court in the case of Rajesh Govind Jagesha and Ors. v. State of Maharashtra, JT, [1999] 9 SC 1 and in the case of State of Himachal Pradesh v. Lekh Raj and Anr. JT, [1999] 9 SC 43 wherein it has been observed as under: [SCC p.253, para 3]
>
> > "..... The evidence of identifying the accused person at the trial for the first time is, from its very nature, inherently of a weak character. Identification proceedings are used for corroboration purposes for believing that the person brought before the court was the real person involved in the commission of the crime. The identification parade even if held, cannot, in all cases, be considered as safe, sole and trustworthy evidence on which the conviction of the accused could be sustained. It is a rule of prudence which is required to be followed in cases where accused is not known to the witness or the complainant".
>
> 19 In this connection, learned counsel for the appellants vehemently relied upon a decision of a three Judge Bench of this Court in the case of Mohanlal Gangaram Gehani v. State of Maharashtra, AIR [1982] SC 839 wherein Fazal All, J., speaking for the Bench in para 25 of the Report, made the following observations: [SCC p.707]

> "... P.W.3 (Sheikh) admits at page 22 of the paper book that he had not seen the accused or any of the three accused before the date of the incident and that he had seen all the three for the first time at the time of the incident. He further admits that the names of me accused were given to him by the police. In these circumstances, therefore, if the appellant was not known to him before the incident and was identified for the first time in the Court, in the absence of a test identification parade the evidence of P.W.3 was .valueless and could not be relied upon..."

20 It becomes at once clear that the aforesaid observations were made in the light of the peculiar facts and circumstances wherein the police is said to have given the names of the accused to the witnesses. Under these circumstances, identification of such a named accused only in the Court when the accused was not known earlier to the witness had to be treated as valueless. The said decision, in turn, relied upon an earlier decision of this Court in the case of State (Delhi Admn.) v. V.C. Shukla and another etc., AIR [1980] SC 1382 wherein also Fazal Ali J., speaking for a three Judge Bench made similar observations in this regard. In that case the evidence of the witness in the Court and his identifying the accused only in the Court without previous identification parade was found to be a valueless exercise. The observations made therein were confined to the nature of the evidence deposed to by the said eyewitnesses. It, therefore, cannot be held, as tried to be submitted by learned counsel for the appellants, that in the absence of test identification parade, the evidence of eyewitness identifying the accused would become inadmissible or totally useless whether the evidence deserves -any credence or not would always depend on the facts and circumstances of each case. It is, of course, true as submitted by learned counsel for the appellants that the later decisions of this Court in the case of Rajesh Govind Jagesha and Ors. v. State of Maharashtra and State of Himachal Pradesh v. Lekh Raj and Am., (supra) had not considered the aforesaid three Judge Bench decisions of this Court. However, in our view, the ratio of the aforesaid later decisions of this Court cannot be said to be running counter to what is decided by the earlier three Judge Bench judgment on the facts and circumstances examined by the Court while rendering these decisions. But even assuming as submitted by learned counsel for the appellants that the

> evidence of these two injured witnesses i.e. Bhogilal Ranchhodbhai and Karsanbhai Vallabhbhai identifying the accused in the Court may be treated to be of no assistance to the prosecution, the fact remains that these eyewitnesses were seriously injured and they could have easily seen the faces of the persons assaulting them and their appearance and identity would well remain imprinted in their minds especially when they were assaulted in broad day light. They could not be said to be interested in roping in innocent persons by shielding the real accused who had assaulted them".

Thus, when the injured witness, who had seen and also undergone a deadly attempt and brutal act on the part of the accused, appearance and identity of such witnesses would remain imprinted in the mind and in such cases absence of test identification parade and identifying the accused for the first time in the court cannot be said to be inadmissible and deserves no credence for establishment of the guilt of the accused.

5 The case of **Malkiat** Singh [supra] is in the context of importance of case diary of the investigation vis-a-vis section 172 of the Code pertaining to diary of proceedings in investigation, we reproduce herewith paras 10 and 11 for ready reference. The Apex Court also considered Section 145 of the Evidence Act vis-a-vis Section 161 of the Code, 1973 and limited use of the case diary, it is a record of day today investigation of the investigating officer.

> "10. The evidence on record clearly shows that the defence has freely used the entries in the case diary as evidence and marked some portions of the diary for contradictions or omissions in the prosecution case. This is clearly in negation of and in the teeth of s.172(3) of the Code. Section 172 reads thus:
>
> "172 Diary of proceedings in investigation -- (1) Every police officer making an investigation under this Chapter shall day by

day enter his proceedings in the investigation in a diary, setting forthwith the time at which the information reached him, the time at which he began and closed his investigation, the place or places visited by him, and a statement of the circumstances ascertained through his investigation.

[2] Any Criminal Court may send for the police diaries of a case under inquiry or trial in such Court, and may use such diaries, not as evidence in the case, but to aid it in such inquiry or trial.

[3] Neither the accused nor his agents shall be entitled to call for such diaries, nor shall he or they be entitled to see them merely because they are referred to by the Court; but, if they are used by the police officer who made them to refresh his memory, or if the Court uses them for the purpose of contradicting such police officer, the provisions of Section 161 or Section 145, as the case may be, of the Indian Evidence Act, 1872 (1 of 1872) shall apply."

11 It is manifest from its bare reading without subjecting to detailed and critical analysis that the case diary is only a record of day to day investigation of the Investigating Officer to ascertain the statement of circumstances ascertained through the investigation. Under sub-s. (2) the Court is entitled at the trial or enquiry to use the diary not as evidence in the case, but as aid to it in the inquiry or trial. Neither the accused, nor his agent, by operation of sub-s. (3), shall be entitled to call the diary, nor shall he be entitled to use it as evidence merely because the Court referred to it. Only right given thereunder is that if the police officer who made the entries in the diary uses it to refresh his memory or if the Court uses it for the purpose of contradicting such witness, by operation of s.161 of the Code S. 145 of the Evidence Act, it shall be used for the purpose of contradicting the witness, i.e. Investigation Officer or to explain it in re- examination by the prosecution, with permission of the court. It is, therefore, clear that unless the investigating officer or the Court uses it either to refresh the memory or contradicting the investigating officer as previous statement under s.161 that too after drawing his attention thereto as is enjoined under s.145 of the Evidence Act. The entries cannot be used by the accused as evidence. Neither PW-5, nor PW-6, nor the court

used the case diary. Therefore, the free use thereof for contradicting the prosecution evidence is obviously illegal and it is inadmissible in evidence. Thereby the defence cannot place reliance thereon. But even if we were to consider the same as admissible that part of the evidence does not impinge upon the prosecution evidence."

6 In the case of **Shamshul Kanwar** [supra] the Apex Court considered Section 172 of the Code, 1973 along with Sections 161 and 145 of the Evidence Act. For better appreciation, we reproduce hereunder paras 10 to 17 of the judgment in which various decisions of Privy Council and Malkiat Singh vs. State of Punjab [(1991)4 SCC 341] were considered. **That accused gets right to cross-examination the police officer with regard to factors in case diary when the same is used by the police officer to refresh his memory or when the court uses it for the purpose of contradicting police officer and such right of the accused is up to Sections 145 and 161 of the Code, 1973.**

"Section 172 CrPC reads as under:

"172. Diary of proceedings in investigation - [1] Every police officer making an investigation under this chapter shall day by day enter his proceedings in the investigation in a diary, setting forth the time at which the information reached him, the time at which he began and closed the investigation, the place or places visited by him, and a statement of the circumstances ascertained through his investigation.

[2] Any Criminal Court may send for the police diaries of a case under inquiry or trial in such Court, and may use such diaries, not as evidence in the case, but to aid it in such inquiry or trial.

[3] Neither the accused nor his agents shall be entitled to call for such diaries, nor shall he or they be entitled to see them merely because they are referred to by the Court; but, if they are used by the police officer who made them to refresh his memory, or if the Court uses them for the purpose of contradicting such police officer, the provisions of section 161 or section 145, as the case may be, of the Indian Evidence Act (1 of 1872) shall apply."

This Section firstly lays down that every police officer making an investigation should maintain a diary of his investigation. It is well- known that each State has its own police regulations or otherwise known as police standing orders and some of them provide as to the manner in which such diaries are to be maintained. These diaries are called case diaries or special diaries. The Section itself indicates as to the nature of the entries that have to be made and what is intended to be recorded is what the police officer did, the places where he went and the places which he visited etc. and in general it should contain a statement of the circumstances ascertained through his investigation. Sub-section (2) is to the effect that a criminal court may send for the diaries and may use them not as evidence but only to aid in such inquiry or trial. The aid which the court can receive from the entries in such a diary usually is confined to utilising the information given therein as foundation for questions to be put to the witnesses particularly the police witnesses and the court may, if necessary, in its discretion use the entries to contradict the police officer who made them. Coming to their use by the accused, sub-section (3) clearly lays down that neither the accused nor his agents shall be entitled to call for such diaries nor he or they may be entitled to see them merely because they are referred to by the courts. But in case the police officer uses the entries to refresh his memory or if the court uses them for the purpose of contradicting such police officer then provisions of Section 161 or Section 145, as the case may be, of the Evidence Act would apply. Section 145 of the Evidence Act provides for cross-examination of a witness as to the previous statements made by him in writing or reduced into writing and if it is intended to contradict him by the writing, his attention must be called to those parts of it which are to be used for the purpose of contradiction. Section 161 deals with the adverse party's rights as to the production, inspection and cross-examination when a document is used to refresh the memory of the witness. It can therefore be seen that the right of accused to cross-examine the police officer with reference to the entries in the General Diary is very much limited in extent and even that limited scope arises only when the court uses the entries to contradict the police officer or when the police officer uses it for refreshing his memory and that again is subject to the limitations of Sections 145 and 161 of the Evidence Act and for that limited purpose only the accused in the discretion of the court may be

permitted to peruse the particular entry and in case if the court does not use such entries for the purpose of contradicting the police officer or if the police officer does not use the same for refreshing his memory, then the question of accused getting any right to use the entries even to that limited extent does not arise. The accused person is not entitled to require a police officer to refresh his memory during his examination in court by referring to the diary. At the most the accused can on a reasonable basis seek the court to look into the diary and do the needful within the limits of Section 172 Cr.P.C. However, the court is not bound to compel the police witness to look at the diary in order to refresh his memory nor the accused is entitle to insist that he should do so. If there is such a refusal what inference should be drawn depends on the facts and circumstances of each case. Section 172 does not deal with any recording of statements made by witnesses and what is intended to be recorded is what the police officer did namely the places where he went, the people he visited and what he saw etc. It is Section 161 Cr.P.C. which provides for recording of such statements. Assuming that there is failure to keep a diary as required by Section 172 Cr.P.C., the same cannot have the effect of making the evidence of such police officer inadmissible and what inference should be drawn in such a situation depends upon the facts of each case. It is well-settled that the entries of the police diary are neither substantive nor corroborating evidence and they cannot be used by or against any other witness than the police officer and can only be used to the limited extent indicated above. The above stated principles are reiterated in many decisions rendered by the courts.

11 As early as 1897 the Full Court of the Allahabad High Court in Queen Empress v. Mannu, ILR Allahabad VoL XIX 390 examined the scope of Section 172 Cr.P.C. and the meaning of the police diaries and Edge, CJ. who spoke for the Court held thus:

> "Section 172 of the Code of Criminal Procedure provides for the two events, on the happening of either of which the accused or his agent is entitled to see the special diary: and it enacts that, except on the happening on one of those events, "neither the accused nor his agents, shall be entitled to call for such diaries, nor shall he or they be entitled to see them merely because they are referred to

> by the Court." In my opinion the plain meaning of section 172 is that the special diary, no matter what it may contain, is absolutely privileged, unless it is used to enable the Police officer who made, it to refresh his memory or is used for the purpose of contradicting him."

(emphasis supplied)

Coming to the entries that are to be made and the "aid" which the courts can have, it was further observed:

> "A properly kept special diary would afford such information, and such information would enable the Magistrate or Judge to deter-mine whether persons referred to in the special diary, but not sent up as witnesses by the Police, should be summoned to give evidence in the interests of the prosecution or of the accused. It must be always remembered that it is the duty of the Magistrate or of the Judge before whom a criminal case is, to ascertain if possible on which side the truth is, and to decide accordingly."

12 This view of the Full Bench has been approved by the Privy Council in Dal Singh v. King Emperor, AIR (1917) PC 25. The Privy Council while disapproving the use to which the entries were put to, held thus :

> "In other words, they treated what was thus entered, as evidence which could be used at all events for the purpose of discrediting these witnesses. In then Lordships' opinion, this was plainly wrong. It was inconsistent with the provisions of section 172 of the Criminal Code. To use the diary for the purpose they did was to contravene the rule laid down in Queen Empress v. Mannu, (1897) 19 All 390 where a full court pointed out that such a diary may be used to assist the Court which tries the case by suggesting means of further concluding points which need clearing up, and which are material for the purpose of doing justice between the Crown and the Accused, but not as containing entries which can by themselves be taken to be evidence of any date, fact or statement contained in the diary. The police officer who made the entry may be confronted with it but not any other witness."

13 **In Pulukuri Kottaya v. King Emperor, AIR (1947) PC 67 it was laid down that breach of Section 172 does not amount to any illegality and the same does not vitiate the trial.** In Niranjan Singh and Others v. State of Uttar Pradesh, AIR (1957) SC 142 it was urged that there was a failure to comply with para 109 of Chapter 11 of U.P. Police Regulation which lays down that when the investigation is closed for the day a copy of the case diary should be sent to the superior police officers and such failure amounted to infraction of rule of law. A Bench of three Judges of this Court considered this aspect and following the ratio in Pulukuri Kottaya's case held as under:

> **"The Criminal Procedure Code in laying down the omissions or irregularities which either vitiate the proceedings or not does not anywhere specifically say that a mistake committed by a police officer during the course of the investigation can be said to be an illegality or irregularity. Investigation is certainly not an inquiry or trial before the court and the fact that there is no specific provision either way in Chapter XLV with respect to omissions or mistakes committed during the course of investigation except with regard to the holding of an inquest is, in our opinion, a sufficient indicating that the legislature did not contemplate any irregularity in investigation as of sufficient importance to vitiate or otherwise form any infirmity in the inquiry or trial."**

14 **In Habeeb Mohammad v. The State of Hyderabad, [1954] SCR 475** it was held thus:

> **"Section 172 provides that any criminal court my send for the police diaries of a case under inquiry or trial in such court and may use such diaries, not as evidence in the case but to aid it in such inquiry or trial It seems to us that the learned Judge was in error in making use of the police diaries at all in his judgment and in seeking confirmation of his opinion on the question of appreciation of evidence from statements contained in those diaries. The only proper use he could make of these diaries was the one allowed by section 172, Criminal Procedure Code, i.e., during the**

> **trial he could get assistance from them by suggesting means of further elucidating points which needed clearing up and which might be material for the purpose of doing justice between the State and the accused**."

In Khatri and Others (IV) v. State of Bihar and Others, [1981] 2 SCC 493 it was held thus: [SCC p.501, para 5]

> **"The criminal court holding an inquiry or trial of a case is therefore empowered by sub-section (2) of Section 172 to send for the police diary of the case and the criminal court can use such diary, not as evidence in the case, but to aid it in such inquiry or trial. But, by reason of such- section (3) of Section 172, merely because the case diary is referred to by the criminal court, neither the accused nor his agents are entitled to call for such diary nor are they entitled to see it. If however the case diary is used by the police officer who has made it to refresh his memory or if the criminal court uses it for the purpose of contradicting such police officer in the inquiry or trial, the provisions of Section 161 or Section 145, as the case may be, of the Indian Evidence Act would apply and the accused would be entitled to see the particular entry in the case diary which has been referred to for either of these purposes and so much of the diary as in the opinion of the court is necessary to a full understanding of the particular entry so used. It will thus be seen that the bar against production and use of case diary enacted in Section 172 is intended to operate only in an inquiry or trial for an offence and even this bar is a limited bar, because in an inquiry or trial, the bar does not operate if the case diary is used by the police officer for refreshing his memory or the criminal court uses it for the purpose of contradicting such police officer."**

(emphasis supplied)

16 In Mukand Lal v. Union of India and Another, AIR (1989) SC 144 it was observed that the court is empowered to call for relevant case diary if there is any inconsistency or contradiction arising in the context of the case diary and the court can use the entries for the purpose of contradicting the

police officer as provided in Sub-section (3) of Section 172 Cr.P.C. Likewise in State of Bihar and Another v. P.P. Sharma, IAS and Another, [1992] Supp 1 SCC 222 it was observed thus: [SCC p.256, para 41]

> "The only duty cast on the investigation is to maintain a diary of his investigation, which is known as "Case Diary" under Section 172 of the Code. The entries in the case diary are not evidence nor can they be used by the accused or the Court unless the case comes under Section 172(3) of the Code. **The court is entitled for perusal to enable it to find out if the investigation has been conducted on the right lines so that appropriate directions, if need be, be given and may also provide materials showing the necessity to summon witnesses not mentioned in the list supplied by the prosecution or to bring on record other relevant material which in the opinion of the court will help it to arrive at a proper decision in terms of Section 172(3) of the Code.** The primary duty of the police, thus is to collect and sift the evidence of the commission of the offence to find whether the accused committed the offence or has reason to believe to have committed the offence and the evidence available is sufficient to prove the offence and to submit his report to the competent Magistrate to take cognizance of the offence."

17 Now coming to the rights of the accused regarding the use of diaries, this Court in Malkiat Singh and Others v. State of Punjab, [1991] 4 SCC 341 reiterating the view taken in Mannu's case and in Khatri's case (supra) regarding the scope of section 172 (3) also observed thus:

> "The evidence on record clearly shows that the defence has freely used the entries in the case diary as evidence and marked some portions of the diary for contradictions or omissions in the prosecution case. This is clearly in negation of and in the teeth of Section 172(3) of the Code.

It is manifest from its bare reading without subjecting to detailed and critical analysis that the case diary is only a record of day to day investigation of the investigating officer to ascertain the statement of circumstances ascertained through

> the investigation. Under sub-section (2) the court is entitled at the trial or enquiry to use the diary not as evidence in the case, but as aid to it in the inquiry or trial. Neither the accused, nor his agent, by operation of sub-section (3), shall be entitled to call for the diary, nor shall he be entitled to use it as evidence merely because the court referred to it. Only right given thereunder is that if the police officer who made the entries in the diary uses it to refresh his memory or if the court uses it for the purpose of contradicting such witness, by operation of Section 161 of the Code and Section 145 of the Evidence Act, it shall be used for the purpose of contradiction the witness, i.e. Investigation Officer or to explain it in re- examination by the prosecution, with permission of the court It is, therefore, clear that unless the investigating officer or the court uses it either to refresh the memory or contradicting the investigating officer as previous statement under Section 161 that too after drawing his attention thereto as is enjoined under Section 145 of the Evidence Act, the entries cannot be used by the accused as evidence. Neither PW 5 nor PW6, nor the court used the case diary. Therefore, the free use thereof for contradicting the prosecution evidence is obviously illegal and it is inadmissible in evidence. Thereby the defence cannot place reliance thereon. But even if we were to consider the same as admissible that part of the evidence does not impinge upon the prosecution evidence".
> (emphasis supplied)

7 In the case of **Akthar & Ors.** [supra], the point of non-examination of medical officer was considered in the context of Section 294(3) of the Code, 1973 where genuineness of any document filed by a party is not disputed by the opposite party and it can be read as substantive evidence under the above provisions. Para 21 of the judgment reads as under:

> "21 It has been argued that non-examination of the concerned medical officers is fatal for the prosecution. However, there is no denial of the fact that the defence admitted the genuineness of the injury reports and the post mortem examination reports before the trial court. So the genuineness and authenticity of the documents stands proved

> and shall be treated as valid evidence under Section 294 of the CrPC. It is settled position of law that if the genuineness of any document filed by a party is not disputed by the opposite party it can be read as substantive evidence under sub-Section (3) of Section 294 CrPC. Accordingly the post-mortem report, if its genuineness is not disputed by the opposite party, the said post-mortem report can be read as substantive evidence to prove the correctness of its contents without the doctor concerned being examined.

8 The case of **Bhagwan Das** [supra] is on the question of the opinions of the authors which were neither shown nor they were put to the expert witnesses, it is not a satisfactory way of disposing of the evidence to discard it on the ground that statements do not accord with the opinions expressed in the books and in the case of Sunderlal v. State of Madhya Pradesh [AIR 1954 SC 28(A)], the Apex Court disapproved of judges drawing conclusions adverse to the accused by relying on such passages in the absence of their being put to medical witnesses.

9 The case of **Piara Singh** [supra] is on the point of conflict between opinions of medical witnesses in the context of Section 45 of the Evidence Act. The Apex Court held that opinion of that expert which support direct evidence should be accepted and in the facts of this case in detail, ocular version of witnesses vis-a-vis evidence of FSL experts deserves to be considered.

10 Again the case of **Sanjay Rai** [supra] is in the context of Sections 14 and 45 of the Evidence Act and text books by specialist authors, the Apex Court held that though such opinions in such text books may be of considerable assistance and importance for the court in arriving at the truth they cannot be viewed as either conclusive or final to to extent of depriving a court of law of its own conclusion on basis of

peculiar facts actually proved in a given case and that such opinions cannot be elevated to or placed on higher pedestal than opinion of expert / medical witness examined in court. In this decision also the Apex Court considered previous cases in the case of Sunderlal v. State of M.P. [AIR 1954 SC 28] and Bhagwan Das. v. State of Rajasthan [AIR 1957 SC 589].

11 The case of **Santosh Kumar Sikngh** [supra] was relied on the very question that placing reliance on a large number of textbooks and to give adverse findings on the accuracy of the tests of DNA and even putting a question to expert witness was held improper by the Apex Court.

12 The decision in the case of **Mehbub Samsuddin Malek** [supra] was relied relied on the context of Section 120A and 120B of the IPC viz about criminal conspiracy and also about Section 9 of Evidence Act pertaining to identification in which a bus driver stopped the bus near a violent mob of persons armed with weapons and had a talk with mob was held in the circumstances of the case, that there was an agreement between the accused and the said unlawful assembly which was established.

13 In the context of sting operation and evidentiary value thereof case of **Mukesh** [supra] is relief on in which the Apex Court held that the expression “previous statement made” used in Section 145 of the Evidence Act, cannot , in view of Their Lordships be extended to include statements made by a witness after the filing of the charge sheet. For the sake of convenience, 2 unnumbered paras are reproduced herein below:

"Having carefully considered the submissions made on behalf of the respective parties, we are inclined to hold that, from the scheme of the investigation and the materials collected by the prosecution prior to the filing of the charge-sheet under section 161 of the Code, are material for the purposes of Section 145 of the Evidence Act, 1872. The expression "previous statements made" used in Section 145 of the Evidence Act, cannot , in our view, be extended to include statements made by a witness, after the filing of the charge-sheet. In our view, Section 146 of the Evidence Act also does not contemplate such a situation and the intention behind the provisions of Section 146 appears to be to confront a witness with other questions, which are of general nature, which could shake his credibility and also be used to test his veracity. The aforesaid expression must, therefore, be confined to a statements made by a witness before the police during investigation and not thereafter.

Coupled with the above is the fact that the statement made is not a statement before the Police authorities, as contemplated under Section 161 of the Code. It is not that electronic evidence may not be admitted by way of evidence since specific provision has been made for the same under Section 161 of the Code, as amended, but the question is whether the same can be used, as indicated in Section 161, for the purposes of the investigation. If one were to read the proviso to sub-section (3) of Section 161 of the Code, which was inserted with effect from 31st December, 2009, it will be clear that the statements made to the police officer under Section 161 of the Code may also be recorded by audio-video electronic means, but the same does not indicate a statement made before any other authority, which can be used for the purposes of Section 145 of the Evidence Act".

14 The case of **Chandra Prakash** [supra] is about Section 120B of IPC in which investigating agency recovered life time bomb from the stadium and exposed had occurred in which, the Apex Court considered decision in the cases of Yogesh @Sachin Jagdish Joshi v. State of Maharashtra [(2008)10 SC 394], Pratapbhai Hamirbhai Solanki vs.

State of Gujarat [(2013)1 SCC 613], Yakub Abdul Razak Memon v. The State of Maharashtra [2013(3) SCALE 565]. In paras 70 to 72 of the judgment, the Apex Court briefly considered the facets of criminal conspiracy, which are reproduced herein below, for the sake of convenience:

> "**70. While dealing with the facet of criminal conspiracy, it has to be kept in mind that in case of a conspiracy, there cannot be any direct evidence. Express agreement between the parties cannot be proved. Circumstances proved before, during and after the occurrence have to be considered to decide about the complicity of the accused. Such a conspiracy is never hatched in open and, therefore, evaluation of proved circumstances play a vital role in establishing the criminal conspiracy. In this context, we may refer with profit to a passage from Yogesh alias Sachin Jagdish Joshi v. State of Maharashtra[45]: -**
>
> > **"20. The basic ingredients of the offence of criminal conspiracy are: (i) an agreement between two or more persons; (ii) the agreement must relate to doing or causing to be done either (a) an illegal act; or (b) an act which is not illegal in itself but is done by illegal means. It is, therefore, plain that meeting of minds of two or more persons for doing or causing to be done an illegal act or an act by illegal means is sine qua non of criminal conspiracy. Yet, as observed by this Court in Shivnarayan Laxminarayan Joshi v. State of Maharashtra[46] a conspiracy is always hatched in secrecy and it is impossible to adduce direct evidence of the common intention of the conspirators. Therefore, the meeting of minds of the conspirators can be inferred from the circumstances proved by the prosecution, if such inference is possible."**
>
> 71 The same principles have been stated in Pratapbhai Hamirbhai Solanki v. State of Gujarat and another.
>
> 72 In Yakub Abdul Razak Menon v. The State of Maharashtra, through CBI, Bombay[48], analyzing various pronouncements, this Court opined thus: -

> **"68. For an offence Under Section 120B Indian Penal Code, the prosecution need not necessarily prove that the conspirators expressly agreed to do or cause to be done the illegal act, the agreement may be proved by necessary implication. It is not necessary that each member of the conspiracy must know all the details of the conspiracy. The offence can be proved largely from the inferences drawn from the acts or illegal omission committed by the conspirators in pursuance of a common design. Being a continuing offence, if any acts or omissions which constitute an offence are done in India or outside its territory, the conspirators continuing to be the parties to the conspiracy and since part of the acts were done in India, they would obviate the need to obtain the sanction of the Central Government. All of them need not be present in India nor continue to remain in India. The entire agreement must be viewed as a whole and it has to be ascertained as to what in fact the conspirators intended to do or the object they wanted to achieve. (Vide: R.K.Dalmia v. Delhi Administration [[AIR 1962 SC 1821], Lennart Schussler and Anr. v. Director of Enforcement and Anr. [(1970)1 SCC 152], Shivanarayan Laxminarayan Joshi v. State of Maharashtra and Mohammad Usman Mohammad Hussain Maniyar and Anr. v. State of Maharashtra[51])."**

Thus, criminal conspiracy is never hatched in open and evaluation of proved circumstances play a vital role in establishing the criminal conspiracy.

15 The case of **Ajay Agarwal**[supra] is about conspiracy under Section 120A of IPC and that a conspiracy is a continuing offence and continuous to subsist and committed wherever one of the conspirators does an act or series of facts. In this decision, the Apex Court was confronted with requirement of obtaining sanction under section 188 of the Code when offence is committed outside India and in juxtaposition

the same facets of conspiracy containing three elements viz. **[i] agreement [ii] between two or more persons by whom the agreement is effected; and [iii] a criminal object, which may be either the ultimate aim of the agreement, or may constitute the means, or one of the means by which that aims to be accomplished. It is immaterial whether this is found in the ultimate objects.** The Apex Court scanned various definitions even under Law Commission and various decisions of the Apex Court and in paras 9 to 25 held as under:

> "9 This Court in **E.G.Barsay v. State of Bombay [1962] 2 SCR at 229**, held:
>
> > "The (list of the offence is an agreement to break the law. The parties to such an agreement will be guilty of criminal conspiracy, though the illegal act agreed to be done has not been done. So too, it is an ingredient of the offence that all the parties should agree to do a single illegal act. It may comprise the commission of a number of acts. Under section 43 of the Indian Penal Code, an act would be illegal if fit is an offence or if it is prohibited by law".
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> In **Yashpal v. State of Punjab [(1977) SCR 2433]** the rule was laid as follows [para 9]:
>
> > "**The very agreement, concert or league is the ingredient of the offence. It is not necessary that all the conspirators must know each and every detail of the conspiracy as long as they are co-participators in the main object of the conspiracy. There may be so many devices and techniques adopted to achieve the common goal of the conspiracy and there may be division of performances in the chain of actions with one object to achieve the real end of which every collaborator must be aware and in which each one of them must be interested. There must be unity of object or purpose but there may be plurality of means sometimes even unknown to one another, amongst the conspirators. In achieving the goal several offences may be committed by some of the**

conspirators even unknown to the others. The only relevant factor is that all means adopted and illegal acts done must be and purported to be in furtherance of the object of the conspiracy even though there may be sometimes misfire or over-shooting by some of the conspirators".

10 In **Mohammed Usman Mohammad Hussain Manivar & Anr. v. State of Maharashtra [1981] 3 SCR 68**, it was held that for an offence under section 120B IPC, the prosecution need not necessarily prove that the conspirators expressly 556 agreed to do or cause to be done the illegal act. the agreement may be proved by necessary implication. In Noor Mohammed Yusuf Momin v. State of Maharashtra [1971] 1 SCR 119, it was held that s. 120-B IPC makes the criminal conspiracy as a substantive offence which offence postulates an agreement between two or more persons to do or cause to be done an act by illegal means. If the offence itself is to commit an offence, no further steps are needed to be proved to carry the agreement into effect. In R. K. Dalmia & Anr. v. The Delhi Administration, [1963] 1 SCR 253, it was further held that it is not necessary that each member of a conspiracy must know all the details of the conspiracy. In Shivanarayan Laxminarayan & Ors. State of Mahrashtra & Ors. [1980] 2 SCC 465, this court emphasized that a conspiracy is always hatched in secrecy and it is impossible to adduce direct evidence of the same. The offence can be only proved largely from the inferences drawn from acts or illegal omission committed by the conspirators in pursuance of a common design.

11 The question then is whether conspiracy is continuing offence. **Conspiracy to commit crime it self is punishable as a substantive offence and every individual offence committed pursuant to the conspiracy is separate and distinct offence to which individual offenders are liable to punishment, independent of the conspiracy. Yet, in our considered view, the agreement does not come to an end with its making, but would endure till it is accomplished or abandoned or proved abortive**. Being a continuing offence, if any acts or omissions which constitutes-an offence, are done in India or outside its territory the conspirators continuing to be parties to the conspiracy and since part of the acts were done in India, they would obviate the need to obtain sanction of the Central Govt. all of them need not be present in India nor continue to remain

in India. In lennart Schussler- & Anr. v. Director of Enforcement & Anr. [1970] 2 SCR 760, a Constitution Bench of this Court was to consider the question of conspiracy in the setting of the facts, stated thus:

> "A. 2 was the Managing Director of the Rayala Corporation Ltd. Which manufactures Halda Typewriters. A. 1 was an Export Manager of ASSAB. A. 1 and A.2 conspired that A.2 would purchase material on behalf of his Company from ASSAB instead of M/s Atvidaberos, which provided raw material. A.2 was to over-invoice the value of the goods by 40 per cent of true value and that he should be paid the difference of 40 per cent on account of the aforesaid over-invoicing by crediting it to A.2's personal account at Stockholm in a Swedish Bank and requested A. 1 to help him in opening the account in Swenska Handles Banken, Sweden and to have further 557 deposits to his personal account from ASSAB. A. 1 agreed to act as requested by A.2 and A.2 made arrangements with ASSAB to intimate to A. 1 the various amounts credited to A.2's account and asked A. 1 to keep a watch over the correctness of the account and' to further intimate to him the account position from time to time through unofficial channels and whenever A. 1 come to India. A. 1 agreed to comply with this request. This agreement was entered into between the parties in the year 1963 at Stockholm and again in Madras in the year 1965. The question was whether Sec. 120-B of the Indian Penal Code was attracted to these facts".

12 Per majority, Jaganmohan Reddy, J. held that the gist of the offence defined in s. 120-A IPC, which is itself punishable as a substantive offence is the very agreement between two or more persons to do or cause to be done an illegal act or legal act by illegal means, subject, however, to the proviso that where the agreement is not an agreement to commit an offence, the agreement does not amount to a conspiracy unless it is followed up by an overt act done by one or more persons in pursuance of such an agreement. There must be a meeting of minds in the doing of the illegal act or the doing of a legal act by illegal means. If. in furtherance of the conspiracy, certain persons are induced to do an unlawful act without the knowledge of the conspiracy or the plot they cannot be held to

be conspirators, though they may be guilty of an offence pertaining to the specific unlawful act. The offence of conspiracy is complete when two or more conspirators have agreed to do or cause to be done an act which is itself an offence, in which case no overt act need be established. It was contended in that regard that several acts which constitute to make an offence under s. 120-B may be split up in parts and the criminal liability of A. 1 must only be judged with regard to the part played by him. He merely agreed to help A.2 to open an account in the Swedish Bank, having the amounts lying to the credit of A.2 with Atvidaberg to that account and to help A.2 by keeping a watch over the account. Therefore, it does not amount to a criminal conspiracy. While negating the argument, this court held thus [AIR 1970 SC 549 at p.555, para 9]:

> "It appears to us that this is not a justifiable contention, because what has to be seen is whether the agreement between A. 1 and A.2 is a conspiracy to do or continue to do something which is illegal and, if it is, it is immaterial whether the agreement to do any of the acts in furtherance of the commission of the offence do not strictly amount to an offence. the entire agreement must be viewed as a whole and it has to be ascertained as to what in fact the conspirators intended to do or the object they wanted to achieve".

13 **Thus, this court, though not in the context of jurisdictional issue, held that the agreement not illegal at its inception would become illegal by subsequent conduct and an agreement to do an illegal act or to do a legal act by illegal means, must be viewed as a whole and not in isolation. It was also implied that the agreement shall continuing- till the object is achieved. The agreement does not get terminated by merely entering into an agreement but it continues to subsist till the object is either achieved or terminated or abandoned.**

14 In **Abdul Kader v. State AIR 1964 Bombay 133**, a conspiracy was formed in South Africa by appellants to cheat persons by dishonestly inducing them to deliver money in the Indian currency by using forced documents and the acts of cheating were committed in India. When the accused were charged with the offence of conspiracy, it was contended that the conspiracy was entered into and was completed in South

Africa and, therefore, the Indian Courts had no jurisdiction to try the accused for the offence of conspiracy. The Division Bench held that though the conspiracy was entered in a foreign country and was completed as soon as the agreement was made, yet it was treated to be a continuous offence and the persons continued to be parties to the conspiracy when they committed acts in India. Accordingly, it was held that the Indian Courts had jurisdiction to try the offence of conspiracy. In U.S. v. Kissal (1909) 218 US 601, Holmes, J. held that conspiracy is a continuous offence and stated "is a perversion of natural thought and of natural language to call such continuous co-operation of a cinema to graphic series of distinct conspiracies rather than to call it a single one... a conspiracy is a partnership in criminal purposes. That as such it may have continuation in time. is shown by the rule that overt act by one partner may be the act of all without any new agreement specifically directed to that act". In Ford v. U. S. (1926) 273 US 593 at 620 to 622, Tuft, C.J. held that conspiracy is a continuing offence.

15 In Director of public Prosecutions v. Door and Ors. 1973 Appeal Cases 807 (H.L.), the five respondents hatched a plan abroad, i.e. Belgium and Morocco and worked out the details to import cannabis into the United States via England, In pursuance thereof two vans with cannabis concealed in them were shipped from Morocco to Southampton; the other van was traced at Liverspool, from where the vans were to have been shipped to America and the cannabis in it was found. They were charged among other offences with conspiracy to import dangerous drugs. At the trial, the respondents contended that the Courts in England had no jurisdiction to try them on the count of conspiracy since the conspiracy had been entered into abroad. While rejecting the contention, Lord Wilberforce held (at page 817)

> "The present case involves international elements the accused are 559 aliens and the conspiracy was initiated abroad but there can be no question here of any breach of any rules of international law if the) are prosecuted in this country. Under the objective territorial principle (use the terminology of the Harward Research in International Law) or the principle of University (For the prevention of the trade in narcotics falls within this description)or both, the courts of this country have a

clear right, if not a duty, to prosecute in accordance with our municipal law. The position as it is under the international law it not, however, determinative of the question whether, under our municipal law, the acts committed amount to a crime. That has to be decided on different principles. If conspiracy to import drugs were a statutory offence, the question whether foreign conspiracies were included would be decided upon the terms of the statute. Since it is (if at all) a common law offence, this question must be decided upon principle and authority- In my opinion, the key to a decision for or against the offence charged can be found in an answer to the question why the common law treats certain actions as crimes. And one answer must certainly be because the actions in question are a threat to the Queen's peace or as we would now perhaps say, to society. Judged by this test, there is every reason for, and none that I can see against, the prosecution. Conspiracies are intended to be carried into effect, and one reason why, in addition to individual prosecution of each participant, conspiracy charges are brought is because criminal action organised and executed, in concert is more dangerous than an individual breach of law. Why, then, restrain from prosecution where the relevant concert was, initially, formed outside the United Kingoom?...The truth is that, in the normal case of a conspiracy carried out, or partly carried out, in this country, the location of the formation of the agreement is irrelevant; the attack upon the laws of this country is identical wherever the conspirators happened to commit; the "conspiracy" is a complex formed indeed, but not separately completed, at the first meeting of the plotters".
[emphasis supplied]

16 **Viscount Dilhorne at page 823** laid the rule that:

"**a conspiracy does not end with the making of the agreement. It will continue so long as there are two or more parties to it intending to carry out the design. It would be highly unreal to say that the conspiracy to carry out the Gunpower plot was completed when the conspirators met and agreed to the plot at Catesby".**

At page 825B it was concluded thus:

> "The conclusion to which I have come after consideration of these authorities and of many other to which the House was referred but to which I do not think it is necessary to refer is that though the offence of conspiracy is complete when the agreement to do unlawful act is made and it is not necessary for the prosecution to do more than prove the making of such an agreements conspiracy does not end with the making of the agreement. It continues so long as the parties to the agreement intended to carry it out...."

Lord Pearson at page 827 held that:

> **"a conspiracy involved an agreement express or implied. A conspiratorial agreement is not a contract, not legally binding because it is unlawful. But as an agreement it has its three stages, namely, [1] making or formation; [2] performance or implementation; [3] discharge or termination. When the conspiratorial agreement has been made, the offence of conspiracy is complete, it has been committed, and the conspirator can be prosecuted even though no performance had taken place. But the fact that the offence of conspiracy is complete at that stage does not mean that the conspiratorial agreement is finished with. It is not dead. If it is being performed, it is very much alive. So long as the performance continues, ti is operating, it is being carried out by the conspirators, and it is governing or at any rate influencing their conduct. The conspiratorial agreement continues in operation and therefore in existence until it is discharged (terminated) by completion of its performance or by abandonment or frustration or, however, it may be".**

Lord Salmon at page 833 observed:

> **"If a conspiracy is entered into abroad to commit a crime in England, exactly the same public mischief is produced by it as if it had been entered into here. It is unnecessary for me to consider what the position might be if the conspirators came to England for an**

> **entirely innocent purpose unconnected with the conspiracy.** If however, the conspirators come here and do acts in furtherance of the conspiracy, for example, by preparing to commit the planned crime it cannot, in my view, be considered contrary to the rules of international comity for the forces of law and order in England to protect the Queen's peace by arresting them and putting them in trial for conspiracy whether they are British subjects or foreigners and whether or not conspiracy is a crime under the law of the country in which the conspiracy was born".

17 At page 835 it was held that the respondents conspired together in England notwithstanding the fact that they were abroad when they entered into the agreement which was the essence of the conspiracy. That agreement was and remained a continuing agreement and they continued to conspire until the offence they were conspiring to commit was in fact committed. Accordingly, it was held that the conspiracy, though entered into abroad, was committed in England and the courts in England and jurisdiction. The ratio emphasizes that acts done in furtherance of continuing conspiracy constitute part of the cause of action and performance of it gives jurisdiction for English Courts to try the accused.

18 In Trecy v. Director of Public Prosecutions 1971 Appeal Cases 537 at 563 (HL) the facts of the case were that the appellant therein posted in the Isle of Wright a letter written by him and addressed to Mrs. X in West Germany demanding money with menaces. The letter was received by Mrs. X in West Germany. The appellant was charged with black mail indictable s. 21 of the Theft Act, 1968. While denying the offence, it was contended that the courts in England were devoted of jurisdiction. Over-ruling the said objection, Lord Diplock at page 562 observed:

> "The State is under a correlative duty to those who owe obedience to its laws to protect their interests and one of the purposes of criminal law is to afford such protection by determining by threat of punishment conducted by other persons which is calculated to hand to those interests. Comity gives no right to a State to insist that any person may with immunity do physical acts in its own territory which have harmful consequences to

> persons within the territory of another state. It may be under no obligation in comity to punish those acts itself, but it has no ground from complaint in international law if the State in which the harmful consequences had their effect punishes, when they do enter its territories, persons who did such acts".

19 **Prof. Williams, Glanville in his article "Venue and the Ambit of Criminal Law [1965] LQR 518 at 528** stated thus:

> "Sometimes the problem of determining the place of the crime is assisted by the doctrine of the continuing crime. Some crimes are regarded as being of a continuing nature, and they may accordingly be prosecuted in any jurisdiction in which they are partly committed the partial commission being, in the eye of the law, a total commission'.

20 In the context of conspiracy under the caption inchoate crimes" It was stated:

> "The general principle seems to be that jurisdiction over an inchoate crime appertains to the State that would have had jurisdiction had the crime been consummated".

Commenting upon the ratio laid down in Board of Trade v. Owen [1957] Appeal Cases 602, he stated at page 534 thus

> "The seems to follow owen as logical corollary that our courts will assume jurisdiction to punish a conspiracy entered into abroad to commit a crime here. Although the general principle is that crime committed abroad do not become punishable here merely because their evil effects occur here, there may be an exception for inchoate crimes aimed against persons in this country. Since conspiracy is the widest and vaguest of the inchoate crimes, it seems clearly that the rule for conspiracy must apply to more limited crimes of incitement and attempt also".

21 At page 535 he further stated that "the rule of inchoate crimes is therefore an exception from the general principle of territorial jurisdiction. The crime is wholly committed in the State A, yet is justiciable also in State B". At page 535 he

elucidated that "certain exceptions are recognised or suggested". Lord Tucker in own's case (supra) illustrated that a conspiracy D 2 England to violate the laws of a foreign country might be justiciable here if the preferments the conspiracy charged would produce a public mischief within the State or injure a person here by causing him damage, abroad". At page 536 be stated that "as another exception from the rule in Board of, Trade v. Owen (supra it seems from the earlier decision that a conspiracy entered into here will be punishable if the conspirators contem plates that the illegality may be performed either within British jurisdiction or abroad even though, in the event, the illegality is performed abroad". His statement of law now receives acceptance by House of Lords in Doot's case.

22 In **Halsbury's Law of England,** third edition, vol. 10, page 327, para 602, while dealing with continuing offence it was stated as under:

> "A criminal enterprise may consist of continuing act which is done in more places than one or of a series of acts which are done in several places. In such cases, though there is one criminal enterprise, there may be several crimes, and a crime is committed in each place where a complete criminal act is performed although the act may be only a part of the enterprise".

It was further elucidated in para 603 that:

> "What constitutes a complete criminal act is determined by the nature of the crime. Thus, as regards continuing acts, in the case of sending by post or otherwise a libellous or threatening letter, or a letter to provoke a breach of the peace, a crime is committed, both where the letter is posted or otherwise sent, and also where it is received, and the venue may be laid in either place.

23 **Archbold in Criminal Pleadings, Evidence and Practice, 42nd edition (1985) Chapter 23, in para 28-32 at p. 2281**, Wright on Conspiracies and Agreements at pages 73-74, Smith on Crimes at page 239 and Russel on Crime, 12th edition, page 613 stated that conspiracy is a continuing offence and liable to prosecution at the place of making the agreement and also in the country where the acts are committed.

24 Thus, an agreement between two or more persons to do an illegal act or legal acts by illegal means is criminal conspiracy. If the agreement is not an agreement to commit an offence, it does not amount to conspiracy unless it is followed up by an overt act done by one or more persons in furtherance of the agreement. The offence is complete as soon as there is meeting of minds and unity of purpose between the conspirators to do that illegal act or legal act by illegal means. Conspiracy itself is a substantive offence and is distinct from the offence to commit which the conspiracy is entered into. It is undoubted that the general conspiracy is distinct from number of separate offences committed while executing the offence of conspiracy. Each act constitutes separate offence punishable, independent of the conspiracy. The law had developed several or different models or technics to broach the scope of conspiracy. One such model is that of a chain, where each party performs even without knowledge of other a role that aids succeeding parties in accomplishing the criminal objectives of the conspiracy. An illustration, of a single conspiracy, its parts bound together as links in a chain, is 564 the process of procuring and distributing narcotics or an illegal foreign drug for sale in different parts of the (,lobe. In such a case, smugglers, middlemen and retailers are privies to a single conspiracy to smuggle and distribute narcotics. The smugglers knew that the middlemen must sell to retailers-, and the retailers knew that the middlemen must buy of importers of someone or another. Thus the conspirators at one end of the chain knew that the unlawful business would not, and could not, stop with their buyers, and those at the other end knew that it had not begun with their settlers. The accused embarked upon a venture in all parts of which each was a participant and an abettor in the sense that, the success of the part with which he was immediately concerned, was dependent upon the success of the whole. It should also be considered as a spoke in the hub. There is a rim to bind all the spokes to gather in a single conspiracy. It is not material that a rim is found only when there is proof that each spoke was aware of one another's existence but that all promoted in furtherance of some single illegal objective. The traditional concept of single agreement can also accommodate the situation where a well defined group conspires to commit multiple crimes so long as all these crimes are the objects of the same agreement or continuous conspiratorial relationship, and the conspiracy continues to subsist though it was entered

in the first instance. Take for instance that three persons hatched a conspiracy in country 'A' to kill 'D' in country 'B' with explosive substance. As far as conspiracy is concerned, it is complete in country 'A' one of them pursuant thereto carried the explosive substance and hands it over to third one in the country 'B' who implants at a place where 'D' frequents and got exploded with remote control. 'D' may be killed or escape or may be diffused. The conspiracy continues-till it is executed in country 'B' or frustrated. Therefore, it is a continuing act and all are liable for conspiracy in country 'B' though first two are liable to murder with aid of s. 120-B and the last one is liable under s. 302 or 307 IPC, as the case may be. Conspiracy may be considered to be a march under a banner and a person may join or drop out in the march without the necessity of the change in the text on the banner. In the comity of International Law, in these days, committing offences on international scale is a common feature. The offence of conspiracy would be a useful weapon and there would exist no conflict in municipal laws and the doctrine of autre fois convict or acquit would extend to such offences. The comity of nations are duty bound to apprehend the conspirators as soon as they set their feet on the country territorial limits and nip the offence in the bud.

25 A conspiracy thus, is a continuing offence and continues to subsist and committed wherever one of the conspirators does an act or series of acts. So long as its performance continues, it is a continuing offence till it is executed or rescinded or frustrated by choice or necessity. A crime is complete as soon as the agreement is made, but it is not a thing of the moment. It does not end with the making of the 565 agreement. It will continue so long as there are two or more parties to it intending to carry into effect the design. Its continuance is a threat to the society against which it was aimed at and would be dealt with as soon as that jurisdiction can properly claim the power to do so. The conspiracy designed or agreed abroad will have the same effect as in India, when part of the acts, pursuant to the agreement are agreed to be finalised or done, attempted or even frustrated and vice versa".

16 **The case of Pargan Singh [supra] was relied with regard to identification of accused before the court after lapse of 7 years of the incident. Paras 15 and 16 of the decision reads as under:**

"15 Before entering upon the discussion on this aspect specific to this case, we would like to make some general observations on the theory of "memory". Scientific understanding of how memory works is described by Geoffrey R. Loftus while commenting upon the judgment dated January 16, 2002 rendered in the case of Javier Suarez Medina v. Janie Cockrell by United States Court of Appeals, Fifth Circuit in Case No.01-10763. He has explained that a generally accepted theory of this process was first explicated in detail by Neisser (1967) and has been continually refined over the intervening quarter-century. The basic tenets of the theory are as follows: First, memory does not work like a video recorder. Instead, when a person witnesses some complex event, such as a crime, or an accident, or a wedding, or a basketball game, he or she acquires fragments of information from the environment. These fragments are then integrated with other information from other sources. Examples of such sources are: information previously stored in memory that leads to prior expectations about what will happen, and information-both information from external sources, and information generated internally in the form of inferences- that is acquired after the event has occurred. The result of this amalgamation of information is the person's memory for the event. Sometimes this memory is accurate, and other times it is inaccurate. An initial memory of some event, once formed, is not "cast in concrete." Rather, a memory is a highly fluid entity that changes, sometimes dramatically, with the passage of time. Every time a witness thinks about some event-revisits his or her memory of it-the memory changes in some fashion. Such changes take many forms. For instance, a witness can make inferences about how things probably happened, and these inferences become part of the memory. New information that is consistent with the witness's beliefs about what must have happened can be integrated into the memory. Details that do not seem to fit a coherent story of what happened can be stripped away. In short, the memory possessed by the witness at some later point (e.g., when the witness testifies in court) can be quite different from the memory that the witness originally formed at the time of the event. Memory researchers study how memory works using a variety of techniques. A common technique is to try to identify circumstances under

which memory is inaccurate versus circumstances under which memory is accurate. These efforts have revealed four major sets of circumstances under which memory tends to be inaccurate. The first two sets of circumstances involve what is happening at the time the to-be-remembered event is originally experienced, while the second two sets of circumstances involve things that happen after the event has ended. The first set of circumstances involves the state of the environment at the time the event is experienced. Examples of poor environmental conditions include poor lighting, obscured or interrupted vision, and long viewing distance. To the degree that environmental conditions are poor, there is relatively poor information on which to base an initial perception and the memory that it engenders to begin with. This will ultimately result in a memory that is at best incomplete and, as will be described in more detail below, is at worst systematically distorted. The second set of circumstances involves the state of the observer at the time the event is experienced. Examples of suboptimal observer states include high stress, perceived or directly inflicted violence, viewing members of different races, and diverted attention. As with poor environmental factors, this will ultimately result in a memory that is at best incomplete and, as will be described in more detail below, is at worst systematically distorted. The third set of circumstances involves what occurs during the retention interval that intervenes between the to-be-remembered event and the time the person tries to remember aspects of the event. Examples of memory-distorting problems include a lengthy retention interval, which leads to forgetting, and inaccurate information learned by the person during the retention interval that can get incorporated into the person's memory for the original event. The fourth set of circumstances involves errors introduced at the time of retrieval, i.e., at the time the person is trying to remember what he or she experienced. Such problems include biased tests and leading questions. They can lead to a biased report of the person's memory and can also potentially change and bias the memory itself.

16 While discussing the present case, it is to be borne in mind that the manner in which the incident occurred and description thereof as narrated by PW-2, has not been questioned on the ground that narration should not be

believed because of lapse of time. Instead, the appellants have joined issue on a very limited aspects viz. their identification on the ground that faces of the culprits could not have been remembered after 7½ years of the occurrence as memory fades by that time".

17 The case of **Devender Pal Singh** [supra] is in the context of Section 120A and 120B of the IPC in which the Apex court considered the definition of criminal conspiracy under section 120A and in paras 39 to 51 and held as under:

"39 120-A- When two or more persons agree to do, or cause to be done-

[1] an illegal act, or

[2] an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy:

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof."

40 The element of a criminal conspiracy have been stated to be: (a) an object to be accomplished, (b) a plan or scheme embodying means to accomplish that object, (c) an agreement or understanding between two or more of the accused persons whereby they become definitely committed to co-operate for the accomplishment of the object by the means embodied in the agreement, or by any effectual means, (d) in the jurisdiction where the statute required an overt act. The essence of a criminal conspiracy is the unlawful combination and ordinarily the offence is complete when the combination is framed. From this, it necessarily follows that unless the statute so requires, no overt act need be done in furtherance of the conspiracy, and that the object of the combination need not be accomplished, in order to constitute an indictable offence. Law making conspiracy a crime is designed to curb immoderate power to do mischief which is gained by a combination of the means. The encouragement and support which co-conspirators

give to one another rendering enterprises possible which, if left to individual effort, would have been impossible,furnish the ground for visiting conspirators and abettors with condign punishment. The conspiracy is held to be continued and renewed as to all its members wherever and whenever any member of the conspiracy acts in furtherance of the common design. (See American Jurisprudence Vol.II Section 23, p. 559). For an offence punishable under Section 120B,prosecution need not necessarily prove that the perpetrators expressly agree to do or cause to be done illegal act; the agreement may be proved by necessary implication. Offence of criminal conspiracy has its foundation in an agreement to commit an offence. A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and an act of each of the parties, promise against promise, actus contra actum, capable of being enforced, if lawful,punishable if for a criminal object or for use of criminal means.

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

42 In Halsbury's Laws of England (Vide 4 th Ed., Vol. 11, page 44, para58), the English Law as to conspiracy has been stated thus-

> "Conspiracy consists in the agreement of two or more persons to do an unlawful act, or to do a lawful act by unlawful means. It is an indictable offence at common law,the punishment for which is imprisonment or fine or

both in the discretion of the Court.

The essence of the offence of conspiracy is the fact of combination by agreement. The agreement may be express or implied, or in part express and in part implied. The conspiracy arises and the offence is committed as soon as the agreement is made; and the offence continues to be committed so long as the combination persists, that is until the conspiratorial agreement is terminated by completion of its performance or by abandonment or frustration or however, it may be. The actus reus in a conspiracy is the agreement to execute the illegal conduct, not the execution of it. It is not enough that two or more persons pursued the same unlawful object at the same time or in the same place; it is necessary to show a meeting of minds, a consensus to effect an unlawful purpose. It is not, however, necessary that each conspirator should have been in communication with every other."

43 There is no difference between the mode of proof of the offence of conspiracy and that of any other offence, it can be established by direct or circumstantial evidence. **[See Bhagwan Swarup etc. etc. v. State of Maharashtra (AIR 1965 SC 682 at p. 686)**].

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

45 The provisions of Sections 120A and 120B, IPC have brought the law of conspiracy in India in line with the English Law by making the ovet act unessential when the conspiracy is to commit any punishable offence. The English Law on this matter is well-settled. Russell on Crime(12 Ed.

Vol.1, p.202) may be usefully noted-

> "The gist of the offence of conspiracy then lies, not in doing the act, or effecting the purpose for which the conspiracy is formed, nor in attempting to do them, nor in inciting others to do them, but in the forming of the scheme or agreement between the parties agreement is essential. Mere knowledge, or even discussion, of the plan is not, per se,enough."

46 **Glanville Williams in the "Criminal Law" (Second Ed p.382)** states-

> "The question arose in an Iowa case, but it was discussed in terms of conspiracy rather than of accessoryship. D, who had a grievance against P. told E that if he would whip P someone would pay his fine. E replied that he did not want anyone to pay this fine. that he had a grievance of his own against P and that he would whip him at the first opportunity. E whipped P. D was acquitted of conspiracy because there was no agreement for 'concert of action, no agreement to 'co-operate'.

47 **Coleridge, J, while summing up the case to Jury in Regina v. Murphy** (1937) 173 ER 502 at p. 508) states:

> "I am bound to tell you, that although the common design is the root of the charge, it is not necessary to prove that these tow parties came together and actually agreed in terms to have this common design and to pursue it by common means, and so to carry ti into execution. This is not necessary, because in many cases of the most clearly established conspiracies there are not means of proving any such thing, and neither law nor common sense requires that it should be proved. If you find that these two persons pursued by their acts the same object, often by the same means, one performing one part of an act, so as the complete it, with a view to the attainment of the object which they were pursuing,you will be at liberty to draw the conclusion that they have been engaged in a conspiracy to effect that object. The question you have to ask yourselves is. 'Had they this common design, and did they pursue it by these common means the design being unlawful."

48 As noted above, the essential ingredient of the offence of criminal conspiracy is the agreement to commit an offence. In a case where the agreement is for accomplishment of an act which by itself constitutes an offence, then in that event no overt act is necessary to be proved by the prosecution because in such a situating criminal conspiracy is established by proving such an agreement. Where the conspiracy alleged is with regard to commission of a serious crime of the nature as contemplated in Section120B read with the proviso to Sub-section (2) of Section 120A, then in that event mere proof of an agreement between the accused for commission of such a crime alone is enough to bring about conviction under Section 120B and the proof of any overt act by the accused or by any one of them would not be necessary. The provisions, in such a situation, do not require that each and very person who is a party to the conspiracy must do some overt act towards the fulfillment of the object of conspiracy, the essential ingredient being an agreement between the conspirators to commit the crime and if these requirements and ingredients are established, the act would fall with in the trapping of the provisions contained in Section 120B [See Suresh Chandra Bahri v. State of Bihar [1995 Supp. (1) SCC 80].

49 The conspiracies are not hatched in open, by their nature, they are secretly planned, they can be proved even by circumstantial evidence, the lack of direct evidence relating to conspiracy has no consequence. [See E.K. Chandrasenan v. State of Kerala [(1995)2 SCC 99].

50 In Kehar Singh and Ors. v. State (Delhi Administration) , this Court observed-

> "275 Generally, a conspiracy is hatched in secrecy and it may be difficult to adduce direct evidence of the same. The prosecution will often rely on evidence of acts of various parties to infer that they were done in reference to their common intention. The prosecution will also more often rely upon circumstantial evidence. The conspiracy can be undoubtedly proved by such evidence direct or circumstantial. But the Court must enquire whether the two persons are independently pursuing the same end or they have come together to the pursuit of the unlawful object. The former does not render them

> conspirators, but the latter does. It is,however, essential that the offence of conspiracy required some king of physical manifestation of agreement. The express agreement , however, need not be proved. Nor actual meeting of the two persons is necessary. Nor it is necessary to prove the actual words of communication. The evidence as to transmission of thoughts sharing the unlawful design may be sufficient".

Conspiracy can be proved by circumstances and other materials. (See: State of Bihar v. Paramhans [1986 Pat LJR 688].

> "To establish a charge of conspiracy knowledge about indulgence in either an illegal act or a legal act by illegal means is necessary. In some cases, intent of unlawful use being made f the goods or service in question may be inferred form the knowledge itself. This apart, the prosecution has not to establish that a particular unlawful use was intended, so long as the goods or service in question could not be put to any lawful use. Finally, when the ultimate offence consists of a chain of actions, ti would not be necessary for the prosecution to establish, to bring home the charge of conspiracy, that each of the conspirators had the knowledge of what the collaborator would do so, so long as it is known that the collaborator would put the goods or service to an unlawful use [See : State of Maharashtra v. Som Nath Thapa [(1996)4 SCC 659, Cr.LJ 2448 at p. 2453(SC) at p. 668, para 24]".

51 Where trust worthy evidence establishing all links of circumstantial evidence is available, the confession of a co-accused as to conspiracy even without corroborative evidence can be taken into consideration. [See Baburao Bajirao Patil v. State of Maharashtra [(1971)3 SCC 432]. It can in some cases be inferred for the acts and conduct of parties. [See Shivanarayan Laxminarayan Joshi and Ors. v. State of Maharashtra and Ors. [(1980)2 SCC 465].

18 In the above case, the Apex Court considered the cases of Bachan Singh v. State of Punjab [(1980)2 SCC 684] and Machhi

Singh v. State of Punjab [(1983)3 SCC 470]. That paras 52 to 54 are pertaining to benefit of doubt and that proof beyond reasonable doubt is a guideline, not a fetish. Paras 52 to 54 of the above judgment read as under:

> "52. It is submitted that benefit of doubt should be given on account of co-accused's acquittal.
>
> 53 Exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicions and thereby destroy social defence. Justice cannot be made sterile on the plea that it is better to let hundred guilty escape than punish an innocent. Letting guilty escape is not doing justice according to law. [See Gurbachna Singh v. Stapal Singh and Ors.][(19990)1 SCC 445]. Prosecution is not required to meet any and every hypothesis put forward by the accused. [See State of U.P. v. Ashok Kumar Srivastava][(1992)2 SCC 86].
>
> 54 If a case is proved perfectly it is argued that it is artificial; if a case has some flaws, inevitable because human beings are prone to err, it is argued that it is too imperfect. One wonders whether in the meticulous hypersensitivity to eliminate a rare innocent form being punished, many guilty persons must be allowed to escape. Proof beyond reasonable doubt is a guideline, not a fetish. [See Inder Singh and Anr. v. State (DelhiAdministration)][(1978)4 SCC 161]. Vague hunches cannot take place of judicial evaluation.
>
> "A Judge does not preside over a criminal trial,merely to see that no innocent man is punished. A judge also presides to see that a guilty man does not escape. Both are public duties." [Per Viscount Simon in Stirlant v. Director of Public Prosecution (1944 AC(PC) 315) quoted in State of U.P. v. Anil Singh] [(1988 Supp SCC 686], SCC p. 692, para 17]".

19 The decisions of **Kunju @Balchandran** [supra], **Ravi** [supra] and **Gulam Sarbar** [supra] are in the context of Section 134 of the Evidence Act and it is submitted that quality and not the quantity of witnesses is important and if testimony of solitary witness is not shaken in a lengthy cross-examination and that the same is corroborated by

other evidence, though not fully supporting the case of the prosecution, conviction based on sole testimony of such witness cannot be interfered with. That test is whether the evidence of such witness has a ring of truth and it is cogent, credible and trustworthy and inspires confidence and therefore reliable.

PART XI-C

Analysis of case law relied on by Shri B.B.Naik, Senior Advocate appearing for Victims

1 In the case of **Harjagdev Singh [supra]**, the trial court convicted the accused under Section 302 of the IPC for allegedly killing his parents. By relying on judicial confession of his parents recorded under Section 164 of the Code, 1973, however, the High Court, on the ground that requisite procedure for recording confession under Section 164 was not followed and directed acquittal was held to be not proper by the Apex Court by holding that an act of recording confessions under section 164 is a very solemn act and in discharging his duties under the said Section, Judicial Magistrate is required to take care to see that requirements of Section 164(2) are fully satisfied and when necessary questions are asked and due care is taken before recording statement of accused such a confessional statement of accused could be used in evidence against him.

2 In the case of **Henry Westmuller Roberts etc. [supra]**, time for reflection to accused was argued that it was inadequate and, therefore, confessional statement was to be rejected. But repelling the argument, the Apex Court in para 32 held that the court appreciating such evidence of confessional statement has to assure genuineness and

voluntary nature of confessions and even if such statement is retracted, but if it is corroborated by circumstantial evidence, there is no satisfactory reason for the confession not being accepted and acted upon. Para 32 of the judgment read as under:

> "32 A perusal of these confessional statements, Exs. 6 and 7 shows that they are more or less exculpatory of the maker, for Henry had attributed everything to Sunil and stated that he had done every thing at the instance of Sunil while Sunil had attributed the important roll in the crime to Henry. As pointed out by Mr. Rajender Singh, Senior Counsel appearing for complainant, P.W. 23, this would not normally be the position if the confessions were the result of tutoring by the police. The confessional statement of Henry is quite long while that of Sunil is much longer. As remarked by the learned Sessions Judge these confessions are full of facts and minute details which would not be there normally if the confessions are the result of tutoring or of compulsion. The circumstantial evidence relied upon by the trial court and the High Court lend assurance to the genuineness and voluntary nature of these confessions. They have no doubt been retracted, but in view of the fact that they are generally corroborated by the circumstantial evidence in ample measure, there is no satisfactory reason for the confessions not being accepted and acted upon. In these circumstances, we agree with the learned Sessions Judge that the confessional statements of Henry and Sunil, Exs. 6 and 7, are voluntary and can be acted upon, together with the circumstantial evidence, for basing a conviction".

The Apex Court in para 33 agreed with the court below that the corpus delicti has been correctly established by the prosecution to be that of Sanjay, who was killed and thereafter in para 35 enumerated the circumstances found by the Trial Court and the learned Judges of the High Court to have been proved satisfactorily against the accused.

3 In the case of **Mohd. Jamiludin Nasir** [supra], in the context of attack on American Center in Calcutta in which 5 police

personnel were killed and 13 policemen and many civilians were injured in which accused were charged under Section 120B, 121, 121-A, 122, 302, etc. of IPC and also the Apex Court considered confession recorded under section 164 of Code, 1973 in which minor discrepancies were held not to discredit confession. In the context of facts of that case it was further held that minor discrepancies in a confession recorded under Section 164 cannot be treated as a non-corroborative factor and sections 24 to 26 were also considered. The Apex Court also deliberated on evidentiary value of such confessional statement of co-accused under Section 164 of the Code, 1973 by addressing to Sections 10 and 30 of the Evidence Act, 1872. [This judgment also taken into consideration decision in the case of the Apex Court in the cases of Bachan Singh v. State of Punjab [(1980)2 SCC 684], Machhi Singh v. State of Punjab [(1983)3 SCC 470], State [NCT of Delhi] v. Navjot Sandhu [(2005)11 SCC 600] and Mohd. Ajmal Amir Kasab v. State of Maharashtra [(2012)9 SCC 1] in the context of Section 120B and Section 121, 121A, 122 and 302 of IPC].

4 The case of **Bhagwan Swarup Lal Bishan Lal** [supra] is with regard to Section 120A of IPC vis-a-vis proof of criminal conspiracy and scope and applicability of Section 10 of Evidence Act. Para 8 of the judgment reads as under:

> "8 Before dealing with the individual cases, as some argument was made in regard to the nature of the evidence that should be adduced to sustain the case of conspiracy, it will be convenient to make at this stage some observations thereon. Section 120-A of the Indian Penal Code defines the offence of criminal conspiracy thus:
>
> > "When two or more persons agree to do, or cause to be done an illegal act, or an act which is not illegal by illegal means, such an agreement is designated a

> criminal conspiracy. "

The essence of conspiracy is, therefore, that there should be an agreement between persons to do one or other of the acts described in the section. The said agreement may be proved by direct evidence or may be inferred from acts and conduct of the parties. There is no difference between the mode of proof of the offence of conspiracy and that of any other offence : it can be established by direct evidence or by circumstantial evidence. But S. 10 of the Evidence Act introduces the doctrine of agency and if the conditions laid down therein are satisfied, the act done by one is admissible against the coconspirators. The said section reads :

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

This section, as the opening words indicate, will come into play only when the Court is satisfied that there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, that is to say, there should be a prima facie evidence that a person was a party to the conspiracy before his acts can be used against his co-conspirators. Once such a reasonable ground exists, anything said, done or written by one of the conspirators in reference to the common intention, after the said intention was entertained, is relevant against the others, not only for the purpose of proving the existence of the conspiracy but also for proving that the other person was a party to it. The evidentiary value of the said acts is limited by two circumstances, namely, that the acts shall be in reference to their common intention and in respect of a period after such intention was entertained by any one of them. The expression "in reference to their common intention" is very comprehensive and it appears to have been designedly used to give it a wider scope than the words "in furtherance of" in the English law; with the result,

> anything, said, done or written by a co-conspirator, after the conspiracy was formed, will be evidence against the other before he entered the field of conspiracy or after he left it. Another important limitation implicit in the language is indicated by the expressed scope of its relevancy. Anything so said, done or written is a relevant fact only "as against each of the persons believed to be so conspiring as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it". It can only be used for the purpose of proving the existence of the conspiracy or that the other person was a party to it. It cannot be used in favour of the other party or for the purpose of showing that such a person was not a party to the conspiracy. In short, the section can be analysed as follows: (1) There shall be a prima facie evidence affording a reasonable ground for a Court to believe that two or more persons are members of a conspiracy; (2) if the said condition is fulfilled, anything said, done or written by any one of them in reference to their common intention will be evidence against the other; (3) anything said, done or written by him should have been said, done or written by him after the intention was formed by any one of them; (4) it would also be relevant for the said purpose against another who entered the conspiracy whether it was said, done or written before he entered the conspiracy or after he left it; and (5) it can only be used against a coconspirator and not in his favour".

5 In the case of **Nanak Chand** [supra], the Apex Court drawn distinction of Sections 149 and 34 of IPC. Reliance was also placed in the cases of Barendra Kumar Ghosh v. Emperor [AIR 1925 PC 1(A)]. In paras 6, 7 and 9 of the above judgment, the Apex Court discussed ingredients of both the above offences making a clear distinction between provisions of Sections 34 and 149 while holding that section 149 creates specific offence, but Section 34 does not. Paras 6, 7 and 9 of the above judgment are as under:

> "6 It is necessary, therefore, to examine the provisions of section 149 of the Indian Penal Code and consider as to whether this section creates a specific offence. Section 149 of

the Indian Penal Code is to be found in Chapter VIII of that Code which deals with offences against the public tranquility.

Section 149 of the Indian Penal Code reads:-

> "If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence".

This section postulates that an offence is committed by a member of an unlawful assembly in prosecution of the common object of that assembly or such as a member of the assembly knew to be likely to be committed in prosecution of that object and declares that in such circumstances every person, who was a member of the same assembly at the time of the commission of the offence, was guilty of that offence.

Under this section a person, who is a member of an unlawful assembly is made guilty of the offence committed by another member of the same assembly, in the circumstances mentioned in the section, although he had no intention to commit that offence and had done no overt act except his presence in the assembly and sharing the common object of that assembly. Without the provisions of this section a member of an unlawful assembly could not have been made liable for the offence committed not by him but by another member of that assembly. Therefore when the accused are acquitted of riot and the charge for being members of an unlawful assembly fails, there can be no conviction of any one of them for an offence which he had not himself committed.

Similarly under section 150 of the Indian Penal Code, a specific offence is created. Under this section a person need not be a member of an unlawful assembly and yet he would be guilty of being a member of an unlawful assembly and guilty of an offence which may be committed by 1207 a member of the unlawful assembly in the circumstances mentioned in the section.

Sections 149 and 150 of the Indian Penal Code are not the

only sections in that Code which create a specific offence. Section 471 of the Indian Penal Code makes it an offence to fraudulently or dishonestly use as genuine any document which a person knows or has reason to believe to be a forged document and it provides that such a person shall be punished in the same manner as if he had forged such document.

Abetment is an offence under the Indian Penal Code and is a separate crime to the principal offence. The sentence to be inflicted may be the same as for the principal offence. In Chapter XI of the Indian Penal Code offences of false evidence and against public justice are mentioned. Section 193 prescribes the punishment for giving false evidence in any stage of a judicial proceeding or fabricating false evidence for the purpose of being used in any stage of a judicial proceeding. Section 195 creates an offence and the person convicted of this offence is liable in certain circumstances to be punished in the same manner as a person convicted of the principal offence. Sections 196 and 197 to 200 of the Indian Penal Code also create offences and a person convicted under any one of them would be liable to be punished in the same manner as if he had given false evidence.

7 It was, however, urged on behalf of the Prosecution that section 149 merely provides for constructive guilt similar to section 34 of the Indian Penal Code. Section 34 reads:

> "When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone".

This section is merely explanatory. Several persons must be actuated by a common intention and when in furtherance of that common intention a criminal act is done by them, each of them is liable for that act as if the act bad been done by him alone. This section does not create any specific offence.

As was pointed out by Lord Sumner in Barendra Kumar Ghosh v. EmperorAIR 1925 PC 1(A)

> "'a criminal act' means that (1) [1925] I.L.R. 52 Cal. 197, 1208 unity of criminal behaviour which results in something, for which an individual would be punishable,

if it were all done by himself alone, that is, in a criminal offence".

There is a clear distinction between the provisions of sections 34 and 149 of the Indian Penal Code and the two sections are not to be confused. The principal element in section 34 of the Indian Penal Code is the common intention to commit a crime. In furtherance of the common intention several acts may be done by several persons resulting in the commission of that crime. In such a situation section 34 provides that each one of them would be liable for that crime in the same manner as if all the acts resulting in that crime had been done by him alone.' There is no question of common intention in section 149 of the Indian Penal Code. An offence may be committed by a member of an unlawful assembly and the other members will be liable for that offence although there was no common intention between that person and other members of the unlawful assembly to commit that offence provided the conditions laid down in the section are fulfilled. Thus if the offence committed by that person is in prosecution of the common object of the unlawful assembly or such as the members of that assembly knew to be likely to be committed in prosecution of the common object, every member of the unlawful assembly would be guilty of that offence, although there may have been no common intention and no participation by the other members in the actual commission of that offence.

In Barendra Kumar Ghosh v. Emperor AIR 1925 PC 1(A) **Lord Sumner** dealt with the argument that if section 34 of the Indian Penal Code bore the meaning adopted by the Calcutta High Court, then sections 114 and 149 of that Code would be otiose. In the opinion of Lord Sumner, however, section 149 is certainly not otiose,, for in any case it created a specific offence. It postulated an assembly of five or more persons having a common object, as named in section 141 of the Indian Penal Code and then the commission of an offence by one member of it in prosecution of that object and he referred to Queen v. Sabid Ali, 20 Suth WR [Cr.] 5 [FB][B].

He pointed out that there was a difference between object and intention, for although the object may be common, the intentions of the several members of the unlawful assembly may differ and indeed may be similar only in respect that

they are all unlawful, while the element of participation in action, which is the leading feature of section 34, was replaced in section 149 by membership of the assembly at the time of the committing of the offence. It was argued, however, that these observations of Lord Sumner were obiter dicta. Assuming though not conceding that may be so, the observations of a Judge of such eminence must carry weight particularly if the observations are in keeping with the provisions of the Indian Penal Code. It is, however, to be remembered that the observations of Lord Sumner did directly arise on the argument made before the Privy Council, the Privy Council reviewing as a whole the provisions of sections 34, 114 and 149 of the Indian Penal Code.

9 A charge for a substantive offence under section 302, or section 325 of the Indian Penal Code, etc. is for a distinct and separate offence from that under section 302, read with section 149 or section 325, read with section 149, etc. and to that extent the Madras view is incorrect. It was urged by reference to section 40 of the Indian Penal Code that section 149 cannot be regarded as creating an 'offence' because it does not itself provide for a punishment. Section 149 creates an offence but the punishment must depend on the offence of which the offender is by that section made guilty. Therefore the appropriate punishment section must be read with it. It was neither desirable nor possible to prescribe one uniform punishment for all cases which may fall within it. The finding that all the members of an unlawful assembly are guilty of the offence committed by one of them in the prosecution of the common object at once subjects all the members to the punishment prescribed for that offence and the relative sentence. Reliance was also placed upon the decision of the Patna High Court in Ramasray Ahir v. King-Emperor, AIR 1928 Pat 454 (I) as well as the decision of the Allahabad High Court in Sheo Ram and Others v. Emperor, AIR 1948 All 162 (J). In the former case the decision of the Privy Council in Barendra Kumar Ghosh's case was not considered and the decision followed the Full Bench of the Madras High Court and the opinion of Sir John Edge. In the latter case the Allahabad High Court definitely declined to answer the question as to whether the accused charged with an offence read with section 149, Indian Penal Code, or with an offence read with section 34, Indian Penal Code, could be convicted of the substantive offence only".

6 In the case of **Chikkarange Gowda** & Ors. [supra] **explained that the leading features of Section 34 is the element of participation in action, whereas, membership of the assembly at the time of committing of the offence is the important element of Section 149. The two sections have a certain resemblance and may to a certain extent overlap, but it cannot be said that both have the same meaning. That Section 34 embodies a principle of joint liability in the doing of criminal act, and the essence of that liability is the existence of a common intention.**

7 In the case of **Madan Singh** [supra], the Apex Court relied on earlier decisions in the case of Chikkarange Gowda [supra] and in paras, 10 to 13 analyzed and explained the concept of constructive liability of members of an unlawful assembly and common object as specified in Section 141 of IPC and though proof regarding overt act, may not be necessary and circumstances are enumerated about relevant consideration for determining common object and that unlawful assembly continues and so the common object up to a beyond stage, where after it get modified or it may abandon and the effect of Section 149 may be different on members of same assembly.

> **"10 Major plea which was emphasised relates to the question whether S. 149, I.P.C. has any application for fastening the constructive liability on the basis of unlawful acts committed pursuant to the common object by any member or the acts which the members of the unlawful assembly knew to be likely to be committed which is the sine qua non for its operation. The emphasis is on the common object and not on common intention. Mere presence in an unlawful assembly cannot render a person liable unless there was a common object and he shared the same or was actuated by that common object and that**

object is one of those set out in S. 141. Where common object of an unlawful assembly is not proved, the accused persons cannot be convicted with the help of S 149. The crucial question to determine is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects, as specified in S. 141. It cannot be laid down as a general proposition of law that unless the commission of an overt act is proved against a person, who is alleged to be a member of unlawful assembly, it cannot be said that he is a member of an assembly. The only thing required is that he should have understood that the assembly was unlawful and was likely to commit any of the acts which fall within the purview of S. 141. The word "object" means the purpose or design and, in order to make it "common," it must be shared by all. In other words, the object should be common to the persons, who compose the assembly, that is to say, they should all be aware of it and concur in it. A common object may be formed by express agreement after mutual consultation, but that is by no means always necessary. It may be formed at any stage by all or a few members of the assembly and the other members may just join and adopt it. Once formed, it need not continue to be the same. It may be modified or altered or abandoned at any stage. The expression "in prosecution of common object" as appearing in S. 149 have to be strictly construed as equivalent to "in order to attain the common object." It must be immediately connected with the common object by virtue of the nature of the object. There must be community of object and the object may exist only up to a particular stage, and not thereafter. Members of an unlawful assembly may have community of object up to certain point beyond which they may differ in their objects and the knowledge, possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command, but also according to the extent to which he shares the community of object, and as a consequence of this the effect of S. 149, I.P.C. may also vary on different members of the same assembly.

11. "Common object" is different from a "common intention" as it does not require a prior concert and a common meeting of minds before the attack. It is enough if

each has the same object in view and their number is five or more and that they act as an assembly to achieve that object. The "common object" of an assembly is to be ascertained from the acts and language and utterances of the members composing it the nature of arms carried, and from a consideration of all the surrounding circumstances. It may be gathered also from the course of conduct adopted by and behaviour of the members of the assembly at or before the actual conflict. What the common object of the unlawful assembly is at a particular stage of the incident is essentially a question of fact to be determined, keeping in view the nature of the assembly, the arms carried by the members, and the behaviour of the members at or near the scene of the incident. It is not necessary under law that in all cases of unlawful assembly, with an unlawful common object, the same must be translated into action or be successful. Under the Explanation to S. 141, an assembly which was not unlawful when it was assembled, may subsequently become unlawful. It is not necessary that the intention or the purpose, which is necessary to render an assembly an unlawful one comes into existence at the outset. The time of forming an unlawful intent is not material. An assembly which, at its commencement or even for some time thereafter, is lawful, may subsequently become unlawful. In other words it can develop during the course of incident at the spot eo instante.

12 Section 149, I.P.C. consists of two parts. The first part of the section means that the offence to be committed in prosecution of the common object must be one which is committed with a view to accomplish the common object. In order that the offence may fall within the first part, the offence must be connected immediately with the common object of the unlawful assembly of which the accused was member. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under S. 141, if it can be held that the offence was such as the members knew was likely to be committed and this is what is required in the second part of the section. The purpose for which the members of the assembly set out or desired to achieve is the object. If the object desired by all the members is the same, the knowledge that is the object which is being pursued is shared by all the members and they are in general agreement as to how it is to be

achieved and that is now the common object of the assembly. An object is entertained in the human mind, and it being merely a mental attitude, no direct evidence can be available and, like intention, has generally to be gathered from the act which the person commits and the result therefrom. Though no hard and fast rule can be laid down as to the circumstances from which the common object can be called out, it may reasonably be collected from the nature of the assembly, arms it carries and behaviour at or before or after the scene of incident. The word "knew" used in the second branch of the section implies something more than a possibility and it cannot be made to bear the sense of "might have been known." Positive knowledge is necessary. When an offence is committed in prosecution of the common object, it would generally be an offence which the members of the unlawful assembly knew was likely to be committed in prosecution of the common object. That, however, does not make the converse proposition true; there may be cases which would come within the second part but not within the first part. The distinction between the two parts of S. 149 cannot be ignored or obliterated. In every case it would be an issue to be determined, whether the offence committed falls within the first part or it was an offence such as the members of the assembly knew to be likely to be committed in prosecution of the common object and falls within the second part. However, there may be cases which would fall within first part being offences committed in prosecution of the common object, while at the same time, though not always falling within the second part, as offences which the members of the unlawful assembly knew to be likely to be committed by a person engaged in the prosecution of the common object and acting with the purpose of executing it. (See Chikkarange Gowda and others v. State of Mysore (AIR 1956 SC 731).

13 As noted by this Court in Sukhbir Singh v. State of Haryana (2002 (3) SCC 327) common object in terms of S. 149 can develop at the spot. Existence of the object has to be considered at the time of actual occurrence and not necessarily from anterior point of time."

8 In the case of **Vyas Ram @Vyas Kahar & Ors.** [supra], the Apex Court reiterated principles governing unlawful assembly under

section 149 of the IPC and held that if an offence committed by any member of an unlawful assembly in prosecution of the common object by that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence is a member of the same assembly, is guilty of that offence and Section 149 is in a sense vicarious, and does not always proceed on the basis that the offence has been actually committed by every member of the unlawful assembly. However, if a person is a member bystander, and no specific role is attributed to him, he may not come under the wide sweep of section 149. In the above decision, other cases of the Apex Court in the case of Masalti v. State of U.P. [AIR 1965 SC 202], Baladin v. State of U.P. [AIR 1956 SC 181] were relied and considered.

9 The case of **Krishna Mochi** [supra] is about murder of 35 persons and injuries sustained by several others as a result of gruesome acts on the part of the accused in which they were charged under section 302 read with Section 149 of the IPC and also under TADA Act and majority view of the Apex Court held extreme penalty of death. [In para 42 of the judgment, the Apex Court considered cases of Bachan Singh v. State of Punjab [(1980)2 SCC 684], Machhi Singh v. State of Punjab [(1983)3 SCC 470] and propositions emerge from the above two cases and even in concurring view Arijit Pasayat, J. (as His Lordship then was) placed reliance on other decisions also].

10 For the other decisions relied on by Mr. B.B.Naik, learned Senior Advocate appearing for the victims to which refernece is made in case law cited and relied on by Mr.J.M.Panchal, learned Special Public Prosecutor and also by learned counsels for the defence.

PART XI-D

Analysis of case law relied on by Shri A.D.Shah, learned Senior Advocate for the defence

1 Paras 21 to 29 of **Rabindra Kumar Pal @Dara Singh** [supra] reported in AIR 2011 SC 1436 are equivalent to paras 56 to 64 of the very judgment reported in (2011)2 SCC 490.

2 It is thus emphasized by Mr. Shah, learned senior counsel that remanding accused to police custody is not justified and failure to make searching inquiry by learned Magistrate as held in the facts of **Sivappa** [supra] in which the Apex court reiterated the principles laid down by the Apex Court in earlier cases of U.P. v. Singhara Singh [AIR 1964 SC 358] and provisions of Section 164 of the Code, 1973 emphasises an enquiry by the Magistrate to ascertain true and the voluntary nature of the confession.

3 Case of **Mohd. Ayub Dar** [supra] was relied on in the context of confession recorded under section 15 of the TADA, 1987.

4 On the same point case of **Jogendra Nahak** [supra] was relied on by making a specific reference that a person, who is neither an accused nor sponsored by the investigating agency, held, has no locus standi to apply to the Magistrate to record his statement under Section 164 of the Code, 1973. However, in the very case it was held by the Apex Court that evidence of such a person can, at the instance of any of the parties, be taken during trial.

5 Reliance is also placed on **Adambhai Sulemanbhai Ajmeri**

[Akshardham Temple Attack case] [supra] in which 35 persons died and more then 85 were injured in which the Chief Judicial Magistrate completed procedure within half an hour when confession was recorded of more than 15 pages under section 32(5) of POTA, 2002. Further, requirement that accused shall be sent to judicial custody is mandatory,. The above case was also relied in the context of Section 120B of IPC since confessions of accused were not corroborated by independent evidence. Even contradictions in version of conspiracy given by each conspirator was also not proved.

6 The case of **Dagdu** [supra] was relied on in the context of evidentiary value of confessional statements and there is a risk involved in convicting accused on the testimony of accomplice unless it is corroborated in material particulars, is so real and potent that what during the early development of law was felt to be a matter of prudence has been elevated by judicial experience into a requirement or rule of law. In the above decision the Apex Court relied on the decisions in the cases of King v. Baskerville [(1916)2 KB 658], Rameshwar v. State of Rajasthan [AIR 1952 SC 54] and Bhuboni Sahu v. The King [76 Ind App 147] and other decisions were considered, but at the same time, the Apex Court also held that, a confession does not violate any of the conditions operative under Sections 24 to 28 of the Evidence Act, it will be admissible in evidence. The test is confession has to appear to be voluntary, truthful and free from any threat, influence, allurement or undue advantage or gain. In the above case, the concerned Magistrate was blissfully ignorant about the provisons and procedure to be followed under section 164 of the Code, 1973.

7 Case of **Sarwan Singh Rattan Singh** [supra] is in the context of Section 133 of Evidence Act read with Section 367 of Code,

1973 for appreciation of evidence, it was held by the Apex Court that the Magistrate discharging the duties while recording confessions under Section 164 of the Code, 1973 care must be taken to see that requirement sub-section (3) of Section 164 are fully satisfied. An inquiry by the Magistrate and questions to be put forward should not become a matter of mere mechanical inquiry. Further, reasonable time at least of 24 hours for reflection and to decide whether or not a confession be made to be given to the accused. Before convicting the accused, the prosecution story should satisfy the test of "must be true" and not "may be true".

8 The case of **Malay Kumar Ganguly** [supra] was in the context of Section 45 of the Evidence Act that in order to bring the evidence of a witness as that of an expert it has to be shown that he has made a special study of the subject or acquired a special experience therein or in other words that he is skilled and has adequate knowledge of the subject and his evidence is really of an advisory in character. The expert is duty bound to furnish necessary scientific criteria for testing the accuracy of the conclusions so as to enable the Judge to form his independent judgment by the application of this criteria to the facts proved by the evidence of the case. On the aspect of objections as to admissibility of evidence, such evidence may be classified into two classes: (i) an objection that the document which is sought to be proved is itself inadmissible in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. Para 50 of the above judgment reads as under:

> "50 The said exhibits, however, are admissible before the consumer court. This Court in R.V.E. Venkatachala Gounder v.

Arulmigu Viswesaraswami & V.P. Temple,(2003) 8 SCC 752, at page 763 :

> "... Ordinarily, an objection to the admissibility of evidence should be taken when it is tendered and not subsequently. The objections as to admissibility of documents in evidence may be classified into two classes: (i) an objection that the document which is sought to be proved is itself inadmissible in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as "an exhibit", an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken when the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. The latter proposition is a rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons: firstly, it enables the court to apply its mind and pronounce its decision on the question of admissibility then and there; and secondly, in the event of finding of the court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of the court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the

> evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections, referred to herein above, in the latter case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. In the first case, acquiescence would be no bar to raising the objection in a superior court."

9 The case of **Akbar Sheikh** [supra] is on the point of unlawful assembly in the context of Sections 141, 149 and 34, requirement by the prosecution to establish a case under Sections 149 and 141 of IPC and distinction between “common object” and “common intention” were reiterated and in paras 18 to 35 of the said judgment the Apex Court revisited law laid down on both the above aspects. Paras 18 to 35 of the above judgment read as under:

> “18 The core question which arises for consideration is as to whether some of the appellants who had not committed any overt act must be held to be a part of the unlawful assembly or shared the common object with the main accused.
>
> 19 Chapter VIII of the Indian Penal Code provides for the offences against the public tranquility. Section 141 defines 'Unlawful Assembly' to be an assembly of five or more persons. They must have a common object inter alia to commit any mischief or criminal trespass or other offence. Section 142 of the Indian Penal Code postulates that whoever, being aware of facts which render any assembly an unlawful one, intentionally joins the same would be a member thereof.
>
> 20 Section 143 of the Indian Penal Code provides for punishment of being a member of unlawful assembly. Section 149 provides for constructive liability on every person of an unlawful assembly if an offence is committed by any member thereof in prosecution of the common object of that assembly or such of the members of that assembly knew to be likely to be committed in prosecution of that object.

21 Whether an assembly is unlawful one or not, thus, would depend on various factors, the principal amongst them being a common object formed by the members thereof to commit an offence specified in one or the other clauses contained in Section 141 of the Indian Penal Code. Constructive liability on a person on the ground of being a member of unlawful assembly can be fastened for an act of offence created by one or more members of that assembly if they had formed a common object. The distinction between a common object and common intention is well-known.

22 In Munna Chanda v. State of Assam ((2006) 3 SCC 752), this Court held as under : [SCC pp. 756-57, paras 10-13]

> "10. The concept of common object, it is well known, is different from common intention. It is true that so far as common object is concerned no prior concert is required. Common object can be formed on the spur of the moment. Course of conduct adopted by the members of the assembly, however, is a relevant factor. At what point of time the common object of the unlawful assembly was formed would depend upon the facts and circumstances of each case".
>
> 11 Section 149, IPC creates a specific and distinct offence. There are two essential ingredients thereof :
>
> [i] commission of an offence by any member of an unlawful assembly, and
>
> [ii] such offence must have been committed in prosecution of the common object of that assembly or must be such as the members of that assembly knew to be likely to be committed.
>
> 12 It is, thus, essential to prove that the person sought to be charged with an offence with the aid of Section 149 was a member of the unlawful assembly at the time the offence was committed.
>
> 13 The appellants herein were not armed with weapons. They except Bhuttu were not parties to all the three stages of the dispute. At the third stage of the quarrel, they wanted to teach the deceased and others a

> lesson. For picking up quarrel with Bhuttu, they might have become agitated and asked for apologies from Moti. Admittedly, it was so done at the instance of Nirmal, Moti was assaulted by Bhuttu at the instance of Ratan. However, it cannot be said that they had common object of intentional killing of the deceased. Moti, however, while being assaulted could free himself from the grip of the appellants and fled from the scene. The deceased was being chased not only by the appellants herein but by many others. He was found dead the next morning. There is, however, nothing to show as to what role the appellants either conjointly or separately played. It is also not known as to whether if one or all of the appellants were present, when the last blow was given. Who are those who had assaulted the deceased is also not known. At whose hands he received injuries is again a mystery. Neither Section 34 nor Section 149 of the Penal Code is, therefore, attracted. (See Dharam Pal v. State of Haryana and Shambhu Kuer v. State of Bihar)[(1982)1 ASCC 486]"

23 The question came up for consideration before this Court in Baladin and others v. State of Uttar Pradesh, (AIR 1956 SC 181) wherein B. P. Sinha, J., as the learned Chief Justice then was, opined that with a view to invoke the provisions of Section 149 of the Indian Penal Code, "it was necessary therefore for the prosecution to lead evidence pointing to the conclusion that all the appellants before us had done or been committing some overt act in prosecution of the common object of the unlawful assembly".

24 It was furthermore stated in Baladin v. State of U.P. [AIR 1956 SC 181]:[AIR p.190, para 19]

> "19 .....The evidence as recorded is in general terms to the effect that all these persons and many more were the miscreants and were armed with deadly weapons, like guns, spears, pharsas, axes, lathis, etc. This kind of omnibus evidence naturally has to be very closely scrutinised in order to eliminate all chances of false or mistaken implication. That feelings were running high on both sides is beyond question.
>
> That the six male members who were done to death that

morning found themselves trapped in the house of Mangal Singh has been found by the Courts below on good evidence. We have therefore to examine the case of each individual accused to satisfy ourselves that mere spectators who had not joined the assembly and who were unaware of its motive had not been branded as members of the unlawful assembly which committed the dastardly crimes that morning.

It has been found that the common object of the unlawful assembly was not only to kill the male members of the refugee families but also to destroy all evidence of those crimes. Thus even those who did something in connection with the carrying of the dead bodies or disposal of them by burning them as aforesaid must be taken to have been actuated by the common objective."

25 The aforementioned observation was, however, not accepted later by this Court as an absolute proposition of law and was held to be limited to the peculiar fact of the case in Masalti v. State of U.P., ((1964) 8 SCR 133) in the following terms :

"17 .....What has to be proved against a person who is alleged to be a member of an unlawful assembly is that he was one of the persons constituting the assembly and he entertained long with the other members of the assembly the common object as defined by Section 141, IPC. Section 142 provides that however, being aware of facts which render any assembly an unlawful assembly intentionally joins that assembly, or continue in it, is said to be a member of an unlawful assembly. In other words, an assembly of five or more persons actuated by, and entertaining one or more of the common object specified by the five clauses of Section 141, is an unlawful assembly. **The crucial question to determine in such a case is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects as specified by Section 141. While determining this question, it becomes relevant to consider whether the assembly consisted of some persons who were merely passive witnesses and had joined the assembly**

> **as a matter of the idle curiosity without intending to entertain the common object of the assembly.....**"

26 We may, however, notice that whereas the principle of law laid down in Masalti (supra) is beyond any doubt or dispute, its application in the later cases has not been strictly adhered to. This Court, as would appear from the discussions made hereinafter, in some of its decisions had proceeded to determine the issue in the factual matrix obtaining therein although some observations of general nature had been made.

27 In Sherey and others v. State of U.P., (1991 Supp (2) SCC 437) involved a case where there was a dispute between Hindus and Muslim of a village regarding a grove. Whereas the Hindus were claiming that it was a grove, the Muslims were claiming it to be a graveyard. A large number of Muslims, about 25 in number, came out with lethal weapons and killed three persons and injured others. Before this Court an argument was advanced that the appellants against whom no overt act was attributed but were part of the unlawful assembly should be held to be not guilty was accepted, stating : [SCC p.440, para 4]

> "4 .....Therefore, it is difficult to accept the prosecution case that the other appellants were members of the unlawful assembly with the object of committing the offences with which they are charged. We feel it is highly unsafe to apply Section 149 IPC and make everyone of them constructively liable. **But so far as the above nine accused are concerned the prosecution version is consistent namely that they were armed with lethal weapons like swords and axes and attacked the deceased and others. This strong circumstance against them establishes their presence as well as their membership of the unlawful assembly. The learned counsel appearing for the State vehemently contended that the fact that the Muslims as a body came to the scene of occurrence would show that they were members of an unlawful assembly with the common object of committing various offences including that of murder. Therefore all of them should be made constructively liable. But when there is a general allegation against a large**

> **number of persons the Court naturally hesitates to convict all of them on such vague evidence. Therefore we have to find some reasonable circumstance which lends assurance. From that point of view it is safe only to convict the abovementioned nine accused whose presence is not only consistently mentioned from the stage of FIR but also to whom overt acts are attributed.....**"

28 Similarly, in Musa Khan and others v. State of Maharashtra ((1977) 1 SCC 733), it was opined : [SCC p. 736, para 5]

> "5 .....It is well settled that a mere innocent presence in an assembly of persons, as for example a bystander, does not make the accused a member of an unlawful assembly, unless it is shown by direct or circumstantial evidence that the accused shared the common object of the assembly. Thus a Court is not entitled to presume that any and every person who is proved to have been present near a riotous mob at any time or to have joined or left it at any stage during its activities is in law guilty of every act committed by it from the beginning to the end, or that each member of such a crowd must from the beginning have anticipated and contemplated the nature of the illegal activities in which the assembly would subsequently indulge. **In other words, it must be proved in each case that the person concerned was not only a member of the unlawful assembly at some stage, but at all the crucial stages and shared the common object of the assembly at all these stages**....."
> [emphasis supplied]

It was opined therein that as evidence was wholly lacking that all of them had taken part at all stages of the commission of offence, they were held to be not guilty of the charges levelled against them.

29 Yet again in Nagarjit Ahir v. State of Bihar ((2005) 10 SCC 369), it was opined : [SCC p.373, para 12]

> "**12 .....Moreover, in such situations though many people may have seen the occurrence, it may not be**

> **possible for the prosecution to examine each one of them. In fact, there is evidence on record to suggest that when the occurrence took place, people started running helter-skelter. In such a situation it would be indeed difficult to find out the other persons who had witnessed the occurrence.....**"

It was furthermore observed : [SCC p.373, para 14]

> "**14 .....In such a case, it may be safe to convict only those persons against whom overt act is alleged with the aid of Section 149, IPC, lest some innocent spectators may get involved. This is only a rule of caution and not a rule of law.....**"

30 Almost a similar view has been taken in Hori Lal and another v. State of U. P., [(2006) 13 SCC 79) wherein this Court noticed both Baladin (supra) and Masalti (supra) as also other decisions to opine : [Hari Lal case [(2006) SCC 79] : [SCC p. 85, paras 23-25]

> "**23 Common object would mean the purpose or design shared by all the members of such assembly. It may be formed at any stage.**
>
> **24 Whether in a given case the accused persons shared common object or not, must be ascertained from the acts and conduct of the accused persons. The surrounding circumstances are also relevant and may be taken into consideration in arriving at a conclusion in this behalf.**
>
> **25 It is in two parts. The first part would be attracted when the offence is committed in furtherance of the common object. The offence, even if is not committed in direct prosecution of the common object of the assembly, Section 149, IPC may still be attracted.**"

What was, therefore, emphasized was that not only the acts but also the conduct and surrounding circumstances would be the guiding factors.

31 In Shankaraya Naik and Ors. v. State of Karnataka,

(2008 (12) SCALE 742), this Court held : [SCC p.689, para 15]

> "5.....It is clear from the record that the accused had come to the place of incident duly armed and had immediately proceeded with the attack on the opposite party and had caused serious injuries to the deceased and to as many as eight witnesses. It is also clear from the facts preceding the attack that there was great animosity between the parties and it must, therefore, be inferred that when the accused had come armed with lethal weapons, the chance that somebody might be killed was a real possibility."

32 In Maranadu and Anr. v. State by Inspector of Police, Tamil Nadu, (2008 (12) SCALE 420), this Court stated the law, thus :

> "17 'Common object' is different from 'common intention' as it does not require a prior concert and a common meeting of minds before the attack. It is enough if each has the same object in view and their number is five or more and that they act as an assembly to achieve that object. The 'common object' of an assembly is to be ascertained from the acts and language of the members composing it, and from a consideration of all the surrounding circumstances. It may be gathered from the course of conduct adopted by the members of the assembly. For determination of the common object of the unlawful assembly, the conduct of each of the members of the unlawful assembly, before and at the time of attack and thereafter, the motive for the crime, are some of the relevant considerations. What the common object of the unlawful assembly is at a particular stage of the incident is essentially a question of fact to be determined, keeping in view the nature of the assembly, the arms carried by the members, and the behaviour of the members at or near the scene of the incident. It is not necessary under law that in all cases of unlawful assembly, with an unlawful common object, the same must be translated into action or be successful. **Under the Explanation to Section 141, an assembly which was not unlawful when it was assembled, may subsequently become unlawful. It is not necessary**

that the intention or the purpose, which is necessary to render an assembly an unlawful one comes into existence at the outset. The time of forming an unlawful intent is not material. An assembly which, at its commencement or even for some time thereafter, is lawful, may subsequently become unlawful. In other words it can develop during the course of incident at the spot eo instanti ."

33 We may, however, notice that therein this Court had taken note of an earlier decision of this Court in State of U.P. v. Dan Singh and others, ((1997) 3 SCC 747) wherein it was held : [scc P.760, PARA 34]

"34. Mr. Lalit is right in submitting that the witnesses would be revengeful as a large-scale violence had taken place where the party, to which the eye-witnesses belonged, had suffered and it is, therefore, necessary to fix the identity and participation of each accused with reasonable certainty. Dealing with a similar case of riot where a large number of assailants who were members of an unlawful assembly committed an offence of murder in pursuance of a common object, the manner in which the evidence should be appreciated was adverted to by this Court in Masalti case as follows : [AIR p.210 para 15]

"15 Then it is urged that the evidence given by the witnesses conforms to the same uniform pattern and since no specific part is assigned to all the assailants, that evidence should not have been accepted. This criticism again is not well-founded. Where a crowd of assailants who are members of an unlawful assembly proceeds to commit an offence of murder in pursuance of the common object of the unlawful assembly, it is often not possible for witnesses to describe accurately the part played by each one of the assailants. Besides, if a large crowd of persons armed with weapons assaults the intended victims, it may not be necessary that all of them have to take part in the actual assault. In the present case, for instance, several weapons were carried by different members of the unlawful assembly, but it appears

> that the guns were used and that was enough to kill 5 persons. In such a case, it would be unreasonable to contend that because the other weapons carried by the members of the unlawful assembly were not used, the story in regard to the said weapons itself should be rejected. Appreciation of evidence in such a complex case is no doubt a difficult task; but criminal courts have to do their best in dealing with such cases and it is their duty to sift the evidence carefully and decide which part of it is true and which is not."
>
> 34 The decisions of this Court in Shankaraya Naik (supra) and Maranadu (supra), therefore, do not militate against the proposition of law in regard to appreciation of evidence, which we have to apply herein.
>
> 35 The prosecution in a case of this nature was required to establish (i) whether the appellants were present; and (ii) whether they shared a common object".

PART XI-E

Analysys of case law relied on by Ms. Nitya Ramkrishhan, learned Senior counsel for the defence

1 The case of **Suleman Usman Memon** [supra] was relied on in support of her contention that without factual data and reasons, the report of the chemical examiner, though admissible but such evidence has no evidentiary value. The above case had geneses in the offence under Section 66(1)(b) of the Bombay Prohibition Act, 1949 where3 failure of accused to examine chemical examiner under subsection (2) of Section 510 of earlier Cr.P.C., 1898 made no difference so far as examining alcohol content of the blood of the accused.

2 On the same issue **Ramesh Chandra Agrawal** [supra] was relied on in which the Apex Court held that in support of opinion under

Section 45 of the Evidence Act can be considered if such opinion is scientific, intelligible, convincing and tested along with evidence of the case and admissibility of the expert evidence as to fulfill basic requirement that witness has made a special study of the subject or acquired special experience therein or is skilled and has adequate knowledge of the subject and credibility of expert depends on the reasons stated in support of his conclusions and data and material furnished which form the basis of his conclusions. However, very judgment also said that evidence of expert is admissible when; [i] expert is heard, [ii] he must be within a recognized field of expertise, [iii] his evidence must be based on reliable principles, and [iv] he must be qualified in that discipline.

3 In the case of **Sidhartha Vashist @Manu Sharma** [supra] the Apex Court held that an expert opinion is an expert only if he follows well-accepted guidelines to arrive at a conclusion and supports same with logical reasoning.

4 In the case of **Jai Lal** [supra], District Horticulture Officer was produced as an export witness, who had no scientific study or research in assessment of productivity of apple crop in which, the Apex Court held that his testimony cannot be given label of expert witness.

5 The case of **Mahmood** [supra] was relied on in the context of requirement of the expert having skill, knowledge and experience in the science of identification of finger prints and that it would be highly unsafe to convict one on a capital charge without any independent corroboration, solely on the bald and dogmatic opinion of such a person, even if such opinion is assumed to be admissible under Section 45 of the Evidence Act.

6 The case of **Dayal Singh** [supra] was relied on the issue of an opinion of the expert that it is to provide trial of fact that useful, relevant opinion, but at the same time, the Court is expected to analyse the report, read it in conjunction with the other evidence on record and then form its final opinion as to whether such report is worthy of reliance or not.

7 The case of **Sudevanand** [supra] is about power of appellate court to take further evidence in the context of Section 391 of the Code, 1973 in which it was held that such power is not limited to recall of a witness for further cross-examination with reference to his previous statement, but extends to taking additional evidence for any reason to arrive at a just decision and law casts the duty upon the court to arrive at truth by all lawful means.

8 The case of **Kalyani Baskar [Mrs.]** [supra] was relied on in the context of duty of the court and rules of the procedure to be followed scrupulously that there was no breach of rule sol as to deprive the accused for fair trial and proper opportunities allowed by law to prove innocence of accused to be given keeping in mind a valuable right of defence to adduce evidence and also in view of Article 21 of the Constitution of India. The case of **Mukesh** [supra], **R.K.Anand** [supra] were relied on for sting operation.

9 For the cases of **Haricharan Kurmi** [supra], **Mohd. Khalid** [supra] and **Chikkarange Gowda** [supra] we have already made reference earlier since those decisions were relied on by the counsels appearing for the State and victims and the same were elaborately considered in this very chapter of the judgment.

10 In the context of Sections 149 and 147 read with Section 302 of the IPC and the common object of the unlawful assembly, reliance was placed in the case of **Santosh** [supra], in which the case of **Chikkarange Gowda** [supra] was considered and the same is also considered by us in this very chapter of the judgment, which defines common object.

11 The case of **Dan Singh** [supra] was relied in the context of Section 149 of IPC and ingredients of Section 149 particularly when offence involves a large number of offenders under circumstances, only those of the accused must be held to be members of the unlawful assembly who have been specifically identified by at least four eye witnesses. At the same time, the above judgment referred to earlier decision of the Apex Court in the case of Masalti [supra] [para 32 of this decision on the contrary considers in the context of Section 149 of the IPC and about membership of unlawful assembly and proof of evidence. That exaggeration or inconsequential in the testimony of the eye witnesses not a ground to reject their evidence in its entirety in a right case. What is to be seen is whether the basic feature of the occurrence have been similarly viewed and/or described by the witness in a manner which tallies with the outcome of the right.

12 The case of **Roy Frernandes** [supra] is in the context of Section 149 of the IPC in which also decision in the case of Chhikarange Gowda [supra] was considered.

13 In this case, the Apex Court had an occasion to consider other decisions in which Section 149 of IPC was interpreted and explained and in paras 19 to 34 it is held as under:

"19. Section 149 IPC reads:

> 149. Every member of unlawful assembly guilty of offence committed in prosecution of common object. - If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence."
>
> A plain reading of the above would show that the provision is in two parts. The first part deals with cases in which an offence is committed by any member of the assembly "in prosecution of the common object" of that assembly. The second part deals with cases where the commission of a given offence is not by itself the common object of the unlawful assembly but members of such assembly `knew that the same is likely to be committed in prosecution of the common object of the assembly'.

20 As noticed above, the commission of the offence of murder of Felix Felicio Monteiro was itself not the common object of the unlawful assembly in the case at hand. And yet the assembly was unlawful because from the evidence adduced at the trial it is proved that the common object of the persons comprising the assembly certainly was to either commit a mischief or criminal trespass or any other offence within the contemplation of clause (3) of Section 141 of the IPC, which may to the extent the same is relevant for the present be extracted at this stage:

> "Section 141 : Unlawful Assembly:
>
> An assembly of five or more persons is designated an "unlawful assembly", if the common object of the persons composing that assembly is-
>
> First:- * * * *

Second:- * * * *

Third:- To commit any mischief or criminal trespass, or other offence".

21 From the evidence on record, we are inclined to hold that even when commission of murder was not the common object of the accused persons, they certainly had come to the spot with a view to overawe and prevent the deceased by use of criminal force from putting up the fence in question. That they actually slapped and boxed the witnesses, one of whom lost his two teeth and another sustained a fracture only proves that point.

22 What then remains to be considered is whether the appellant as a member of the unlawful assembly knew that the murder of the deceased was also a likely event in prosecution of the object of preventing him from putting up the fence. The answer to that question will depend upon the circumstances in which the incident had taken place and the conduct of the members of the unlawful assembly including the weapons they carried or used on the spot. It was so stated by this Court in Lalji and Ors. Vs. State of U.P. [1989 (1) SCC 437] in the following words: [SCC p.441, para 8]

"8 ....Common object of the unlawful assembly can be gathered from the nature of the assembly, arms used by them and the behaviour of the assembly at or before scene of occurrence. It is an inference to be deduced from the facts and circumstances of each case."

23 The Court elaborated the above proposition in Dharam Pal and Ors. Vs. State of U.P. [1975 (2) SCC 596] as : [SCC p.603, para 11]

"11. Even if the number of assailants could have been less than five in the instant case (which, we think, on the facts stated above, was really not possible), we think that the fact that the attacking party was clearly shown to have waited for the buggi to reach near the field of Daryao in the early hours of June 7, 1967, shows pre-planning. Some of the assailants had sharp- edged

> weapons. They were obviously lying in wait for the buggi to arrive. They surrounded and attacked the occupants shouting that the occupants will be killed. We do not think that more convincing evidence of a pre-concert was necessary. Therefore, if we had thought it necessary, we would not have hesitated to apply Section 34 IPC also to this case. The principle of vicarious liability does not depend upon the necessity to convict a required number of persons. It depends upon proof of facts, beyond reasonable doubt, which makes such a principle applicable. (See : Yeshwant v. State of Maharashtra; and Sukh Ram v. State of U.P.). The most general and basic rule, on a question such as the one we are considering, is that there is no uniform, inflexible, or invariable rule applicable for arriving at what is really an inference from the totality of facts and circumstances which varies from case to case. We have to examine the effect of findings given in each case on this totality. It is rarely exactly identical with that in another case. Other rules are really subsidiary to this basic verity and depend for their correct application on the peculiar facts and circumstances in the context of which they are enunciated."

24 Coming then to the facts of the present case, the first and foremost of the notable circumstances is that the appellant was totally unarmed for even according to the prosecution witnesses he had pushed, slapped and boxed those on the spot using his bare hands. The second and equally notable circumstance is that neither the cycle chain nor the belt allegedly carried by two other members of the unlawful assembly was put to use by them.

25 Mr. Luthra argued that the prosecution had failed to prove that the assembly was armed with a chain and a belt for the seizure witnesses had not supported the recovery of the said articles from the accused. Even if we were to accept the prosecution case that the two of the members of the unlawful assembly were armed as alleged, the non-use of the same is a relevant circumstance. It is common ground that no injuries were caused by use of those weapons on the person of the deceased or any one of them was carrying a knife. The prosecution case, therefore, boils down to the appellant and his four companions arriving at the spot, one of them giving a

knife blow to the deceased in his thigh which cut his femoral artery and caused death.

26 The question is whether the sudden action of one of the members of the unlawful assembly constitutes an act in prosecution of the common object of the unlawful assembly namely preventing of erection of the fence in question and whether the members of the unlawful assembly knew that such an offence was likely to be committed by any member of the assembly. Our answer is in the negative.

27 This Court has in a long line of decisions examined the scope of Section 149 of the Indian Penal Code. We remain content by referring to some only of those decisions to support our conclusion that the appellant could not in the facts and circumstances of the case at hand be convicted under Section 302 read with Section 149 of the IPC.

28 In Chikkarange Gowda & Ors. Vs. State of Mysore [AIR 1956 SC 731] this Court was dealing with a case where the common object of the unlawful assembly simply was to chastise the deceased. The deceased was, however, killed by a fatal injury caused by certain member of the unlawful assembly. The court below convicted the other member of the unlawful assembly under Section 302 read with Section 149 IPC. Reversing the conviction, this Court held : [AIR p.735, para 9]

> "9. It is quite clear to us that on the finding of the High Court with regard to the common object of the unlawful assembly, the conviction of the appellants for an offence under Section 302 read with Section 149 Indian Penal Code cannot be sustained. The first essential element of Section 149 is the commission of an offence by any member of an unlawful assembly; the second essential part is that the offence must be committed in prosecution of the common object of the unlawful assembly, or must be such as the members of that assembly knew to be likely to be committed in prosecution of the common object.
>
> In the case before us, the learned Judges of the High Court held that the common object of the unlawful

> assembly was merely to administer a chastisement to Putte Gowda. The learned Judges of the High Court did not hold that though the common object was to chastise Putte Gowda, the members of the unlawful assembly knew that Putte Gowda was likely to be killed in prosecution of that common object. That being the position, the conviction under Section 302 read with Section 149 Indian Penal Code was not justified in law."

29 In Gajanand & Ors. Vs. State of Uttar Pradesh [AIR 1954 SC 695], this Court approved the following passage from the decision of the Patna High Court in Ram Charan Rai Vs. Emperor [AIR pp. 242-243]

> "Under Section 149 the liability of the other members for the offence committed during the continuance of the occurrence rests upon the fact whether the other members knew before hand that the offence actually committed was likely to be committed in prosecution of the common object. Such knowledge may reasonably be collected from the nature of the assembly, arms or behavior, at or before the scene of action. If such knowledge may not reasonably be attributed to the other members of the assembly then their liability for the offence committed during the occurrence does not arise".

30 This Court then reiterated the legal position as under : [Gajanand case [AIR 1954 SC 695, AIR p.699, para 9]

> "The question is whether such knowledge can be attributed to the appellants who were themselves not armed with sharp edged weapons. The evidence on this point is completely lacking. The appellants had only lathis which may possibly account for Injuries 2 and 3 on Sukkhu's left arm and left hand but they cannot be held liable for murder by invoking the aid of Section 149 IPC. According to the evidence only two persons were armed with deadly weapons. Both of them were acquitted and Sosa, who is alleged to have had a spear, is absconding. We are not prepared therefore to ascribe any knowledge of the existence of deadly weapons to the appellants, much less that they would be used in order to cause death."

31 In Mizaji and Anr. Vs. State of U.P. [AIR 1959 SC 572] this Court was dealing with a case where five persons armed with lethal weapons had gone with the common object of getting forcible possession of the land which was in the cultivating possession of the deceased. Facing resistance from the person in possession, one of the members of the assembly at the exhortation of the other fired and killed the deceased. This Court held that the conduct of the members of the unlawful assembly was such as showed that they were determined to take forcible possession at any cost. Section 149 of IPC was, therefore, attracted and the conviction of the members of the assembly for murder legally justified.

32 This Court analysed Section 149 in the following words : [Mizaji case [AIR 1959 SC 572], AIR, p.576, para 6]

> "6. This section has been the subject matter of interpretation in the various High Court of India, but every case has to be decided on its own facts. The first part of the section means that the offence committed in prosecution of the common object must be one which is committed with a view to accomplish the common object. It is not necessary that there should be a preconcert in the sense of a meeting of the members of the unlawful assembly as to the common object; it is enough if it is adopted by all the members and is shared by all of them. In order that the case may fall under the first part the offence committed must be connected immediately with the common object of the unlawful assembly of which the accused were members. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under section 149 if it can be held that the offence was such as the members knew was likely to be committed. The expression 'know' does not mean a mere possibility, such as might or might not happen. For instance, it is a matter of common knowledge that when in a village a body of heavily armed men set out to take a woman by force, someone is likely to be killed and all the members of the unlawful assembly must be aware of that likelihood and would be guilty under the second part of section 149. Similarly, if a body of persons go armed to take forcible possession of the land, it would be equally right to say

> that they have the knowledge that murder is likely to be committed if the circumstances as to the weapons carried and other conduct of the members of the unlawful assembly point to such knowledge on the part of them all."

33 In Shambhu Nath Singh and Ors. Vs. State of Bihar [AIR 1960 SC 725], this Court held that : [AIR p.727, para 6]

> "6 .... members of an unlawful assembly may have a community of object upto a certain point beyond which they may differ in their objects and the knowledge possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command but also according to the extent to which he shares the community of object. As a consequence, the effect of Section 149 of the Indian Penal Code may be different on different members of the same unlawful assembly. Decisions of this Court Gangadhar Behera and Others Vs. State of Orissa [2002 (8) SCC 381] and Bishna Alias Bhiswadeb Mahato and Others Vs. State of West Bengal [2005 (12) SCC 657] similarly explain and reiterate the legal position on the subject".

14 The cases of **Bhagwan Das** [supra] and **Sanjay Rai** [supra] are relied on by learned Special Public Prosecutor to which we have already made reference in this very chapter of the judgment.

15 In the cases of **Ugar Ahir** [supa] and **Devi Lal** [supra], the Apex Court held that the prosecution is not permitted to its story changed the version of the prosecution altogether evolving a new theory nor it is open for the court to do so.

PART XI-F

Analysys of case law relied on by Shri I.H.Syed, learned counsel for the defence

1 The case of **Karan Singh** [supra] was relied on the aspect of duty cast upon investigating officer not to indulge into unnecessary harassment either to the complainant or to the accused and that his conduct must be entirely impartial and must dispel any suspicion regarding genuineness of the investigation. In the very judgment, the Apex Court relied on in the case of State [Govt. of NCT of Delhi] [supra]. Paras 16 to 20 of the judgment read as under:

> "16 The investigation into a criminal offence must be free from any objectionable features or infirmities which may give rise to an apprehension in the mind of the complainant or the accused, that investigation was not fair and may have been carried out with some ulterior motive. The Investigating Officer must not indulge in any kind of mischief, or cause harassment either to the complainant or to the accused. His conduct must be entirely impartial and must dispel any suspicion regarding the genuineness of the investigation. The Investigating Officer, "is not merely present to strengthen the case of the prosecution with evidence that will enable the court to record a conviction, but to bring out the real unvarnished version of the truth." Ethical conduct on the part of the investigating agency is absolutely essential, and there must be no scope for any allegation of mala fides or bias. **Words like 'personal liberty' contained in Article 21 of the Constitution of India provide for the widest amplitude, covering all kinds of rights particularly, the right to personal liberty of the citizens of India, and a person cannot be deprived of the same without following the procedure prescribed by law. In this way, the investigating agencies are the guardians of the liberty of innocent citizens. Therefore, a duty is cast upon the Investigating Officer to ensure that an innocent person should not suffer from unnecessarily harassment of false implication, however, at the same time, an accused person must not be given undue leverage. An investigation cannot be interfered with or influenced even by the courts. Therefore, the investigating agency must avoid entirely any kind of extraneous influence, and investigation must be carried out with equal alacrity and fairness irrespective of the status of the accused or the complainant, as a tainted**

investigation definitely leads to the miscarriage of criminal justice, and thus deprives a man of his fundamental rights guaranteed under Article 21 of the Constitution. Thus, every investigation must be judicious, fair, transparent and expeditious to ensure compliance with the rules of law, as is required under Articles 19, 20 and 21 of the Constitution. (Vide: Babubhai v. State of Gujarat and Ors., (2010) 12 SCC 254).

17 In Ram Bihari Yadav v. State of Bihar and Ors., AIR 1998 SC 1850, this Court observed, that if primacy is given to a designed or negligent investigation, or to the omissions or lapses created as a result of a faulty investigation, the faith and confidence of the people would be shaken not only in the law enforcing agency, but also in the administration of justice. A similar view has been re-iterated by this Court in Amar Singh v. Balwinder Singh and Ors., AIR 2003 SC 1164 .

18 Furthermore, in Ram Bali v. State of Uttar Pradesh, AIR 2004 SC 2329 : (2004 AIR SCW 2748), it was held by this Court that the court must ensure that the defective investigation purposely carried out by the Investigating Officer, does not affect the credibility of the version of events given by the prosecution.

19 Omissions made on the part of the Investigating Officer, where the prosecution succeeds in proving its case beyond any reasonable doubt by way of adducing evidence, particularly that of eye-witnesses and other witnesses, would not be fatal to the case of the prosecution, for the reason that every discrepancy present in the investigation does not weigh upon the court to the extent that it necessarily results in the acquittal of accused, unless it is proved that the investigation was held in such manner that it is dubbed as "a dishonest or guided investigation", which will exonerate the accused. (See: Sonali Mukherjee v. Union of India, (2010) 15 SCC 25 : (AIR 2010 SC (Supp) 415) : (2010 AIR SCW 499); Mohd. Imran Khan v. State Government (NCT of Delhi), (2011) 10 SCC 192 : (2011 AIR SCW 6821); Sheo Shankar Singh v. State of Jharkhand and Anr., AIR 2011 SC 1403 : (2011 AIR SCW 1845); Gajoo v. State of Uttarakhand, (2012) 9 SCC 532 : (2012 AIR SCW 5598); Shyamal Ghosh v. State of West Bengal, AIR 2012 SC 3539 : (2012 AIR SCW

4162); and Hiralal Pandey and Ors. v. State of U.P., AIR 2012 SC 2541) : (2012 AIR SCW 2503).

20 Thus, unless lapses made on the part of Investigating authorities are such, so as to cast a reasonable doubt on the case of the prosecution, or seriously prejudice the defence of the accused, the court would not set aside the conviction of the accused merely on the ground of tainted investigation".

2 On the above issue, cases of **Sunil Kundu** [supra] and **Adambhai Sulemanbhai Ajmeri** [supra] are relied.

3 The case of **Dilavar Hussain** [supra] was relied on the point that heinousness of crime or cruelty in its execution howsoever abhorring and hateful cannot be reflected in deciding the guilt. Paras 3 and 4 of the judgment read as under:

"3 **All this generated a little emotion during submissions. But sentiments or emotions, howsoever, strong are neither relevant nor have any place in a court of law**. Acquittal or conviction depends on proof 111 or otherwise of the criminological chain which invariably comprises of why, where, when, how and who. Each knot of the chain has to be proved, beyond shadow of doubt to bring home the guilt. Any crack or loosening in it weakens the prosecution. Each link, must be so consistent that the, only conclusion which must follow is that the accused is guilty. Although guilty should not escape. But on reliable evidence truthful witnesses and honest and fair investigation. **No free man should be amerced by framing or to assuage feelings as it is fatal to human dignity and destructive of social, ethical and legal norm. Heinousness of crime or cruelty in its execution howsoever abhorring and hateful cannot reflect in deciding the guilt**.

4 Misgiving, also, prevailed about appreciation of evidence. Without adverting to submissions suffice it to mention that credibility of witnesses has to be measured with same yardstick, whether, it is an ordinary crime or a crime emanating due to communal frenzy. **Law does not make any distinction either in leading of evidence or in its assessment**.

Rule is one and only one namely, if depositions are honest and true: Whether the witnesses, who claim to have seen the incident in this case, withstand this test is the issue? But before that some legal and general questions touching upon veracity of prosecution version may be disposed of".

4 The cases of **B. Sarwan Singh Ratan Singh** [supra] was relied on by Mr. A.D.Shah, learned counsel for the defence, the reference of which is made in this chapter of judgment.

5 The case of **Aloke Nath Dutt** [supra] was relied on the point of confession [paras 87 to 90]. The court also considered constitutional protection given to accused and retracted confession along with legislative paradigm of retracted confession and evidentiary value of retracted confession [paras 95 to 117]. Paras 87 to 90 and 95 to 117 of the judgment read as under:

"CONFESSION GENERALLY:

87 Confession ordinarily is admissible in evidence. It is a relevant fact. It can be acted upon. Confession may under certain circumstances and subject to law laid down by the superior judiciary from time to time form the basis for conviction. It is, however, trite that for the said purpose the court has to satisfy itself in regard to: (i) voluntariness of the confession; (ii) truthfulness of the confession; (iii) corroboration.

88 This Court in Shankaria v. State of Rajasthan [(1978) 3 SCC 435] stated the law thus : [SCC p.443, para 23]

"23 This confession was retracted by the appellant when he was examined at the trial Under Section 313 Cr. P.C. on June 14, 1975. It is well settled that a confession, if voluntarily and truthfully made, is an efficacious proof of guilt. **Therefore, when in a capital case the prosecution demands a conviction of the accused, primarily on the basis of his confession recorded Under Section 164 Cr. P.C, the Court must**

apply a double test:

[1] Whether the confession was perfectly voluntary?
[2] If so, whether it is true and trustworthy ?

Satisfaction of the first test is a sine quo non for its admissibility in evidence. If the confession appears to the Court to have been caused by any inducement, threat or promise such as is mentioned in Section 24, Evidence Act, it must be excluded and rejected brevi manu. In such a case, the question of proceeding further to apply the second test does not arise. If the first test is satisfied, the Court must before acting upon the confession reach the finding that what is stated therein is true and reliable. **For judging the reliability of such a confession, or for that matter of any substantive piece of evidence there is no rigid canon of universal application. Even so, one broad method which may be useful in most cases for evaluating a confession, may be indicated. The Court should carefully examine the confession and compare it with the rest of the evidence, in the light of the surrounding circumstances and probabilities of the case. If on such examination and comparison, the confession appears to be a probable catalogue of events and naturally fits in with the rest of the evidence and the surrounding circumstances, it may be taken to have satisfied the second test.**"

[Also see Anil @ Raju Namdev Patil v. Administration of Daman and Diu, Daman and Anr. [(2006)13 SCC 36.

89 A detailed confession which would otherwise be within the special knowledge of the accused may itself be not sufficient to raise a presumption that confession is a truthful one. Main features of a confession are required to be verified. If it is not done, no conviction can be based only on the sole basis thereof.

90 In Muthuswami v. State of Madras [AIR 1954 SC 4], this Court opined :

"8. The only reason the High Court give for accepting the confession is because the learned Judges considered

> there was intrinsic material to indicate its genuineness. But the only feature the learned Judges specify is that it contains a wealth of detail which could not have been invented. But the point overlooked is that none of this detail has been tested. The confession is a long and rambling one which could have been invented by an agile mind or pieced together after tutoring. What would have been difficult is to have set out a true set of facts in that manner. But unless the main features of the story are shown to be true, it is, in our opinion, unsafe to regard mere wealth of uncorroborated detail as a safeguard of truth."

"Constitutional Postulates and Retracted confession :

95 Article 20(3) of the Constitution of India provides that no person accused of any offence shall be compelled to be a witness against himself. The right to remain silent is an extension of the rule of civil liberty enjoined by our Constitution.

96 **Considering the guarantee under Article 20 (3) and also humanizing standards under Article 21 we need to tread cautiously while construing retracted confession. Although such caution is subject to some exceptions such as per se evidence of the motivating factors of retraction or retraction based on extraneous circumstances.**

97 In this regard it is important to address the scope and ambit of Article 20(3) i.e. at which stage of criminal process the safeguard becomes operative. In Smt. Nandini Satpathy v. P.L. Dani and Another [AIR 1978 SC 1025], this Court stated the law thus : [SCC p.454, para 57]

> "57. We hold that Section 161 enables the police to examine the accused during investigation. The prohibitive sweep of Article 20(3) goes back to the stage of police interrogation not, as contended, commencing in court only. In our judgment, the provisions of Article 20(3) and Section 161(1) substantially cover the same area, so far as police investigations are concerned. The ban on self-accusation and the right to silence, while one investigation or trial is under way, goes beyond that case

> and protects the accused in regard to other offences pending or imminent, which may deter him from voluntary disclosure of criminatory matter."

98 In this context, it will be useful to refer to the following passage from the decision of this Court in State (N.C.T. of Delhi) v. Navjot Sandhu @ Afsan Guru [(2005)11SCC 600] : [SCC p.721, para 159]

> "This Court rejected the contention advanced on behalf of the State that the two provisions, namely, Article 20(3) and Section 161, did not operate at the anterior stages before the case came to Court and the incriminating utterance of the accused, previously recorded, was attempted to be introduced. Noting that the landmark decision in Miranda v. Arizona [1966, 384 US 436] did extend the embargo to police investigation also, the Court observed that there was no warrant to truncate the constitutional protection underlying Article 20(3). It was held that even the investigation at the police level is embraced by Article 20(3) and this is what precisely Section 161 means."

[See also Directorate of Enforcement v. Deepak Mahajan and Another, (1994)3 SCC 440], and Balkishan A. Devidayal v. State of Maharashtra, (1980) 4 SCC 600].

99 **To withdraw from what has been said previously needs to be interpreted in the vein of right to remain silent as an extension of this civil liberty. The quality or merit of confession, in no uncertain terms, is in voluntary narration by the accused. At the same time we are equally in know of the troubled times the judiciary is plagued with. The issue of evidentiary standards is a very delicate one and has a great bearing on the outcome of cases. But be it as it may, basic tenets of criminal law can not be lost sight of. In similar vein the law on retracted confession must be judged in the context of each case.**

100 Legislative paradigm on retracted confession : In this regard it is important to consider the retracted confession within the legislative paradigm laid down under Sections 24 to 26 of the Indian Evidence Act and Section 162(1) and Section 164 of the Code of Criminal Procedure, 1973.

101 Also it will be in the fitness of the case to appraise the value of retracted confession for the co-accused under section 30 of The Indian Evidence Act a little later.

102 Sections 24 to 30 deal with confession. Section 24 speaks of the effect of a confession made by an accused through inducement, threat or promise proceeding from a 'person in authority'. Whereas section 25 and section 26 deal with situations where such 'person in authority' is police. It is an institutionalized presumption against confession extracted by police or in police custody. In that frame of reference, Section 24 is the genus and sections 25 and 26 are its species. In other words, section 25 and section 26 are simple corollaries flowing out of the axiomatic and generalized proposition (confession caused by inducement where inducement proceeds from a person in authority, is bad in law) contained in section 24. They are directed towards assessing the value of a confession made to a police officer or in police custody.

103 The policy underlying behind Sections 25 and 26 is to make it a substantive rule of law that confessions whenever and wherever made to the police, or while in the custody of the police unless made in the immediate presence of a magistrate, shall be presumed to have been obtained under the circumstances mentioned in Section 24 and, therefore, inadmissible, except so far as is provided by Section 27 of the Act.

104 **Section 164, however, makes the confession before a Magistrate admissible in evidence. The manner in which such confession is to be recorded by the Magistrate is provided under Section 164 of the Code of Criminal Procedure. The said provision, inter alia, seeks to protect an accused from making a confession, which may include a confession before a Magistrate, still as may be under influence, threat or promise from a person in authority. It takes into its embrace the right of an accused flowing from Article 20(3) of the Constitution of India as also Article 21 thereof. Although, Section 164 provides for safeguards, the same cannot be said to be exhaustive in nature. The Magistrate putting the questions to an accused brought before him from police custody, should some time, in our opinion, be more intrusive than what is required in law.**

[See Babubhai Udesinh Parmar v. State of Gujarat 2006 (12) SCALE 385].

105 In a case, where confession is made in the presence of a Magistrate conforming the requirements of Section 164, if it is retracted at a later stage, the court in our opinion, should probe deeper into the matter. Despite procedural safeguards contained in the said provision, in our opinion, the learned Magistrate should satisfy himself that whether the confession was of voluntary nature. It has to be appreciated that there can be times where despite such procedural safeguards, confessions are made for unknown reasons and in fact made out of fear of police.

106 Judicial confession must be recorded in strict compliance of the provisions of Section 164 of the Code of Criminal Procedure. While doing so, the court shall not go by the black letter of law as contained in the aforementioned provision; but must make further probe so as to satisfy itself that the confession is truly voluntary and had not been by reason of any inducement, threat or torture.

107 The fact that the accused was produced from the police custody is accepted. But it was considered in a routine manner. The learned Magistrate in his evidence could not even state as to whether the appellants had any injury on his person or whether there had been any tainted marks therefor.

108 The courts while applying the law must give due regard to its past experience. The past experience of the courts as also the decisions rendered by the superior courts should be taken as a wholesome guide. We must remind ourselves that despite the fact that procedural safeguards contained in Section 164 of the Cr. P.C. may be satisfied, but the courts must look for truthfulness and voluntariness thereof. It must, however, be remembered that it may be retracted subsequently. The court must, thus, take adequate precaution. Affirmative indication of external pressure will render the retracted confession nugatory in effect. The court must play a proactive role in unearthing objective evidence forming the backdrop of retraction and later the examination of such evidence of retraction. However in cases where none exists, the court must give the benefit of

doubt to the accused. Where there is no objective material available for verifying the conditions in which the confession was retracted, the spirit of section 24 of the Evidence Act (irrelevance of confession caused by inducement) may be extended to retracted confession. An inverse presumption must be drawn from absence of materials.

109 In a case of retracted confession, the courts while arriving at a finding of guilt would not ordinarily rely solely thereupon and would look forward for corroboration of material particulars. Such corroboration must not be referable in nature. Such corroboration must be independent and conclusive in nature.

Evidentiary value of retracted confession :

110 A retracted confession of a co-accused cannot be relied upon for the purpose of finding corroboration for the retracted confession of an accused. It was so held in Bhuboni Sahu v. R. [AIR 1949 PC 257], stating : [IA p.156]

> "**The court may take the confession into consideration and thereby no doubt, makes its evidence on which the court may act; but the section does not say that the confession is to amount to proof. Clearly there must be other evidence. The confession is only one element in the consideration of all the facts proved in the case; it can be put into the scale and weighed with the other evidence.**"

[See Hari Charan Kurmi and Jogia Hajam v. State of Bihar (1964) 6 SCR 623]

111 However, we are not unmindful of the fact that in this country, retractions are as plentiful as confessions. In a case of retracted confession, the courts should evidently be a little slow in accepting the confession, although the accused may not be able to fully justify the reasons for his retraction.

112 It is interesting to note that in R. v. Thompson, [1893, 2 QB 12, 18], Cave, J. stated the law thus : [All ER p.380 A-C]

> "**I would add that for my part I always suspect these confessions which are supposed to be the offspring of**

> **penitence and remorse and which nevertheless are repudiated by the prisoner at the trial. It is remarkable that it is of very rare occurrence for evidence of a confession to be given when the proof of the prisoner's guilt is otherwise clear, and satisfactory, but when it is not clear and satisfactory, the prisoner is not frequently alleged to have been seized with a desire, born of penitence and remorse, to supplement it with a confession a desire which vanishes as soon as he appears in a court of justice.**"

Straight J, observed in R v. Babulal, [ILR (1884)6 All 509][ILR at pp. 542 & 543]

> "An endless source of anxiety and difficulty to those who have to see that justice is properly administered, I have said, and repeat now, it is incredible that the extraordinarily large number of confessions, which come before us in the criminal cases disposed of by this court, either in appeal or revision, should have been voluntarily and freely made in every instance as represented the retraction follows almost invariably as a matter of course" .

[See Sarkar on Evidence, 15th Edn. Volume 1 - page 466]

113 The value of a retracted confession is now well-known. The court must be satisfied that the confession at the first instance is true and voluntary. [See Subramania Goundan v. The State of Madras [AIR 1958 SC 66] and Pyare Lal Bhargava v. State of Rajasthan, [AIR 1963 SC 1094].

114 Caution and prudence in accepting a retracted confession is an ordinary rule. [See Puran v. The State of Punjab -AIR 1953 SC 459]. Although if a retracted confession is found to be corroborative in material particulars, it may be the basis of conviction. [Balbir Singh v. State of Punjab - AIR 1957 SC 216].

115 We may notice that in 1950's and 1960's corroborative evidence in "material particulars" was the rule. [See Puran (supra), Balbir Singh (supra), Nand Kumar and Others v. State of Rajasthan 1963 Crl. LJ 702]. A distinctiveness was made in later years in favour of "general corroboration" or "broad

corroboration". [See for General Corroboration - State of Maharashtra v. Bharat Chaganlal Raghani and Others [(2001) 9 SCC 1]; "General trend of Corroboration" - Jameel Ahmed and Another v. State of Rajasthan [(2003) 9 SCC 673]; and "Broad Corroboration" - Parmananda Pegu v. State of Assam [AIR 2004 SC 4197].

116 Whatever be the terminology used, one rule is almost certain that no judgment of conviction shall be passed on an uncorroborated retracted confession. The court shall consider the materials on record objectively in regard to the reasons for retraction. It must arrive at a finding that the confession was truthful and voluntary. Merit of the confession being the voluntariness and truthfulness, the same, in no circumstances, should be compromised. We are not oblivious of some of the decisions of this Court which proceeded on the basis that conviction of an accused on the basis of a retracted confession is permissible but only if it is found that retraction made by the accused was wholly on a false premise. [See Balbir Singh (supra)].

117 There cannot, however, be any doubt or dispute that although retracted confession is admissible, the same should be looked with some amount of suspicion - a stronger suspicion than that which is attached to the confession of an approver who leads evidence to the court".

6 The case of **Haricharan Kurmi** [supra] was relied on by Ms. Nitya Ramkrishnan the discussion of which is made in this chapter of judgment.

7 The case of **Krishnan** [supra] was relied on the point of credibility, trustworthiness and truthfulness of eye witnesses. Paras 21 to 24 of the judgment read as under:

"21 It is trite that where the eye-witnesses' account is found credible and trustworthy, medical opinion pointing to alternative possibilities is not accepted as conclusive. Witnesses, as Bentham said, are the eyes and ears of justice.

Hence the importance and primacy of the quality of the trial process. Eye witnesses' account would require a careful independent assessment and evaluation for their credibility which should not be adversely prejudged making any other evidence, including medical evidence, as the sole touchstone for the test of such credibility. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be credit-worthy; consistency with the undisputed facts the 'credit' of the witnesses; their performance in the witness-box; their power of observation etc. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation.

22 A person has, no doubt, a profound right not to be convicted of an offence which is not established by the evidential standard of proof beyond reasonable doubt. Though this standard is a higher standard, there is, however, no absolute standard. What degree of probability amounts to 'proof' is an exercise particular to each case. Referring to of probability amounts to 'proof' is an exercise the inter-dependence of evidence and the confirmation of one piece of evidence by another a learned author says: (See "The Mathematics of Proof II": Glanville Williams: Criminal Law Review, 1979, by Sweet and Maxwell, p.340(342).

> “The simple multiplication rule does not apply if the separate pieces of evidence are dependent. Two events are dependent when they tend to occur together, and the evidence of such events may also be said to be dependent. In a criminal case, different pieces of evidence directed to establishing that the defendant did the prohibited act with the specified state of mind are generally dependent. A junior may feel doubt whether to credit an alleged confession, and doubt whether to infer guilt from the fact that the defendant fled from justice. But since it is generally guilty rather than innocent people who make confessions, and guilty rather than innocent people who run away, the two doubts are not to be multiplied together. The one piece of evidence may confirm the other."

> 23 Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth. To constitute reasonable doubt, it must be free from an over emotional response. Doubts must be actual and substantial doubts as to the guilt of the accused persons arising from the evidence, or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary, trivial or a merely possible doubt; but a fair doubt based upon reason and commonsense. It must grow out of the evidence in the case.
>
> 24 The concepts of probability, and the degrees of it, cannot obviously be expressed in terms of units to be mathematically enumerated as to how many of such units constitute proof beyond reasonable doubt. There is an unmistakable subjective element in the evaluation of the degrees of probability and the quantum of proof. Forensic probability must, in the last analysis, rest on a robust common sense and, ultimately, on the trained intuitions of the judge. While the protection given by the criminal process to the accused persons is not to be eroded, at the same time, uninformed legitimization of trivialities would make a mockery of administration of criminal justice. This position was illuminatingly stated by Venkatachalia, J(as His Lordship then was) in State of U.P. v. Krishna Gopal and Anr. (AIR 1988 SC 2154)".
>
> **[Emphasis is supplied in all the above paragraphs of concerned cases by us]**

8 All the above judgments reveal law laid down by the Apex Court with regard to various provisions of IPC, Code of Criminal Procedure 1973 and Evidence Act, to which reference is made by learned counsel for the parties in the context of evidence emerging in the facts and circumstances of the case. That principles, parameters, factors and even guidelines to some extent emerging from the above decisions to which we have applied our mind in the context of submissions made by learned counsels for the parties and emphasis supplied therein is to be understood and construed as our understanding

of law in this regard.

9 We are in complete agreement with the law laid down by the Apex Court in all the above cases and we do not propose to add, alter or put it in a different manner inasmuch as common thread which run through all the above judgments is about believing the witness on the analysis of his testimony based on its trustworthiness, truthfulness, inspiring confidence, and therefore, such statement is reliable and quality of the testimony and not quantity of the witnesses, provided such testimony fulfills other requirements of law is important viz. basic ingredients of the offence, lawful procedure adopted by the Investigating Agency and bringing admissible evidence on record by the prosecution within the four corners of penal statute, Code of Criminal Procedure, 1973 and law of Evidence.

VOLUME-III

PART XII

APPRECIATION OF EVIDENCE

PART XII-A

PASSENGERS / INJURED / EYE WITNESSES AND OTHER WITNESSES ON DEADLY ASSAULT BY MEMBERS OF UNLAWFUL ASSEMBLY

1 **It is the case of the prosecution that several coaches of Sabarmati Express, more particularly, Coach No.S-6 was attacked by the assailants; about 1000 to 1500 in number. Whole coach No.S-6 was surrounded on one side i.e. platform side by the assailants. Therefore the victims inside the boggy i.e s-6 would be able to give first hand account of the incident in question**.

2 For that purpose, we **have demarcated the testimonies of the occupants of coach S-6 in three groups according to the seats or the places near the seats they were occupying at the relevant point of time. Group–1** comprises of those occupying seats No.1 to 25 and its surroundings; **Group–2** comprises of those occupying seats No.26 to 51 and its surroundings and **Group–3** comprises of those occupying seats No.52 to 72 and its surroundings.

3 It is the case of the prosecution that fire in the train started at the end of the coach i.e. somewhere around Seat No.72. Therefore, it will be relevant to first note the testimonies of the victims occupying or present near Seat No.52 to 72. Those witnesses are PW–82 (Seat Nos.58, 59 and 61), PW–94 (Seat No.60 or 62), PW–114 (Seat Nos.69, 70 and 71), PW–84, 87 & 88 – unauthorized occupants occupying the space near Seat No.70. PW–91 and 92 present near Seat No.72-unauthorized occupants, PW–99, 102 & 103 – unauthorized occupants, PW–99, 102 & 103 – authorized passengers in coach No.S-7, but occupying space between toilet in the end of coach No.S-6.

4 **Before discussing the testimony of witnesses group-wise, it would be convenient to tabulate those testimonies as under**:

The crucial facts emerging from deposition of this witness Subhashchandra Ramchandra Mishra PW-114 occupying Seat Nos.69, 70 and 71 are mentioned below. In Column No.2 other witnesses corroborating the facts referred to by the witness in Column No.1 are also mentioned	
Particulars of Crucial facts	Prosecution Witnesses who corroborate the following point-wise crucial facts
1. Arrival of Sabarmati express between 6:30 a.m. and 7:30	PWs–77, 78, 94, 84, 86, 87, 88, 89 91, 93, 95, 98, 99, 102, 103, 96,

a.m. on 27/02/2002	107, 120, 79, 81, 89, 97, 113, 202, 164, 150, 152, 154, 155, 159, 172. , 138, 228, 136, 135, 127, 128
2. It's halt of five minutes	Pws-84, 91, 99, 79, 119,
3. Its movement and halting again and restarting	PWs–77, 82, 84, 86, 94, 102, 103, 78, 96, 107, 120, 79, 89, 97, 113, 202, 85, 150, 152, 154, 155, 159, 172, , 138, 228, 136, 135, 127, 128,
4. Its movement again and halt after covering a distance of about one or one and half kilometer	PWs–77, 84, 95, 107, 79, 119, 81, 113, 202, 82, 85, 127,
5. Stone pelting from outside.	PWs–77, 82, 84, 87, 91, 92, 94, 95, 98, 99, 102, 103, 78, 86, 89, 120, 79, 81, 113, 202, 152, 154, 155, 159, , 172, , 38, 228, 136, 135, 127
6. Closing of the windows and doors	PWs-87, 91, 92, 94, 95, 102 , 120, 79, 81, 97, 119
7. Deposes that the window of the seats occupied by him did not have aluminum protection, but it had a protection of glass which gave way to stone pelting.	
8. Breaking of the window and doors due to stone pelting.	PWs–77, 82, 84, 86, 87, 91, 92, 93, 94, 95, 99, 102, 103, 120, 79, 119, 81, 97, 113, 202, 150, 152
9. He moved to the toilet side for safety along with his sister and mother.	
10. Two miscreants placed hey of grass on the	PWs–77 [corroborates the triggering of the smoke at the end of the coach

window and ignited it and thereby triggering the smoke.	i.e. somewhere near seat No.72], PW-86 [states that he heard from the direction of seat No.72 that coach has caught fire], PW-95 [corroborates the factum of triggering of smoke, fire and suffocation], 98 [corroborates triggering of smoke], PW-99 [corroborates breaking of glass windows and eruption and spreading of fire and smoke and suffocation], PW-102 [corroborate breaking of fire], PW-103 [corroborates eruption of fire and smoke], PW-96 [corroborates eruption of fire and smoke at the end of the coach and he sustained burn injuries on both hands], PW-107 [corroborates the sprinkling of inflammable, throwing of burning rags, setting ablaze the coach at its end and triggering of smoke], PW-120 [corroborates breaking of glasses of windows, setting ablaze the coach, triggering of smoke], PW-97 [was occupant of S/6 seat No.11 and 13; corroborates hearing of screams from the rear end of the coach that the coach has caught fire and noticed the smoke and senses

	the smell of petrol and also deposes that his wife started coughing because of smoke], PW-113 [seat Nos.8 and 72; hears shattering of bottle and notices smoke, experiences suffocation, hears screams that the coach has caught fire; deposes that density / thickness of smoke caused blinding effect.
11. Suffocation on account of smoke and therefore opening of the door and disembarking the coach along with his mother and sister.	PWs–77, 82, 84, 85, 86, 87, 91, 92, 95, 98, 99, 103, 79, 119, 81, 113, 202, 150, 152, 154, 155, 172, ,
12. When standing near toilet, knocking of sliding door	PWs–88, 93, 99, 102
13. Noticing the coach in flames after disembarking.	Pws–88, 91, 89, 94, 96, 99, 120, 150, 152, 154, 155, 159, , 172, , 127, 128

Omissions / improvements / proved through PW-244 Mr. Noel Parmar, Investigating Officer.	
1. Admits having not stated in his statement dated 08.05.2002 that "I saw that two boys had placed hey of grass from outside on the broken window and ignited it and that is how the smoke was generated". 2. Admits that he did not state in	

his statement dated 08.05.2002 that when he was standing near toilet, he heard knocking of sliding door at his back, from outside.	

In the above table, we have pointed out the witnesses corroborating the facts deposed by PW-114. For the sake of brevity, we avoid repetition of such corroborative facts while referring to other corroborating witnesses and we refer to only additional facts deposed to by the following corroborative witnesses.

PW–77 Rajendra Ramfersing Rajput (Occupying Reserved Seats No.62, 63 and 64)

Particulars of Crucial facts	Prosecution Witnesses who corroborate the crucial facts
1. Movement of the train and at that time window was open	
2. Sees 1000 to 1500 people on the platform pelting stone and charging towards the train, holding weapons and sticks	PWs–94, 87, 103, 96, 107, 81, 164, 171, 228, 127, 128, 85. Almost all the witnesses are consensus ad idem on these facts.
3. People trying to escape from windows for safety	
4. Receives burn injuries on hand, leg and ear	
5. Taken to Civil Hospital	
6. Indoor patient for three days.	
7. The smoke started from rear of the coach	PWs–82, 94, 95, 228, 136, 128

Contradictions / omissions	
1. Admits that in his statement dated	

08.05.02, he stated that "at that point of time, some Karsevaks came running in our coach and stated that there was a quarrel with a tea vendor and stones were being pelted and therefore get inside" 2. Admits that he omitted to mention in his statement that "the said windows were broken due to attack by sticks and pipes". 3. Confronted with two statements being 06.03.02 wherein he stated that he himself came out of window and the statement dated 08.05.02 wherein he has stated that he fell unconscious and was helped by somebody, and states that the first statement is correct.	

PW–82 Verpal C. Pal (Seat Nos.58, 59 and 61, occupying place on the floor. Gets down as the train was overcrowded and then comes back in coach No.S-6)

Particulars of Crucial facts	Prosecution Witnesses who corroborate the crucial facts
1. Overcrowded train	PWs-78, 86, 81 (almost all) ?
2. **Wanted to buy a cup of tea for wife, but Karsevak did not allow him and the tea vendor who had come inside was taken out of the coach**	PWs-97, 113

by Karsevak and after sometime, there was a commotion.	
3. Wife and daughter injured by stones.	
4. Heavy stone pelting resulting into breaking of iron rods of the window.	PW–94
5. **Heard the noise of breaking of bottles (See PW–114 who says the glass window was broken). Did not see the actual breaking of the bottle and perhaps refers to the breaking of glass, but perceives the sound as that of breaking of bottle. Actually the window as stated by PW–114 had broken. Thus, corroborates PW–114.**)	PW-113
6. The Shawl of his wife was burnt and saree also caught fire. Shawl was removed and doused by somebody who came from S-7. He also doused her Saree and helped her out of the train.	
7. Injuries on the forehead of the wife and treatment given outside the train.	

8. Lost daughter-in-law.	
9. Goes to Baroda with wife	
10. Returns to Godhra on the next day	
11. Gives application for searching his daughter-in-law.	
12. Did not find his daughter-in-law	

Omissions	
1. Admits the omission that because of heavy stone pelting, iron rods of window had broken and at that point of time, his wife obstructed the window by placing a bag, and therefore, the stone did not hit her and at that point of time, the hand of his wife was protruding the window and somebody tried to pull it, but his wife pushed him and withdrew her hand. 2. Admits the omission that the noise generated by bottles was heard from the backside in the coach. 3. Admits the omission that the coach caught fire from the backside.	

PW–94 Bachubhai Dhanjibhai Ladwani (Complainant)
(Seat Nos.60 or 62)

Particulars of Crucial facts	**Prosecution Witnesses who corroborate the crucial facts**
1. Gets down the train and again	

on movement of the train comes back.	
2. Miscreants were throwing burning rags through windows.	PWs-93, 119 (Seat No.24), 89
3. Helps other to come out of the train through windows after breaking rods.	
4. Was helped by Nilkanth Bhatia and Prahlad Patel in coming out of the train.	

Omissions / improvements	
Admits the omission that the people comprising the mob possessed sticks and carboys.	

PW–84 Hetalben Babubhai Patel (Complainant)

Particulars of Crucial facts	**Prosecution Witnesses who corroborate the crucial facts**
1. Hurling of a burning rag with inflammable material caused a blast and as such she advises others to disembark the coach as the coach has caught fire.	PWs–85, 91, 92, 93, 95, 107, 113
2. Deposes that she was blind sited and experienced suffocation, burning sensation on eyes and ears.	PW–91, 79, 113
3. After coming out of the coach, sees many persons on fire.	PWs–79, 119
4. Savitaben who accompanied this witness received burn injury – was admitted in local hospital, Godhra.	

5. Deposes that Lalitaben and Manguba were burnt alive	
6. Deposes that Prahladbhai received burn injuries and succumbed during treatment	

Omissions	
Admits the omission in her statement dated 08.05.2002 that the people comprising the mob reached the coach and broke open the windows.	

PW–85 Rakeshbhai Kantibhai (Complainant)(Seat Nos.56 in S-6)

Particulars of Crucial facts	**Prosecution Witnesses who corroborate the crucial facts**
1. After train stopped for official halt, heard shouts from engine side that stone pelting is being done, was on the platform at that point of time	Pws-138, 228
2. Sees Muslims on the street pelting stones on the train.	
3. Rushes to the train and then goes to the toilet falling towards platform near Seat No.72 of S/6.	
4. Hears the noise of bashing windows by pipes.	
5. Sees legs of many people through toilet window	
6. Fearing that the toilet window may be broken by the assailants and he will be beaten, decides to move out of the toilet and in the	

meanwhile, glass of the said window was broken.	
7. People around him doused burning rags. On seeing that burning rag was doused, the people comprised in the mob started shouting that "they have doused it, bring more" and then something was poured and burning rag was again hurled on the train which smoke and ignited fire in the coach .	
8. Sensing smell of petrol from the side of Seat No.72, he jumped out of the train.	PW-97
9. 50 to 100 people were pelting stones from outside, and therefore, there was a retaliation in defence by stone pelting in order to scare away the mob.	
10. Nilkhantbhai received burn injuries on the lower limbs	PW–87
11. Sadashivbhai, Chiragbhai Patel, Sonikaka and his son, parents of Gayatriben Panchal, and two sisters and other Karsevaks and passengers died due to burn injuries.	
12. Simple burn injuries received on right eye.	
13. Identifies Hasan Ahemad Charkha as one of the assailants.	

Omissions	

Admits the omission regarding throwing of burning rags, its dousing, its throwing again, etc.	

PW–92 Dineshbhai Narsinhbhai Narsinhbhai

Particulars of Crucial facts	Prosecution Witnesses who corroborate the crucial facts
1. This witness does not refer to the second unofficial halt of the train but it appears that her referring to the occurrence which took place at "A" Cabin after the second unofficial halt of the train	PWs-79, 202
2. **Stone pelting from metal stones heap**	
3. Liquid started flowing in.	
4. Falls unconscious because of suffocation	
5. Treatment at Godhra Civil Hospital and transferred to Civil Hospital	
6. Treatment continued for 2 to 3 days	
7. Not willing to identify the assailants due to lapse of time	

Contradictions / omissions	
1. Disputes he having stated in the statement dated 08.05.2002 that "owing to a quarrel with tea vendor, stones were being pelted; close doors and windows; therefore, passengers	

closed the doors and windows of the coach". 2. Disputes that during his statement dated 08.03.2002, when asked about seat number occupied by him in S/6, he was unable to identify the same. 3. Admits he having not clearly stated that owing to stone pelting, the glasses of windows of the coach were broken. 4. Admits the omission in his statement that they were laced with sphere with swords, axe and were cutting the iron rods of the windows and were pelting the metal pieces from the heap of the metal. 5. Admits the omission in his first statement that "thereafter, at the rear side, burning rags were thrown and liquid flow had come".	

PW–93 Shardaben (Seat No.72)(injured witness)

Particulars of Crucial facts	Prosecution Witnesses who corroborate the crucial facts
1. Movement of the train and stone pelting.	PW-128
2. Received forehead injury by stone.	

3. Moves to the safer place between two toilets.	
4. Deposes that last door in the end of the coach was closed and was being knocked with the exhortation "kill Hindus chop them, Hindustan murdabad Pakistan jindabad".	PW-98
5. Indiraben, Shantaben, Kamlaben found safer place between two toilets with him. She and Nandubhai jumped out of the train.	
6. Champaben Manubhai, Sheelaben Mafatbhai, Diwaliben, Shantaben, Manjulaben, Kamlaben were burnt alive	

Contradictions / omissions	
1. Disputes she having made statement that before recording of her statement, the police had shown him the sketch of S-6 wherefrom she specified that she was sitting on Seat No.72. 2. Disputes the omission in her statement that to save themselves from the stone pelting, they went to the space between the toilet and the door at the end of the coach was closed and noise of the knocking on the side door was being heard and they were saying, "kill Hindus, etc.....". 3. Disputes the omission in her	

statement that they had thrown the liquid.	

PW–95 Vandanaben R.Ramfersinh (Complainant)

Particulars of Crucial facts	Prosecution Witnesses who corroborate the crucial facts
1. Prahaladbhai a resident of Mehsana was helped out of the train in burning condition	PW-102
2. Helps Savitaben and injured victim to Godhra Civil Hospital and then moves to Ahmedabad Civil Hospital with Savitaben.	

Contradictions / omissions	
Admits she having not produced any documentary evidence in support of her say as regards occupancy of Seat No.33 in S-6 at the time of incident.	

PW–98 Maheshbhai Cheljibhai (Complainant)

Particulars of Crucial facts	Prosecution Witnesses who corroborate the crucial facts
1. Was sleeping and got up due to shouts	
2. Senses smell of petrol	
3. Admitted to Godhra Civil Hospital and then to Ahmedabad Civil Hospital	
4. Not able to identify the assailants	

Contradictions / omissions	
1. Admits having not produced documentary evidence justifying	

occupancy of specific seats, at the time of recording of his statement, nor did he specify the seat occupied by him. 2. Admits having clearly not stated in his statement that "there were exhortations for killing and stone pelting was being done and he sensed the smell of petrol".	

PW–99 Prakash Hiralal (Complainant)

Particulars of Crucial facts	Prosecution Witnesses who corroborate the crucial facts
1. Closes door between S-6 and S-7 to save his uncle from cold wind.	
2. The fire started from the place where they were sitting on latrine side	
3. Opening of doors of the off-side.	PWs-102, 103, 86, 107, 113 - Almost all the witnesses corroborate this fact.
4. Shifted to Godhra Civil Hospital.	
5. Does not know the assailants	

Contradictions/ omissions	
No material contradiction	

PW–102 Rampal Jigilal Gupta (Complainant)

Particulars of Crucial facts	Prosecution Witnesses who corroborate the crucial facts
1. Uncle injured and suffocated	
2. Shifted to Godhra Civil Hospital	

Contradictions / omissions	
No material contradiction	

PW–103 Somnath Sitaram Kahar (complainant) - Reservation on Seat Nos.66 to 71 in S-7, but was asked to move to S-6 from S-7

Particulars of Crucial facts	Prosecution Witnesses who corroborate the crucial facts
1. Train stopped near "A" Cabin	

Contradictions / omissions	
No material contradiction	

5 **<u>Second Group comprises of following witnesses:</u>**

1. PW-78, Seat Nos.45
2. PW- 86, Seat Nos.41, 44/43,
3. PW-87, was occupant of S/6 coach and he was occupying seat No.47 and at the time of stone pelting climbed to seat No.48
3. PW-89, Seat Nos.26, 27, 28, 29
4. PW-96, Seat Nos.33, 34, 35

Unauthorized passenger in the second group were:

1. PW-107, above Seat No.35,
2. PW-120, Seat No.33

PW–78 Maheshbhai Jayantibhai Patel (Complainant)

Particulars of Crucial facts	Prosecution Witnesses who corroborate the crucial facts
1. Hears that there is stone pelting	
2. He was occupying space near Seat No.45, however, to save himself moves to the space between two toilets.	
3. While coming out of the door, gets	

injured by stone	
4. Goes to Godhra Civil Hospital and then to Ahmedabad Civil Hospital in Ambulance	

Contradictions / omissions	
No material contradiction	

PW–86 Hariprasad Maniram Joshi (Complainant)

Particulars of Crucial facts	**Prosecution Witnesses who corroborate the crucial facts**
1. Learns that there **would be stone pelting** and a suggestion was made to close the doors and windows. While the people were closing the doors and windows, **stone pelting** started from the platform side.	PWs–96, 164
2. Chain of the train was pulled twice and the train halted.	PW-164, 138, 228, 127, 128,
3. Windows near between 41 to 46 were accidentally left open and the stones were coming from there	
4. People gathered between Seat Nos.41 and 72 for safety. **Hears the suggestion from near Seat No.72 that the coach is on fire**.	PWs-79, 97, 113, 202
5. Goes to Seat Nos.1, 2 and 3 and finds the door leading to the yard open, gets down.	
6. Wife died in the incident.	

Contradictions / omissions / improvements	

Admits having stated in the statement dated 12.06.2002 that he had not seen any person pelting stone or setting ablaze the coach as the doors and windows were closed and his wife had shifted to the upper- birth.	

PW–87 Maheshbhai Jayantibhai Patel, was occupant of S/6 coach and he was occupying seat No.47 and at the time of stone pelting climbed to seat No.48 (Complainant)

Particulars of Crucial facts	Prosecution Witnesses who corroborate the crucial facts
1. Sees **smoke emerging from the rear side of the coach.**	
2. Hears the people screaming that the coach was set ablaze from the backside	
3. Continued attack – Sees **burning rags**, stones and bulbs coming into the coach	
4. Joshikaka, Sadashivbhai, Nitaben Panchal, Harsadbhai Panchal and his two daughters were burnt alive.	
5. Taken to Godhra Hospital and then shifted to Ahmedabad.	
6. Nilkhant also in the Civil Hospital Ahmedabad	

Contradictions / omissions / improvements	
Admits the omission in his statement dated 28.02.2002 that “the windows were broke open by pipes and stone	

pelting, thereafter smoke was triggered at the rear side of the coach from some burning substance, from that side people were screaming and saying that the coach has been set ablaze at its rear side, people ran helter-skelter in the coach at this point of time also burning rags, bulbs and stones were being hurled, he and Satishbhai climbed the seat to save themselves of the stone pelting, thereafter the coach starting burning and he proceeded towards the exit, then he came out of the coach with the help of other workers, his colleagues Joshi Kaka, Sadashivbhai, Nitaben Panchal, Harshadbhai Panchal and his two daughters could not come out, and were burnt alive in the coach, some people were pulled out from the right hand side of the coach by workers, Nilkanthbhai was pulled out of the window, one other lady was also pulled out of the window, when Nilkanthbhai was pulled out, his pants were burning.	

PW–89 Premaben A. Mali (Seat Nos.25 to 29)

Particulars of Crucial facts	Prosecution Witnesses who corroborate the crucial facts

1. Heard that the coach is on fire	

Contradictions / omissions	
No material contradiction	

PW–96 Satishkumar Ravindra Mishra (Seat Nos.33,34 and 37)

Particulars of Crucial facts	**Prosecution Witnesses who corroborate the crucial facts**
1. Gets down at the platform, **hears that stone pelting is being done**.	Similar fact was stated by many of the witnesses referred to herein above and also; below
2. Both the windows were closed	
3. Both the windows broke so moves to the upper-birth	
4. Fire started from the backside of the coach	PWs–79, 119
5. Wild fire reaching at his back	PW–79
6. Removes window bar and saves daughter and himself and other passengers	
7. Burn injuries on both hands, wrist and forehead	
8. Taken to Godhra Hospital and his employer Maheshbhai shifted him to Vadodara Civil Hospital for a day and then moves to private hospital	
9. Loses wife	
10. Admittedly hospitalized upto 17.03.2002	
Contradictions / omissions	
1. Admits the omission as regards breaking of both windows due to heavy stone pelting.	

2. Admits the omission as regards stone coming through the windows and starting of the fire from the rear. 3. Admits having not stated in his statement that "my wife, daughter and myself attempted to go ahead for safety and in the meanwhile the fire followed us" 4. Admits having pleaded ignorance in the end of his statement dated 28.02.2002 about the incident and application of bandage on both of his hands.	

PW–107 Parsottam Gordhan (Complainant)

Particulars of Crucial facts	Prosecution Witnesses who corroborate the crucial facts
1. Alights on the platform	

Some of the witnesses state that blanket (Rajai) was also used for setting ablaze. PW-107 says that blanket (Rajai) was placed by them on the window to protect themselves which was snatched by the people of the mob.

Contradictions / omissions	
1. Disputes the omission that after pouring inflammables and throwing burning rags, the coach was set ablaze.	

2. Disputes the omission regarding breaking of windows on account of stone pelting.	

PW–120 Nitinbhai Chaturbhai Patel (Complainant)

Particulars of Crucial facts	Prosecution Witnesses who corroborate the crucial facts
1. Gets down on the platform, finds **commotion or unrest there**. Therefore, gets back into the train.	PW-97
2. Deposes that Prahladbhai received injury	
3. Taken to Godhra Civil Hospital, then Ahmedabad Civil Hospital and discharged on 28.02.2002.	
4. Though claims that he can identify the accused, fails (it was noticed by the Court that during the evidence of this witness as many as 9 accused were in the waiting room and were not present in the Court)	

Contradictions / omissions	
No material contradiction	

6 **<u>Group-1 comprises of following witnesses</u>**:

1. PW-79, Seat Nos.17 to 21, but was given only Seat No.24
2. PW-81, Seat Nos.4, 5 and 6
3. PW-89, Seat Nos.25 to 29

4. PW-97, Seat Nos.11 and 13, but was occupying the space near the seats
5. PW-113, reservation of Seat Nos.8 and 72 in S-7, occupies Seat No.7 in Coach No.6
6. PW-119, reservation of Seat Nos.18 to 21, but was given Seat No.24 only
7. PW-202, Seat No.9 in S-6, but allowed to occupies Seat No.3

PW–79 Amarkumar J.Tiwari

Particulars of Crucial facts	**Prosecution Witnesses who corroborate the crucial facts**
1. Was allotted seat Nos.17, 18, 19 & 21 in S/6, but about 75 to 80 karsevaks had boarded the coach unauthorizedly and they were occupying the said seats and he was offered seat No.24 and was occupying the said seat.	
2. Blocking of the windows by bag to prevent assault of the stones	
3. Attempted snatching of the bag by a bearded man	PWs-119
4. His father, sister-in-law and himself were injured by stones	
5. Loses parents	
6. Taken to Civil Hospital, Godhra	
7. Unable to identify the accused	

Omissions	
Admits the omission that at that point of time, coach and occupants	

had caught fire and were running helter and skelter.	

PW–119 Punamkumari Sunilkumar Tiwari (Complainant)

Particulars of Crucial facts	Prosecution Witnesses who corroborate the crucial facts
1. Was companion of PW-79	
2. Deposes dousing of burning rags by his father-in-law	
3. Son-Ashish and brother-in-law Amarkumar were taken to Godhra Hospital	
4. Lost parents in law	
5. Took treatment in Civil Hospital 6. Identifies dead body of parents in law on the next day	

Contradictions / omissions	
Disputes the omission that the fire had started on the left side of their place of sitting as also from the opposite direction; which generated heavy smoke in the coach.	

PW-81 Pujaben B.Kuswaha

Particulars of Crucial facts	Prosecution Witnesses who corroborate the crucial facts
1. After train started, a mob came from platform side and started pelting stones; closed windows. After train started opened the windows	PW-164, 228

2. Moves to the latrine side for safety. Hears bashing of weapons on the coach	
3. Inflammable smelling petrol was thrown from outside	
4. Vestibule in the passage between two coaches [between S/5 and S/6] was teared by her father to come out of coach.	
5. All came out of the train and proceeded to one house, there shelter was given to them by the inmates, and then arrangement was made for boarding the bus to Bhavnagar.	

Omissions	
1. Admits the omission that after movement of the train, a mob came on the platform and started pelting stone; she closed the doors and windows and after the train moved she opened the windows and while the train moved about the kilometer, many people comprised in the mob were coming from the platform side, they were having weapons and were pelting stones. 2. Admits having stated in her	

statement that she had not seen anyone breaking the coach or setting it ablaze. 3. Not able to say whether she stated in the police statement that the noise of breaking windows where they were sitting, from the outside was being heard and since the window broke, some substance was thrown inside and therefore, she, her mother and father moved towards toilet.	

PW–97 Hariprasad Manilal (complainant) (injured witnesses)

Particulars of Crucial facts	**Prosecution Witnesses who corroborate the crucial facts**
1. Hears commotion from other passengers on the platform	
2. Train moved and then slowed down stone pelting	
3. Explains that when the train started, windows were opened by passengers and found the mob of 200 to 250 persons with weapons, etc.	
4. Blocking of windows by suitcase bag	
5. Both of his hands received burn injuries and his clothes were also burnt.	

Contradictions / omissions / improvements	
1. Admits having stated that from some distance of the coach on platform no.1, she heard about commotion or quarrel between Karsevaks and members of Bajrangdal, and refreshments store keeper/s. 2. Admits the omission that after starting of the train, people opened the windows and saw mob comprised of 200 to 250 people.	

PW–113 Radheshyam Ramchandra (Complainant) (injured witness)

Particulars of Crucial facts	Prosecution Witnesses who corroborate the crucial facts
1. Allottee of Seat Nos.8 and 79 in S-7, but because of paucity of space there, came to S-6	
2. Gives shelter to his wife and grand-son under Seat No.7, covered them with military bedding, is a military man (Havaldar-Army)	
3. Goes under Seat No.7	
4. Blocks the stones with bag	
5. Hit by stones on nose as the bag slipped	
6. Goes to opposite seat	
7. Jumps out of the train, a piece of glass pierced into his leg	

Contradictions / omissions	
Admits the omission that after the train crossed the platform, windows on opposite side were opened and in the meanwhile, from the platform side, many people comprised in mob were shouting and charging, **but explains that the statement was made by him that from the platform side, a mob comprised of Muslims people was shouting and pelting stone from platform side.**	

PW–202 Govindsinh Ratansinh Panda (Complainant)(injured witness)

Particulars of Crucial facts	Prosecution Witnesses who corroborate the crucial facts
1. Is Deputy Subedar and C.C. Head Quarter, Udhampur	
2. Most occupants – members of Bajrangdal, came out of the train and started chanting "Jay Shri Ram" and then returned.	
3. Tries to open the right side (off side) door but feels as if it is locked and tied by wires; forces it partly open with help of others and from the space so created comes out of the coach.	
4. Finds 4 or 5 people with weapons i.e. the rods, pipe and	

knife after coming out, they charged at him. Wanted to escape but was cordoned, was hit by stone and stick at his back.	
5. Presuming him to be the member of Bajrangdal, exhortation was made to beat him	
6. Introduced himself as Fauji with warrant as his identification.	
7. Was hit by iron rod on his head by one person; consequently started bleeding	
8. Explains that initially, he was attacked by knife on the waist but his belt saved and then was hit by iron rod on head and then one of the persons stated that he should be dropped near the road and offered him water.	
9. He was helped to reach the road in the jeep; other passengers desirous of similar help ran towards the jeep and all of them boarded it. Then the boy helped him to board the bus.	
10. Reported to Shahibaug NCC head quarters and meets the Director there and informs about the incident in S-6	
11. He was sent to military hospital Shahibaug for treatment; x-ray	

taken and stitches were applied on his injury.	
12. During treatment in the military hospital, his statement was recorded on 16.03.02	
13. Identifies his saviour on 16.05.02	
14. Fails to identify the assailants	

Contradictions/omissions	
1. Admits having not stated in any of his statement that he felt that offside doors wherefrom he attempted to get down was locked by wires. 2. Admits that after first chain pulling, some of the members of Bajrangdal who were left behind got into the coach and closed the door from inside and at their instance the doors and windows were closed as there had been a quarrel outside. 3. Admits the omission that his saviors were Muslim people, who helped other two passengers as well. 4. Admits the omission in his statement dated 16.03.2002 that	

after movement of the train and stoppage, some stones were pelted and after half a kilometer when the train stopped again, there was heavy stone pelting from the left side of the train; resulting into breaking of the glasses of the windows and in addition even the steel shutter windows were broken because of heavy stone pelting. Safety rods were also broken. Clarifies and explains that he stated in the statement that there was heavy stone pelting. 5. Admits having omitted in his statement dated 16.03.2002 that after sometime, the sensation of burning of rubber was felt from the end of the Godhra side of the coach and the fire started very fast.	

7 **We may now appreciate the testimonies of the witnesses group-wise. The presence of the authorized passengers in coach S/6 and other authorized passengers, who had come from other coaches to S/6 cannot be doubted. As the following discussion would show presence of even unauthorized occupants in coach S/6 has been established by testimonies of numerous witnesses.**

8 According to the prosecution, the inception point of the fire was at the end of coach S/6. Therefore, we may first appreciate the testimonies of witnesses of Group-3, who were the occupants at the end of the coach.

8.1 We may first take up **PW–114 Subhashchandra Ramchandra Mishra occupying Seat Nos.69, 70 and 71)**. He was travelling along with other family members in coach No.S-6 on the fateful day. He had a plan of staying at the place of his visit for about two months and thus was carrying a huge luggage. Though had three seats reserved, was offered only seat No.69, other two being occupied unauthorizedly by Karsevaks. His testimony is tabulated as above. From the above tabulated testimonies of numerous witnesses, it would be seen that said numerous witnesses; in corroboration with the testimony of PW-114 deposed about date and time of arrival of Sabarmati Express, its halt for 5 minutes, its movement and halt again; its movement again and halt after coverage of distance of about 1 or 1½ kms., stone pelting, suffocation on account of smoke and opening of door and disembarking the coach by several witnesses, knocking of sliding door and the coach being in flames. The testimony of PW-114 would further indicate that window of seat No.72 of coach S/6 lacked aluminum shutter and only had a glass protection which was broken by the miscreants and to save himself he moved to the toilet side along with his sister and mother for safety. He then explains that hay of grass was placed on the broken window and ignited by the miscreants, generating the smoke. Lack of aluminum shutter in the window, placement of hay of grass by two boys from outside after breaking of window and generation of the smoke and then fire is accepted by this witness as an omission in his previous statement dated 08.05.2002. The witness is sought to be criticized for such improved version of his. The witness, however reiterates having

stated that the window protection of glass was broken by stone pelting, in his previous statement.

Omissions, contradictions or improvements, may occur for several reasons e.g., a witness may forget to mention particular facts in a particular way in his previous statement owing to trauma or stress or tension or similar such circumstances; when confronted with assault of a high magnitude like the one in the present case. Omitted and contradicted facts or improved version or other incidental material facts connected with omitted, contradicted or improved version; if supported by other witnesses without such omissions, contradictions and improvements, then such omissions, contradictions or improvements would pale into insignificance. Therefore, the testimonies of witnesses on mere ground of omission, contradiction or improvements by few amongst many witnesses cannot be discarded. It is therefore required to be seen as to whether his version or facts connected therewith gets corroboration from other witnesses.

8.2 It is material to note that for those passengers comprised in Group-1 and Group-2, who were facing direction opposite seat No.72 were at their backside and PW-113 and PW-82 [seat Nos.58, 59 and 61] who shifted from coach S/7. Those seats were unauthorizedly occupied by Karsevak and were not even offered to his pregnant daughter-in-law. The family therefore disembarked coach S-6 for alternative arrangement which they could not do and ultimately returned to S-6.], depose having heard the sound of shattering of glass and generation of smoke from backside. They had not seen the breaking of glass as they were facing the direction opposite to s-72. Shri Virpal Chhedilal PW-82 and PW-113 appears to have heard the sound generated by shattering of glass as the sound generated by breaking of bottle, without noticing the object which

had broken. Therefore, it would not be appropriate to mince their words and it appears that what they meant was that a glass had broken. Thus, the said witnesses corroborate the deposition of PW-114 regarding shattering of glass window and the contradiction or the omission on that count are insignificant.

8.3 PW-77 Rajendra Ramshankersing Rajput was the occupant of seat Nos.62, 63 and 64 of S-6. Therefore, other seats following seat No.64 would obviously be the seats at his back. He deposes having seen the smoke in the back side of the boggy and thus corroborates PW-114 regarding generation of smoke.

8.4 PW-86, the occupant of seats No.41 and 44 along with his wife in S-6 deposes having heard from seat No.72 side that the coach has been set ablaze. He thereafter saw the smoke. No material contradiction on this count are found in the evidence of this witness.

8.5 PW-99 is the passenger having reservation of seats No.25 to 28 in coach No.S7. However, because of paucity of space in that coach, he was asked to move ahead and thus he came to coach No.S-6 and occupied the space along with the luggage between the two toilets situated in the end of S-6 i.e. somewhere after seat No.72; the last seat. According to his testimony, the fire had taken place from outside the toilet. No material contradiction appears in his testimony.

8.6 Similarly, PW-102 had the reservation of the seat in S-7 but was asked to come ahead and thus was occupying the space between the two toilets situated in the end of S-6. According to him also, the smoke was generated at the place where they were sitting.

8.7 PW-96, the occupants of seats No.33, 34 and 35 also deposes that the fire had taken place at his back side; although he admits having omitted to mention the said fact in his statement under Section 161 of Code of Criminal Procedure, but the fact remains that he has been corroborated by other witnesses aforesaid on this aspect.

Similar is the version of PW-119, 81 and 97.

9 **Group-2 = PWs-78, 86, 89, 96, 107, 120**

9.1 PW-89 (reserved Seat Nos.26 to 29), PW-96 (reserved Seat Nos.33 to 35), PW-120 (unauthorized occupying reserved Seat No.33 of PW-96), PW-107 (unauthorized occupant sitting above Seat No.35), PW-86 (reserved Seat Nos.41, 43 and 44), PW-78 (Seat No.45) are the witnesses in the second group afore-stated. Except PW-120, they do not claim the initiation of fire at the place where they were sitting.

9.2 PW-120 makes a half hearted statement that the train was set ablaze but does not specify as to whether the fire was initiated at the place where he was sitting. He was confronted with the omission as regards pouring inflammable, throwing of burning rags and setting ablaze coach which he disputed but I.O. proved such existence of omission in his statement under Section 161 of the Cr.P.C. It thus appears that the fire was not initiated at the place where the passengers in Group-2 were traveling in the coach.

9.3 It can be noticed from the testimony of PWs-79, 119 and 113 that the passengers in the train comprised in **Group-1 were resisting the assault and were trying to save themselves**.

9.4 PW-79 testifies having blocked the windows by bag to prevent the stones being pelted from outside, hitting them, and snatching of her bag, her being hit by stones and her treatment in the Civil Hospital.

10 **Group-1** : PW-81 Pujaben Bahadursinh Kushwah of Seat Nos.4, 5 and 6 along with her family members as discussed in greater detail in the later part of this judgment, would establish the assault and smoke, fire even in the beginning.

10.1 Breaking of the windows due to stone pelting (PW-114), throwing of burning rags through window (PW-94 and others), hearing the noise of hitting the windows (PW-85), making of the suggestion to close the windows due to stone pelting and in the meanwhile, starting of the stone pelting before windows could be closed (PW-86), leaving of the windows accidentally opened near Seat Nos.41 to 46 (PW-86), closing of two windows and its breaking (PW-96), blocking of the windows by a suitcase (PWs-97, 113 and 79), arming of the assailants with weapons (PWs-150, 77 and 97), are the facts establishing assaults by stones, fire, burning rags and weapons from outside the train.

10.2 Pelting of stones from outside and breaking of the windows thereby is deposed to by PWs-77, 82, 84, 87, 91, 92, 94, 95, 99, 100, , 120, 79 and 113 who were the passengers traveling in the coach, without contradictions and omissions.

10.3 PWs-94, 84, 103 and 97 are the passengers who, without omission or contradiction, attribute either the possession of weapons or its use for breaking the windows and carrying assault to the accused.

11 Thus, incidental and related facts viz. existence of windows with glass shutters, breaking of windows and doors due to stone pelting, screams of fire from the end of the coach, triggering of smoke at the end of the coach, suffocation, breaking of glass windows, etc. are corroborated by witnesses being PWs-77, 86, 95, 97, 98, 99, 102, 103, 96, 107, 120, 97 and 113. **Thus, the version of PW-114 gets sufficient corroboration and is required to be accepted as credit-worthy.**

11.1 **The evidence also indicates that attempt was made to burn the coach from platform side and it was successfully set ablaze somewhere from S-72. When the ocular version is eloquent and clear, other possibilities or logics based on scientific reasons and scientific opinions which comprehends only theories rather than real fact situation deposed to by eye witnesses, relied upon in defence pales into insignificance. The ocular version, discussed above, rules out accidental fire due to smoldering, short circuit or similar other reasons. However, we may consider the arguments advanced in defence; based upon scientific theories at appropriate place in this judgment.**

12 The fact that after the fire broke out, there was a suffocation in the boggy, because of which many of the passengers came to the off-side either through the door or after tearing the vestibules between S-5 and S-6, is deposed to by PWs-77, 82, 84, 85, 86, 87, 91, 92, 95, 98, 99, 103, 79, 119, 81, 113, 202, 150, 152, 154, 155 and 172.

12.1 Relying upon the evidence of many witnesses who referred to generation of smoke first and then fire, it was argued that causation of fire cannot be attributed beyond reasonable doubt to petrol inasmuch

as it is only smouldering fire that would generate the smoke first and the fire in the next stage.

12.2 The phenomenon of `smoke first and then fire' is better explained by PW-240, a Scientific Expert, which has been discussed in greater detail in later part of this judgment.

12.3 It is misconceived to argue much less to be believed that until the passenger got down to the off-side, it was only smoldering, smoke and fire could be noticed only after getting down of the passengers inasmuch as, various witnesses discussed herein above as also the following witnesses depose having seen the fire in the coach itself.

12.4 PW-96, who sustained the burn injuries on hands, wrist and forehead, explains how the fire chased him in the coach itself.

12.5 PW-82 also deposes hurling of burning rags, its dousing by her father as discussed in greater detail hereinafter.

12.6 PW-157 Savitaben Tribhovandas Sadhu deposes the hurling of burning rags into the train; one of which fell on her, she sustained burn injuries. She also deposes the throwing of petrol from the window. Her right ear and hand were burnt. Because of stone pelting, the windows had broken. Her version as to burn injuries is corroborated by Dr.Parulben Rameshbhai Vaghela PW-68 Exh-544. The Medical Certificate and OPD case papers respectively in that connection are produced at Exh:545.

12.7 PW-80 Gyanprakash Lalanprasad Chaurasia’s deposition

that his parents sustained burn injuries from flames is corroborated by PW-70 through the Medical Certificate Exhs-572 and 573 respectively. Similarly, one of the injured passenger Prahaladbhai Jayantibhai Patel was treated with 30% superfluous and or deep burns caused to him by flames, in the civil hospital as deposed by PW-70.

12.8 **It is however true that many other passengers were diagnosed for suffocation congestion and breathing problems because of inhalation of the smoke. They were however fortunate enough to rush out of the train, mostly on off-side. It is also true that smoldering before eruption of fire may generate smoke and such smoke would cause suffocation and breathing related problems. However, the ocular version by many of the witnesses that inflammable was thrown or sprinkled into the train, hay of grass was ignited on the window of s-6, burning rags were thrown, fire was initiated at or around Seat No.72, rules out the possibility of accidental/smoldering fire.**

12.9 **The above detailed discussion would indicate the manner and method and the nature of assault carried out by the miscreants on Sabarmati Express more particularly, coach S/6, on fateful day. To appreciate the manner of formation of the unlawful assembly and whether or not subsequently the conspirators joined the unlawful assembly for implementing their plans, it may be recapitulated that two separate incidents triggered the trouble for the passengers in the Sabarmati Express**. The assailants at that point of time called for the help in response to which hundreds or thousands of members of Muslim community are deposed to have come to their rescue as also for taking a revenge from the occupants of the train for they have being allegedly molested the Muslim women or beaten the Muslim tea vendors. The

said two incidents took place during the official halt of train. It then started moving and it is borne out from the evidence on record that some of the passengers were left behind and, therefore, chain was pulled to stop the train from four coaches. At the same time, the evidence also shows that the miscreants wanted to take a revenge and, therefore, wanted to stop the train. Thus, the passengers and the miscreants both had a motive to stop the train. However, in absence of clear evidence implicating the miscreants in the act of pulling the chain at this juncture, we may proceed on the assumption that the chain was pulled by the passengers to facilitate the boarding of the train by other passengers left on the platform. The evidence however indicates that when, after the official halt, and after its halt because of first chain pulling, the train was on the move, it halted again because of the chain pulling. **This second chain pulling cannot be attributed to the passengers inasmuch as they were already under assault and thus could not have ventured to pull the chain; rather they would have wished that the train moves towards its onward journey, safely. The testimony of PW-236 indicates that accused exhorting the other miscreants to stop the train and testimonies of PW-228 shows that accused had jumped on to the hose pipe of coach and was trying to damage it. That repairing of the hose pipe is admitted by PW-236 in his testimony before the trial court. Thus, the miscreants had a reason to stop the train and eventually the train came to a halt at `A' cabin. It appears that before the train halted at `A' cabin, it was under an assault mostly by stone pelting and by use of certain weapons of offence. It was assaulted by hurling fire rags, sprinkling or throwing of inflammable in addition to stone pelting and assault of other nature only at `A' cabin and the said facts are noted in greater detail earlier from the testimonies of passengers travelling in the train.**

13 **The happenings on the platform or at `A' cabin can better be known from the non-passengers available on the platform or near `A' cabin**. To have a bird's eye view of their testimonies, we may tabularize their version, as under:

PW-164 Shri Mohan Jagdishsingh Yadav (Constable) to be discarded.
The facts deposed by him are:

Particulars of Crucial facts	**Prosecution Witnesses who corroborate the crucial facts**
1. He was on petrolling duty with his duty hours being 02:00 to 08:00 between 26.02.2002 and 27.02.2002.	
2. His duty area extended from CPWI Office to “A” Cabin.	
3. RPF Constable Karansinh accompanied him during patrolling.	
4. Passengers got down from the train chanting “Jay Shri Ram” “Jay Shri Ram”	
5. Some people from single fadiya came to the platform side and started pelting stone.	
6. Those chanting “Jay Shri Ram” were asked to occupy the train	
7. Train started	
8. Chain pulling was resorted to.	
9. Train stopped again after moving by two or three coaches	
10. Stone pelting continued by miscreants.	
11. Police ran towards the coach and asked the people to get into the train immediately	PW-128

12. Train started moving again.	
13. Stoppage of train at `A' cabin	Pw-136, 127
14. Goes to guard lobby and telephonically apprises his officials about stone pelting and sought extra force to counteract stone pelting	
15. Comes out and sees thousands of people charging towards "A" Cabin and proceeds towards the train; notices pelting stones by miscreants.	
16. Deposes that they were laced with weapons like pipes, sticks, etc.	PW-94
17. Notices the smoke coming out from train near "A" Cabin.	
18. Goes to "A" Cabin and opens fire because the mob had ignited the train	
19. Deposes about arrival of RPF Officer and others police	
20. Karansinh and himself fired one round each and Ambishkumar two rounds	PW-171
21. Apprehends some people from the mob	
22. Other officials also apprehended many persons	
23. On 08.03.2002, handed over the empty cartridge to PW-241 Shri K.C. Bava in presence of panchas.	
24. Identifies the empty cartridge	
25. His statement was recorded on 08.03.2002	

26. Exhibits inability to identify those apprehended	

Contradictions / omissions / improvements / exaggerations, etc.	
1. Having been posted by transfer in Godhra about 10 months of the date of incident, he admits that he is not acquainted with the residents of surroundings of the Railway Station and their work or profession. He further admits that he had not stated names of the miscreants apprehended by him in his statement dated 01.03.2002 [pertinently, examination in chief the witness declares his inability to identify the miscreants apprehended by him or other police personnel. In the examination in chief itself he was confronted with his statement dated 01.03.2002 which contained the names of the miscreants rounded up by him and other police personnel; but disputes having stated such names in the said statement.	
2	
3. Admits omission regarding rushing of the mob from signal faliya; their stone pelting on the train, his scaring them away, asking the people	

chanting “Jay Shri Ram” to occupy the train, moving of the train after sometime, chain pulling and stoppage of the train after its moving by two or three coaches, stone pelting, their rushing towards the coach; asking people to occupy the coaches immediately.	
4. Admits the omission that he went to the guard room calling additional force, his coming out and seeing people thousands in number moving from singhal fadiya to”A” Cabin and towards the train.	
5. Explains that he stated in his statement that at “A” Cabin again chain pulling was done and train stopped and from singhal fadiya people thousands in number came, etc.	

This witness is found to have substantially improved his version and having regard to the fact that there are number of omissions and contradictions and exaggerations referred to herein above on material points in his testimony, we would like to discard this witness.

PW-171 Ambishkumar Siyaram Sake [Police]

Particulars of Crucial facts	Prosecution Witnesses who corroborate the crucial facts
1. Duties hours on 27.02.2002 between 08:00 to 20:00 hours.	

2. Received telephone call from Karansinh Jhala PW-200.	PW-173
3. Comes to "A" Cabin along with Constable Bhavarlal and Head Constable Rajesh Sharma and meets Karansinh (PW-200) and Mohan Yadav (PW-164).	
4. Goes to "A" Cabin from beneath the train and finds 1000 to 1200 members of Muslim community pelting stones on the train and exhorting to kill and burn Hindus	
5. Deposes about possession of weapons by miscreants	
6. Finds Jhala PW-200 scaring the mob with stick; but the mob refused to disburse.	
7. Jhala orders firing – fires two round in air.	PW-135
8. Jhala and others apprehended seven persons	
9. He himself also helped to catch those persons	
10. Weapons from those persons who were caught, were recovered	
11. Apprehended people were cordoned near "A" Cabin	PW-173
12. Jhala was writing the names of the persons so apprehended.	

Contradictions/omissions, etc.	
1. Disputes the omission that the	

apprehended people had sticks, iron rod, and axe with them.	
2. Admits the omission that apprehended persons were cordoned by Jhala Saheb near "A" Cabin; Jhala Saheb was noting the names of those apprehended; thereafter he went to the off side beneath train.	

PW-173 Karansinh Lalsinh Yadav

Particulars of Crucial facts	Prosecution Witnesses who corroborate the crucial facts
1. Companion witness of PW-164	
2. The people in the mob had with them carboys and were charging towards the train.	
3. Announcement from the mike of nearby Masjid that chop, burn and kill Hindus was being made.	
4. Ambishkumar received the call from him.	
5. Returns to "A" Cabin from platform after telephonic talk, as above.	PW-228
6. Finds people with weapon. Breaking doors, windows and sprinkling, inflammable on the train and setting the coach ablaze.	PW-228
7. Deposes that after the stone pelting was done, he went to the platform no.2 to guard driver lobby.	
8. Further deposes that he saw the people of the mob sprinkling	

inflammable on the coach.	
09. Names Yusuf Sabir with axe, Yahmahammad Chhakda with stick, Ajgarali Kamrudin with axe and Ahemad Abdulrahim with iron rod as the persons identified in the mob.	
10. Names Nasirkhan Sultankhan with iron pipe, Sadiqkhan with rod, Allahuddin Ansari with iron road, as persons apprehended, along with other persons apprehended by other police personnel.	
11. Deposes cordoning of the apprehended persons at “A” Cabin.	
12. Identifies following persons without names: (1) Husain Abdulsatar Durvarsh (2) Nasirkhan Sultankhan Pathan (3) Mehboob Yakub Mitha (4) Siddiq Abdulla Madam (5) Idrish Abdulla Imarji (6) Kamal Badshah Mohammad Sharif	

Contradictions / omissions / improvements / exaggerations, etc.	
1. Disputes the omission that the exhorting from the announcement from the Masjid to kill Hindus, burn Hindus was being done and thereafter, he went to platform no.2	

in guard drivers lobby.	
2. Disputes the omission that the Muslims people were breaking the doors and windows by using sword, axe and pipes.	
3. Disputes the omission that the apprehended people were cordoned near "A" Cabin.	

Visitors who had come to receive the karsevaks in the train. They are the witnesses who were available at Platform No.1 before arrival of the train, in order to receive the karsevaks travelling from Ayodhyaya in the train.

PW-150 Jayantibhai Umeddas Patel [Passenger in S/6]

Particulars of Crucial facts	**Prosecution Witnesses who corroborate the crucial facts**
1. He came out of a broken window and saw a huge crowd pelting stones.	
2. Felt suffocated and then shifted to Godhra Civil Hospital.	
3. Deposes weapons with the mob.	
4. Shifted to Civil hospital, Ahmedabad – Ward G-1 in the evening (indoor patient for 2 or 3 days)	
5. Identifies Raiskhan Mitha, Yunus Abdul Haq Samol, Saukat Faruk, Rafik Patadiya, Mohd. Saeed Abdul Salam Badam without naming them.	

Contradictions/omissions, etc.	
1. Admits the omission that because of pelting of stones, doors and windows were broken and stones were coming inside.	This fact is corroborated by other co-passengers
2. Admits the omission that the burning rags were thrown inside.	This fact is corroborated by other co-passengers
3. Admits the omission that because of the throwing of the burning rags the coach caught fire and smoke was emitting. 4. Admits the omission in the statement dated 07.03.2002 that "we all karsevaks were frightened and did not open the doors and windows but we all got suffocated because of the smoke inside". 5. He states that there was a small mob on the off-side. He was occupying Seat No.40.	

This is an injured witness and barring few omissions / improvements, he is credit worthy as several facts stated by him are corroborated by other independent witnesses.

PW-154 Chandrashanker Nathuram Sonaiya

Particulars of Crucial facts	**Prosecution Witnesses who corroborate the crucial facts**
1. Being the resident of Godhra, he knows Ahmed Abdul Karim, Asif @ Babu and Harun @ Husain with	

weapons like rod, pipe etc.	

Following facts deposed by this witness gets corroboration from several witnesses as discussed herein above:

Firing, stick bashing, apprehension of some persons by police, their cordoning at "A" cabin.

Gathering of huge number of Muslims to harm other karsevaks in the train and to get the apprehended persons released.

Bashing of batons for disbursing the mob and apprehension of some other persons from the second mob.

Identifies two persons Ahmed Abdul Rahim Hathibhai and Idris Yusuf Mafat but does not identify Asif @ Babu who was present amongst the accused in the court.

No material contradiction, omission, improvement and exaggerations are found in his testimony.

PW-155 Manojbhai Hiralal Adwani

Particulars of Crucial facts	**Prosecution Witnesses who corroborate the crucial facts**
1. Identifies Anwar Husain Ahmed and Mohd. Salman with deadly weapons as the persons present in the mob.	

Contradictions / omissions / improvements / exaggerations, etc.	

1. He identifies two persons Mohd. Abdul Salam (the defence stated that the witness named initially as Ahmed Abdul Salam during identification).	
2. On verification the accused stated his name as Mohd. Abdul Salam Getali. 3. The witness does not know the name of other accused who was identified by him. On verification by the court, the said person was introduced himself as Nasirkhan Sultankhan Pathan. 4.The witness also referred to one Anwar Husain Ahmed who was present in the court as accused but did not identify him. 5. **In the cross-examination** he explains that the inflammable was being sprinkled from the heap of metal stones situated near by the train after approaching the train **from a very close distance.**	

PW-159 Rajesh Vithhalbhai Darji

Particulars of Crucial facts	Prosecution Witnesses who

	corroborates the crucial facts
1. He deposes that RPI people came and then the train moved.	
2. Noticed five to six persons with carboys sprinkling inflammatory substance on the train; followed by burning rags which triggered fire; and on arrival of RPF personnel and police, lathi charge and firing was resorted to; which made the mob to disburse.	PW-127
3. Names the following persons from the mob viz. Habib Bin Yamin Behra, Saukat Dagal, Harun Dav, Siraj Abdul Jamsa, Rafik Mohd. Kalandar, Mehmood Ahmed Hasan (knife). Rafik, Habib, Siraj (pelting stones and exhortation.	

4. Identifies three persons in the court, but not able to name them. On verification by court, they introduced themselves respectively as Siddiq Abdul Baqar, Habib Bin Yamin Behra, Mohd. Kutub Mohd. Ansari. From amongst other persons seen by him in the mob being Habib Bin Yamin Behra, Saukat Dagal, Harun Dav, Siraj Jamsa, Rafik Kalandar and Mehboob Hasan,	

Habib Bin Yamin Behra was present in the court and others being MehboobAhmed Hasan (the correct name is Mehboob Ahmed Yusuf) was also present. Rafik Abdul Majid Kalandar was also present but Saukat Dagal was not present, however, Saukat Mohd. Kalandar (accused No.34 in Sessions Case No.69 of 2009) was present in the court. **These persons though named** in the testimony were not identified by him.	

Contradictions / omissions / improvements / exaggerations, etc.	
1. Admits the omission that they had assailants were breaking the doors and windows by using sticks and iron pipes.	This fact is corroborated by other witnesses
2. Admits the omission that they had thrown the burning rags.	This fact is corroborated by other witnesses
3. Admits the omission that Rafiq Kalandar, Habib Behra and Siraj Jamsa were pelting stones and making exhortation. 4. Admits having mentioned in his police statement that the people of the mob were having carboys filled with	

kerosene.	

PW-172 Nitinkumar @ Kakulkumar Hariprasad Pathak

Particulars of Crucial facts	Prosecution Witnesses who corroborate the crucial facts
1. Names Amin Husain Hathila, Siddiq Ibrahim Hathila, Usmangani Kofiwala, Ibrahim Dantiya, Kalu Chunga as the assailants seen by him. He attributes the assailants with carboys filled with inflammable and setting the train ablaze by them.	
2. Identifies two persons namely Ibrahim Adam and Kofiwala, who on verification by court respectively introduced themselves as Ibrahim Adam Dantiya and Ismail Gani Ahmed Kofiwala.	
3. Amin Husain Hathila and Siddiq Ibrahim Hathila and Kalu were present in the court but could not be identified by the witness.	
4. Identification of Usmangani Kofiwala was done through this witness on 31.08.2004 by the Mamlatdar and that of Ibrahim Dantiya on 01.09.2009.	

Pertinently, his one of the statements was recorded immediately on the next day of the incident i.e. 28.02.2002 and no contradiction as regards possession of carboys with inflammable

substance is found in his testimony and even on other points no material contradictions, omissions, improvements and exaggerations are found in this witness.

14 Though the trial court has not believed the evidence of local VHP workers witnessing the crime in para 89 of the judgment of the trial court by assigning reasons, but the presence or absence of the eye-witnesses can be inferred on various facts and where the witnesses whose credibility is doubted by the defence are shown to have made such statements in the testimony as can only be known to the eye-witnesses, they cannot be discredited for the reasons noted by the trial Court. While we are inclined to discard the testimonies of PW-151, 167, and 208 for improvement and exaggeration by them on vital and material facts, as also that of PW 203 who is hostile to the prosecution; testimony of PW 154, 155, 159 and 172 is found to be credit-worthy on certain material points as discussed herein-below.

14.1 PW-154 Chandrashekhar Nathuram Sonaiya is not found to have made any serious omission or contradiction or improvement in his statement under Section 161 and his testimony as regards firing by the railway police firing stick winging and apprehension of some of the persons and they are being cordoned at A cabin and arrival of a second Muslim mob to harm other Karsevaks in the train as also to get apprehended persons released and resorting of the police personnel lathi charge firing for the purpose of dispersement of the mob and apprehension of some accused from the said second mob gets corroboration from various witnesses and he has successfully identified Ahmed Abdul Rahim Hathibhai and Idrish Yusuf Mafat in the Court.

14.2 PW-155 Manoj Hiralal Advani also gets corroboration on material points from several witnesses discussed herein above. That apart in the cross-examination, he has explained that the inflammable was being sprinkled from the heap of the metal stone situated very near to the train. Such a statement can come from an eye-witness who is alive to the minute details in the surroundings of the place of incident to which he may spontaneously refer to during his testimony to justify his evidence. By a concocted witness the focus would normally be on exaggeration and improvements on the material incriminating circumstances so as to implicate the accused to a severest possible extent. Pertinently, his statement gets corroboration about the existence of heap of metal stones from none other than independent and injured or other passengers who are victims of the incident in question; being P.W.175, 118, 91 and 127.

14.3 No serious and material contradictions, exaggerations or omissions are noticed in the testimony of P.W.159 and he has been corroborated on material particulars by several witnesses as discussed above. The only improvement which can hardly stated to be an improvement as regards his reference to the carboy containing "kerosene" in his statement under Section 161 of Cr.P.C. Therefore his evidence cannot be justifiably discarded on the ground suggested by the trial court.

14.4 P.W.172 is also very crucial witness whose statement under Section 161 was recorded on the very next day i.e. on 28.2.2002 leaving virtually no room for exaggeration or improvement in his story. **Apart from corroborating other witnesses on various facts, the witness attributes amongst other weapons, the plastic carboys filled with inflammable, to the accused. Although other statements of witnesses**

were also recorded, the defence has not been able to controvert the factum of possession of carboys in the hands of accused, during the cross-examination of this witness. Having regard to the fact that a crucial fact above-referred is borne out from the testimony of this witness as also having regard to the fact that on all material facts his testimony is corroborated by other witnesses above-referred, it would be unjustified to discard his testimony for the reasons recorded by the trial court.

PART XII-B

KNOCKING OF SLIDING DOOR, ASSAULT MADE BY VIOLENT MOB ON THE TRAIN AND SETTING THE COACHES ON FIRE AND EXISTENCE OF METAL STONES

1 Knocking of sliding door situated at the end of Coach S-6 is deposed to by PW-114, however, with the omission in his statement dated 08.05.2002 recorded under Section 161 of the Cr.P.C. Similarly, PW-93 Shardaben Manubhai Patel also deposes the knocking of the sliding door and exhortation by the people behind it, that Hindus should be killed. She however disputes the omission as regards knocking of the sliding door, etc. in her statement recorded under Section 161 of the Cr.P.C., however, such omission is proved through Mr. Noel Parmar, Investigating Officer PW-244 .

2 PW-88 Shantibhai Shankarbhai Patel was the occupant of Seat No.70 and according to his version to save himself, he moved towards the toilet side and therefrom he heard the knocks from the middle portion where he was standing. No contradictions and omissions are found in his testimony. Similar deposition is given by PWs-99 and 102 without any contradiction, omission and improvement. Thus, while

these witnesses proved only knocking of the sliding door at the end of S-6 and exhortation, they do not depose breaking of sliding door and entry of accused with petrol carboys therefrom. In fact, none of the witnesses referred to in this judgment so far depose to the entry of accused with carboys filled with petrol into S/6 after breaking of the sliding door, and some of the witnesses above-referred deposed having sensed kerosene smell at both ends of the Coach S-6; none of them, however, deposed having seen any of the accused pouring inflammable after obtaining entry through the broken sliding door or through teared vestibules, into the Coach S-6.

3 The question therefore would be whether the accused made good their entry into coach No.6 with carboys filled with inflammable. Before appreciating this aspect, it is required to be noted that the train was jam-packed with double the capacity than its official capacity; with luggage of the passengers in huge quantity, restricting the free movement of the passengers. The passengers, who could successfully disembark coach S/6 have not been able to depose about the entry of the accused into the said coach because it was impossible for the accused to obtain a free entry into the jam-packed coach. It is borne on record that over 150 passengers with their luggage were occupying coach S/6 and eventually 57 or 58 passengers were burnt alive. If the whole scenario after the assault on the train is recalled, it becomes clear that while over 150 passengers were in the coach, the fire had already started and it continued to aggravate. The fortunate few who were either near to the doors at two ends of the coach on the offside or were near to the windows falling on the offside could come out of the train with minor or serious burn injuries. While such passengers were in the process of coming out of the train, the situation was aggravating continuously suffocating others, who were not that fortunate. Obviously, the

suffocation made them motionless and defenseless. The medical evidence would show that many of the passengers developed serious pulmonary complications on account of suffocation. Thus, it appears that eventually 59 passengers were rendered motionless and defenseless and by that time almost 2/3rd of the coach was vacated by other passengers who came out of the coach. This appears to have made the coach vulnerable to easy entry of the accused by cutting the vestibule situated between coach S/6 and S/7 and as indicated in later part of this judgment, PW-236, PW-237 and confessional statement of accused Jabir Binyamin Behra explain how the accused could obtain the entry into the coach and carried out further assault on the trapped passengers being 59 in number.

4 PW-175 Gayatriben H. Panchal refers to the metal heap in cross in Paragraph-19. It was so close to the train, on onside that her companion pooja could jump and land on to it from the window of burning coach s-6 as deposed by PW-175. Similar reference to metal heap is made by PWs-91, 155, however, omissions are proved. Existence of the metal heap very close to S-6 and pelting of the metal stones therefrom is deposed to also by PWs- 92 and 131 with the omission in their statement under Section 162 of the Cr.P.C. as also PWs-155, 118, 175, 91 and 127 without any omission. It is thus clear that metal heap situated at a very close distance from S-6 was being used by the assailants as a platform for pelting the stones and hurling of burning rags on Coach S-6. However, with an enthusiasm to prove that the petrol if thrown from the heap would not reach Coach S-6, an experiment was done after about 50 days of the incident in question by taking into consideration the unreal situation of the metal heap at a distance of 14 ft. from S-6. This experiment was made to show that to pour and the sprinkle the petrol into the coach, it was necessary for the accused to

enter into the coach after cutting open the vestibules and sliding doors separating S-6 and S-7. With the said experiment, testimony of PW-236 Ajaykumar Kanubhai Bariya and other similar witnesses is sought to be justified.

5 **Ghanprakash Lalanprasad Chorasia, PW-80.** This witness was travellling in Sabarmati Express by reserving 3 seats and boarded from Kanpur for Ahmedabad with his father, mother and nephew having seat Nos. 8 and 72. According to this witness one of the reserved seat was occupied by karsevaks and there were about 150 to 200 passengers in the coach S6. Paras 3 and 4 revel the incident of chain pulling of the train at 2 different places after departure from Godhra Railway Station. That father and mother of this witness sustained 90% and 40% burn injuries respectively and were admitted to Godhra Civil Hospital, while nephew died therein. Paras 3 and 4 read as under:

> "3 Our train arrived at Godhra Railway Station at about half past seven o'clock on 27/2/2002. The train halted for about five minutes at Godhra Railway Station. At that time passengers and karsevaks sitting in our coach got down to drink water tea etc. After about five minutes, the train departed from the railway station. It stopped immediately after the departure. Thereafter, it started from there again. After departing in this manner second time, the train stopped again after about five minutes. When the train started in this manner second time, the windows were open and many people came running from the village side and after reaching near the train, stone pelting was started. Stone pelting was done for a long time and thereafter, petrol and chemical was thrown from the back part of the place where I was sitting and fire was ignited and there was smoke. Many persons of the coach died due to fire. My nephew also died therein.
>
> 4 My father sustained 90 percent burns and my mother sustained 40 percent burns at that time. After reaching Godhra Civil Hospital, I informed my brother Arvindkumar Chorasia in

Ahmedabad over phone. Therefore, he arrived at Godhra. My parents and I received treatment at Godhra Civil Hospital. My mama (mother's brother) and masa (husband of mother's sister) also reached Godhra. After those people arrived, search for Rishabh was carried out, but he was not found. We came to Ahmedabad Civil Hospital in an ambulance from Godhra Civil Hospital on that same day at four – five o'clock in the evening. Three of us received treatment in Ahmedabad Civil Hospital. I am shown Mark-619/1 and the name J. D. Chorasia written therein at seat no.8 is the name of my mother. The dead body of Rishabh was identified by DNA test. Police recorded my three statements after inquiring to me".

In cross-examination, the above witness described situation of seat Nos.8 and 72, both were at different ends of the coach and there were doors at both the ends of the coach for movement and that there were toilets facing each other adjacent to those doors. In para 7 of cross-examination, the above witnesses stated as under:

"7 I saw police when we were in Godhra Civil Hospital. I did not give my address or any statement in connection with the incident to Godhra Police at that time. It is true that police was also present at Ahmedabad Civil Hospital and I did not give any information to the police regarding the incident over there also. It is true that I continued my studies even after the incident. I know to read, write and speak Gujarati. I was in Ahmedabad Civil Hospital on 4/3/2002. I do not remember as to whether the police visited me on that day. My first statement was recorded in Ahmedabad Civil Hospital. I do not remember as to on which date it was recorded. It is not true that I was discharged from Ahmedabad Civil Hospital on 2/3/2002. I do not remember as to at what time my statement was recorded in Ahmedabad Civil Hospital. At the time of that statement, I dictated whatever I knew regarding whatever was asked to me. **It is true that I ascertained after reading that statement that it was written correctly. It is true that I have dictated in police statement dated 4/3/2002 that "after the train departed, it suddenly halted after about five minutes and suddenly stones started to arrive from the left side of train. Therefore, the persons sitting in the coach**

immediately started to close the glass and iron windows and they also started to close the doors of the coach. Despite that stone pelting continued on the coach. Some stones out of the same fell into the coach and the glasses of the windows were also broken. Before the iron windows could be closed, some burning article was thrown by breaking the glass window. After it fell into the coach, suddenly there was excessive black colour smoke in the coach. On seeing the same, first I told my mother that there is smoke, therefore, my mother told my father to get out of the coach immediately with my nephew Rushabh. At this time, all four of us were sitting on the upper seat. **As there was smoke below and as the smoke came up, the visibility decreased. Thereafter, my father immediately got down from the upper seat with my nephew and he told my mother also to get down and he stated that as there is fire in the coach, come out of the coach immediately. Therefore, my mother and I immediately got down from the seat. At that time my father was shouting that there is fire, there is fire, get down immediately**. Therefore, my mother and I left all the luggage in the coach and got down towards the side of the coach where my father and others had got the door opened." It is true that after the incident I was reading the news published in the newspapers regarding the incident. It is true that news and visuals of the incident were also being telecast on the TV. It is true that when my statement was recorded in the year 2005, the police made me aware regarding the incident and my earlier statement".

However, this witness is unable to state clearly about why and how the train stopped twice after departure from Railway station. In para 9 of the cross-examination, the witness reveals that he had no knowledge whether the stone pelting started at the time itself when the train departed from the platform. Para 9 of the cross-examination is reproduced herein below for appreciating trustworthiness of the statement made by him before the police. Para 9 reads as under:

"9 I do not know as to whether the stone pelting started at the time itself when the train departed from the platform.

It is not true that due to the stone pelting, the passengers in the train closed all the doors and windows of the coach. It is not true that I am falsely stating the fact, which I have stated in examination-in-chief, that a mob belonging to Muslim caste came and threw petrol and chemicals in the coach. It is true that there were horizontal iron bars on the outer side in the windows of this train and thereafter, there was iron window at the inside part and at last there was glass window inside. It is true that if one wants to pour petrol or chemical in the coach, the window made of metal sheet has to be broken. The witness states that the stones were pelted with the same intention. It is true that I have not stated in any statement before the police or in examination-in-chief that the iron window were broken by pelting stones. It is not true that in stone pelting, the glass window breaks only after the iron window is broken. The witness states that the glass windows were shut first. It is not true that I have dictated in my first police statement that "some burning article was thrown." My mother or I did not sustain any injury during stone pelting. My father sustained injury. He sustained injury as he was hit with stone in the coach. I did not dictate in my police statement that my father sustained injury with stone".

6 **Pujaben Bahadursinh Kushvah, PW-81**. This witness is the passenger who had reserved seat Nos.4, 5 and 6 in S6 coach of Sabarmati express train which was to leave from Kanpur on 25.02.2002 and it was running late since beginning and that though seats were reserved some passengers were occupying seat Nos.4, 5 and 6 and in para 2 of examination in chief, it is stated as under:

"2 Thereafter when the said train started, a mob came from platform side and as stones were pelted on the train, we closed the windows. After the train started, we opened the windows and saw and while the train went ahead for about one kilometer, a mob consisting many people was coming from platform side. The people of the said mob were armed with weapons and they were pelting stones at the train, therefore, we closed the window. Despite of closing windows, more stone pelting continued. As this stone pelting etc. was done, the metal sheet windows etc. got broken. As the window broke, we went towards toilet. Thereafter, as we went towards the toilet

side, sound of beating with weapons was heard, therefore, we stood over there near the door. Thereafter, as we saw liquid smelling like petrol was thrown from outside through the window of toilet. Thereafter, as there was smoke in the coach we felt suffocated and faced breathing problem. As stone pelting was done in the manner I stated earlier, my parents and I – three of us came near toilet. My mother and I started crying, therefore, my father tore open the raxin like layer of the passage between the two coaches and my father jumped down. Thereafter, my mother and I jumped down on the other side of platform. Thereafter, we started running and when we looked back, the coach was on fire. Thereafter, as we ran towards a house located there, some women who were in that house called us inside. Thereafter, they gave us water to drink. Thereafter, a male person came to drop us on the road and he made us to sit in a bus going to Bhavnagar. All our luggage was left in the said coaches and we all reached our house in Bhavnagar. Police recorded my statement in this regard. I am shown Mark 619-1. I state after seeing this reservation chart that the seat no.4 of the said S-6 coach was reserved in my father name and seat no.5 was reserved in my mother name and seat no.6 was reserved in my name".

In paras 6, 7 and 8 of her cross-examination, she has stated as under:

"6 It is true that when we got into the coach from Kanpur, passengers and karsevaks were sitting inside the coach in the middle passage near the door and in the part of passage having toilet and bathroom and we had difficulty in moving in. It is true that karsevaks were also sleeping on our seats. Two persons each were sleeping on one seat having their heads facing each other. It is true that when we woke them up and asked to vacate our reserved seat, they stated that "we are karsevaks." It is true that they had also stated that "this entire train belongs to us." It is true that they also stated that "seat wherever you want."

7 I do not know as to whether there was any quarrel between the karsevaks and the hawkers of the station when this train was standing on the platform at Godhra Railway Station. I do not know that that quarrel took place near

canteen on the platform. It is true that when the train was on the platform itself, I had heard the noise of stone pelting on the train at that time. It is true that due to this stone pelting, those passengers who had got down on the platform, immediately got into the coaches. It is true that the passengers of the coach were frightened due to this reason. It is true that the karsevaks etc., who got into the coach, asked to close the doors and windows of the coach. The witness states that we ourselves closed the doors and windows.

8 It is true that the doors of the coaches of the train were such that can be closed from inside only. It is true that in the windows and doors of the coach have horizontal iron bars at the outer side first, then there is an iron window on the inside part and at the end there is glass window inside. I do not know that when the karsevaks got into the coaches from the platform, they brought with them stones and pieces of bricks. I do not know that the stones and pieces of bricks brought by them, were with them in the coach till we jumped off the coach".

From the above cross-examination, it appears that even reserved seats were occupied by karsevaks and unauthorised passengers, but she had no idea about if any quarrel took place between karsevaks and hawkers at Godhra Railway Station.

In further cross-examination, she admits to have not stated certain specific words in her police statement dated 11.07.2002 and about a mob coming from platform side and pelting stones and after the train started windows are opened to see that a mob consisting many people was coming from platform side. In para 12, the above witness stated as under:

"12 It is true that the coach caught fire after we went little far after getting down from the coach. It is not true that the house in which we drank water and the person who came to drop us at the crossroads belonged to Muslim community. **It is not true that as I have been tutored today, I am stating that**

the said house and the person did not belong to Muslim community. It is not true that the area in which we drank water belonged to Muslim community. It is true that when there was smoke in the coach, foul smell started. The witness states that the smell was like petrol. It is true that the foul smell coming due to smoke was of different types. It is true that due to smoke there was difficulty in breathing. It is not true that there was no smell of petrol at the time of smoke. My parents and I were taken to Godhra Police Station to record our statement. The said police station was located in Godhra City. I did not see as to whether stones were pelted against one another on the platform on that day. I do not know as to whether there was quarrel on that day at the canteen on the platform just opposite to our coach. It is true that I have dictated in my police statement that "I have not seen anyone breaking or burning the coach."

In para 13 of her cross-examination, she has stated that there was smoke in the in the coach as some substance was thrown and there was difficulty in breathing due to the smoke and they got frightened and according to her say the substance which was thrown was like petrol and it was smelling like that.

7 **Virpal Chhedilal Pal, PW-82**, is a retired Sargent of the Indian Air Force and his sons were to settle down in Vapi in the State of Gujarat. He was travelling with his family in the train. The witness, his wife and daughter in law all three boarded at Kanpur on 25.02.2002 and that they had reserved for seat Nos.58, 59 and 61 in coach S6 of Sabarmati Express. It was crowded and karsevaks were occupying reserved seats and request was made by him to vacate the seat for his daughter in law who was pregnant, but none of the karsevak vacated the reserved seats and all three sat down on the floor. In view of difficulty in travelling, it was decided to get down from the train and to travel in other train, but at Jhansi Railway Station upon checking it was found that no other train was available and, therefore, they requested the

Ticket Examiner to make some arrangement for their sitting in some other coach, but they were told that all the coaches were equally crowded and, therefore, they went back to coach S6 at Jhansi Railway Station. The above witness in his examination in chief stated about the behaviour of karsevaks and requesting them not to buy tea from Muslim hawkers of Godhra Railway Station and after departure, the train stopped about 10 meters ahead and thereafter it started and again stopped after going to 5 to 10 meters. **That stone pelting started after 2 to 4 minutes from left side, which hit his wife and daughter in law. This witness also heard sound of bottles on the back part and smoke started coming and he decided to go to left side with bag to save himself and found a person wearing kurta and pyjama having spectacles signaling the mob. He tried to search his wife and daughter in law by shouting in the commotion which took place and after some time he found shawl and sari of his wife caught fire and a person who came out of S7 coach threw away the shawl of his wife and doused the fire and pushed his wife from door. He contained to search for his daughter in law, but he could not trace her out. Unfortunately, even after inquiry and search on the next date her dead body was not found.**

In cross-examination, this witness confirms about unruly behaviour of karsevaks and other unauthorised passengers, who not only misbehaved with the witness, but also with Ticket Examiner. Further, this witness had no knowledge why train had stopped twice and had no information exactly about stone pelting. Again in para 10 this witness described that he was asked not to buy tea from Muslim vendors and further shouting of slogans by karsevaks in para 11 of his cross-examination. That coach S6 was so overcrowded that the persons sitting inside were facing difficulty even to reach toilet. **In para 12 the above**

witness stated that "It is true that before the smoke started in our coach there was a noise and thereafter smoke arose and spread in the entire coach. It is true that the smoke seemed poisonous and it seemed that the smoke arose from some chemical". In paras 15 and 16 of cross-examination, this witness stated as under:

> **"15 It is true that after the train stopped for the second time at the place of incident, stone pelting began and due to that reason the passengers etc. of our coach started running here and there to save themselves**. At that time the right side door of this coach was four to five feet far from the place where we were sitting in the coach. The said door was open at that time. I do not know as to whether the passengers of the train were trying to get out from the open door at that time. I got out from this coach through this open door. I do not know as to where my wife and my daughter-in-law were when I was getting out. Within two to three minutes after I came out of the coach, my wife was brought out of the coach by pushing her. She was also brought out from the door itself. After getting down from the coach, my wife and me went 20 to 25 feet far and sat in an open place. It is true that when my wife was brought out of this coach by pushing her, the person, who pushed her, was in S/6 itself. I did not meet this person prior to that or after he pushed.
>
> **16 It is true that after I came out of this coach, the entire coach got filled with smoke. The condition was such due to fire that it cannot be seen as to who was at which place in the coach.** When the police recorded my statement, the fact of the written application submitted by me to the police station was not read over to me before recording my statement at that time. At that time a military person was also there in out coach. I had sat down on his seat for some time. After I came out from the coach I had seen that military person at the place of incident".

However, in para 17 of the cross-examination, this witness denies to have stated in his earlier statement that sound of bottles was heard in the coach at back part and further not dictated in his statement

that the coach was set ablaze from rear side. **He admits that the person had pushed his wife to save her from fire and had itching in his eyes due to smoke. Again, presence of a person wearing kurta, pyjama and spectacles is not denied.**

8 **Radheshyam Ramshankar Mishra, PW-113**, who is Ex-Army man has similar version to that of PW-82. He got seat Nos.8 and 72 reserved in S7 coach in Sabarmati Express, which is over crowded. Therefore, this witness with his wife and grandson went to coach S6. In para 8 of the cross-examination, this witness stated as under:

> "8 When the train stopped at Godhra Railway Station, there was uproar on the platform as I stated in the examination-in-chief, but I do not know what was the cause of it. It is true that after the train had started from the platform, when it stopped after covering some distance, stone-pelting started and hence, all people closed windows and doors. It is true that after there was the sound of blast of bottle in the coach and after there was smoke, we came out in off-side. Some had got out through windows and some from doors, in off-side. It is true that I have not dictated in my statement before the police that "after the train had passed from the platform, the windows opposite to us were opened, in the meantime, a mob of many people was coming from the side of the platform on the road." **The witness states that I have dictated in the statement that "a mob of Muslim people had come from the side of platform hurling stones." It is not true that only the glasses of windows broke down due to stone-pelting and that windows did not break. It is true that I have dictated in my statement before the police that "they started breaking the windows of our coach and the glasses of windows broke down on account of stone-pelting." It is not true that I have not clearly dictated in my statement before the police that the sound of explosion was due to blast of bottle and as it caused smoke, I was facing difficulty in breathing. It is true that I have not dictated clearly in my statement before the police that "taking the stone which had fallen in the coach due to stone-pelting, I had tried to break the rod of the window. At that time, as someone tried**

> **to break the rod from outside also, it broke down." The witness states that I have dictated in my statement before the police that "the rod of the window was broken by opening the window of off-side of seat no. 7 where I was sitting.**" It is true that I have not dictated in my statement before the police that I was provided with first aid by a karsevak who sprinkled spray on my injury of nose. Thereafter, the train was taken in yard, and after the burnt coach had been separated, the train moved again and we left for Ahmedabad in it." It is true that I have not dictated in my statement before the police that "after I had reached home at Ahmedabad, I came to know while changing clothes that there are scars on my back-part. As there was disturbance for two to three days, I went to the Civil Hospital for treatment after second or third day. The witness states that it has been dictated that "I got treated in Ahmedabad Hospital."

In cross-examination, this witness admits to have dictated in his statement before the police that "they started breaking the windows of our coach and the glasses of windows broke down on account of stone-pelting". Further in his statement before the police he had dictated that "the rod of the window was broken by opening the window of off-side of seat no. 7 where I was sitting."

9 **The following witnesses are injured witnesses, who were travelling in Sabarmati Express on the day of incident.**

9.1 **Gayatriben Harshadbhai Panchal, passenger in Sabarmati Express having Seat Nos.41 to 46 in S/6 coach, PW-175** Exh.891 stated in paragraph 3 of examination in chief and paragraphs 17 to 20 of cross-examination, as under:

> "3. On 27/2/2002 in the morning at about quarter to eight our train had arrived at the Godhra Railway Station. There the train had stopped for about ten minutes. Thereafter the train started again and immediately stopped at the railway

platform. At that time there was stone pelting on the train. Thereafter after some time the train started again, and after travelling about half a kilometer again it had stopped. There from the side of the coach there was heavy stone pelting started and the Muslims were shouting instigating slogans. They were shouting, "Hindu ko jala daalo, kafiro ko maar dalo' [burn the Hindus, kill the fanatics], and they were abusing. Due to heavy stone pelting I was scared and shut the windows. These persons were carrying weapons like sword, rods, pipes and etc and they had broken the windows and started to pour liquid inside from the carboys and these persons had thrown fire inside . Due to stone pelting we had climbed onto the upper seats. These persons had pelted stones one stone hit my elder sister Pratiksha and my sister started crying. She had shouted that, 'mummy I am hit by stone on my stomach and on my head', these persons had thrown fire inside the coach so my father had called us down. Due to fire the people in the coach were shouting. We were going with our father in the meanwhile my sister Chhaya was left behind one-two persons. Thus, my father started to cry that, 'my Chhaya is left behind', there was lot of smoke inside and we had tried to come out but could not come out and due to smoke the vision was blocked and we family members got separated. I had gone to the left side of the coach, a little light was there and all the rods of a window were broken and one rod was loose which was pulled out by me and one old man so it came out. Thereafter the old man had jumped out from the window. I had pushed out my face and hand and asked the old man to pull me out, so the old man had pulled me out. Similarly Pujadidi was also pulled out from the window. After coming out my sister's friend was injured she was got thrown at a little distance. After pulling us down the old man ran away from there and where I had descended I had seen there that at a little distance four-five Muslim youths came carrying weapons towards me. These persons were in Pathani apparels. They had cap on their head and beard and were having red handkerchief round their neck. Of them one Muslim youth had held my left hand. I had mustered courage and tried to release my hand but he had not left my hand so my sister's friend had pelted one stone and the said stone hit him on his hand so he released my hand. Thereafter immediately myself and Pujadidi had gone beneath the coach and went onto the other side. After going

onto the other side in a short while my aunt and her son came from opposite side I had seen them and I ran and hugged my aunt and started crying and while crying I said that, 'mummy, pappa and two sisters are left inside the coach', my maternal aunt informed me that, 'your mummy, pappa and sisters have come out from the coach, and they are taken to the hospital', thereafter in the same train at about 12-30 we departed for Ahmedabad.

17 Our train had stopped at the Godhra Railway Station at the time of incident total three to four times. As per my say there was stone pelting on the train twice. It had not happened that the train started from the platform and thereafter stopped only once and there was stone pelting only once.

Question :: Is your understanding low?
Reply :: I do not have reply to your question.

Question :: Do you have difficulty in hearing?
Reply :: No

I do not remember that on 8/3/2002 and on 22/1/2005 in my statement before the police I had stated that 'after the train started it reached about half a kilometer and immediately it had become slow and stopped and immediately from the left side there was sudden stone pelting started', I do not remember that in both my statements before the police whether I had stated that 'train started from the platform and thereafter it had stopped twice and both times there was stone pelting'.

18 The liquid that was thrown in the coach what was that liquid I do not know. The witness states that along with throwing the liquid the fire was catching. The liquid was sprinkled from the carboys as per my say. I am not aware of the fact that when the liquid was sprinkled from the carboys into the coach at that time, whether part of it had dropped on the ground or not, I am not aware of the same. This liquid was kerosene and petrol and it was spilled in the coach from the carboys I had not seen that. I am not aware of the fact that at the time of spilling the petrol or kerosene in this manner it was spilled on the ground or not. I am not aware of the fact that whether there was any lid or cover on the carboys or not. This

liquid was spilled inside the coach from the windows. It had not happened that I had not seen anyone pouring petrol or kerosene into the coach, but I had seen the sudden fire from the back of the coach. I do not remember that in statement before the police I had stated that, 'in the meanwhile from the rear of the coach suddenly there was fire and smoke started coming towards us', it is true that due to smoke in the coach I was getting suffocated and nothing could be seen in the coach. In my previous deposition I have stated that liquid was sprinkled in the coach, thereafter I had seen them pouring petrol and kerosene in the coach and thereafter from the rear of the coach suddenly there was smoke, thus I have stated these facts of having seen spraying liquid is correct.

19 On the left side the person who had assisted me in getting down from the window what was the age of that person I cannot say. The said person might have been about fourty five years old. On the left side of the window we had come out at that place on the ground there were heaps of metal stone, Pujadidi had jumped over it. The said metal heap was how far from the coach of the train I do not know. The heap was about two to two and half feet hight. It is true that, at that time on the left side there was mob of about one thousand to one thousand five hundred persons. I am not aware of the fact that between the heap and the train whether there was any way or not. Pujadidi had fallen on the heap so she was injured by stones. I am not aware of the fact that whether with regard to these injuries Pujadidi had taken any treatment or not. It is true that after breaking the rod the person who was with me he had saved me. That the rod was broken by me and the person together. It had not happened that this rod was pulled out by me and Pujadidi together. On 8/3/2002 in my statement before the police I have not stated that this rod was pulled out by me and Pujadidi. It is not true that, in my statement before the police on 22/1/2005 it is stated that the rod of the window was broken and removed and we came out, I have not stated this. It is true that on 22/1/2005 in my statement before the police I have stated that, 'whoever got place from anywhere tried to make efforts to go out, I was also making efforts to go out from the window, first the person who had gone out from the same window had pulled me out from the

window and Pujadidi had also jumped out from the same window.'

20 I am not aware that on the right side of the train whether there was any mob or not. On the left side of the train when I was trying to get out at that time I had seen the mob with weapons and carboys. The witness states that, due to fire in the coach they had moved back a little. It is true that at the time of descending on the left side from the train on seeing the mob I was scared of death. When I was descending at that time the mob was about 200 to 250 feet away. The witness states that her hand was held and at that stage she had identified. I state about holding my hand, at that time, the said person was not running but as per my say he was walking speedily and came towards me. On seeing him coming towards me I had stood up to make efforts to run, at that time this person came near me. At that time Pujadidi was about five – seven feet away from me. Whether anyone tried to catch her also or not I am not aware. After my hand was released then from amongst those persons whether any person chased me or not I do not know. The witness states that at that time immediately she had gone below the coach No. S/6 and went onto to the right side, at that time the coach was burning. It is true that from beneath the coach when we crossed over to the right side, she and Pujadidi did not sustain any burn injury. In this manner, they had gone from beneath the coach and due to stones she had injury on my knees. Our hands were also bruised due to crawling over stones. The injuries on the hands and legs which I am stating, in this regard I had not taken any kind of treatment. Puja had not sustained any injuries on going from beneath the coach. On the right side ambulance arrived or not I am not aware. From that side the injured were taken in ambulance to the hospital for treatment whether I had seen this or not I do not remember. After coming onto the right side I had not gone to the platform. The witness states that on that side at a distance she sat down on the tracks. On that day upto about twelve I sat there. At that time with me was my maternal aunt Yoginiben, her son Chirag and Pujadidi. It is true that thereafter when the train departed for going towards Ahmedabad then we had left for Ahmedabad. When we were sitting on the right side at that time my

maternal aunt had informed me that my mother-father and sisters were taken to the hospital for treatment at that time I had felt it necessary to find out about them. I had personally not gone to any place for making inquiry in this regard. My aunt or her son had also not gone anywhere for making their inquiry. I do not remember that due to incident the persons who were injured were rescued by karsevaks, volunteers, police persons or not. At the place of incident we stopped for about four hours, in the meanwhile I had not made any inquiry about my mother, father or sisters in any manner. When the train arrived at Vadodara at that time on the platform there were doctors, I had taken treatment from them and I had informed them that how I was injured. On the platform at that time the policemen were also present. At that time I had informed the policemen about the incident and my mother, father and sisters were not found. The police had recorded these facts or not, I do not know. It is true that on 8/3/2002 the police came to record my statement over there, prior to that I had not declared any facts regarding the incident before police in Ahmedabad. The witness states that the situation in the house was such that I could not go out".

9.2 **Satishkumar Ravidutt Mishra, a passenger in Sabarmati Express having Seat Nos.33, 34 and 35 in S/6 coach, PW-96** Exh.666 stated in paragraphs 2, 6 and 8 of his deposition as under;

"2 On 27.02.2002 in the morning at about seven thirty to quarter to eight our train arrived at Godhra Railway Station. At that time I had descended on the platform for tea and refreshments, and after taking tea I had come back to the coach, in the meanwhile there was commotion and I came to know that there was stone pelting on the coach. Thereafter the train had started, and after running for about five minutes again it had stopped, and again the stone pelting had started. There was heavy stone pelting and so we had closed both the windows, in spite of this there was heavy stone pelting so both the windows were broken, therefore for saving we had climbed on the seat. At that time from the outside the shouts of 'maaro, kaato' [beat, cut] were heard.

Therefore the people inside were also shouting due to stones hitting, and were trying to save themselves. In the meanwhile the stones started coming inside from the broken windows also and from the rear side of the coach the fire had started and thereafter smoke started to form in the coach. Thus, for protecting ourselves myself, my wife and daughter started to make efforts for going in front. In the meanwhile the fire had increased and the fire had reached behind me. At that time for protecting ourselves went near the window on the opposite side of the platform where there is single seat there I had broken the rods of the window and there was another one rod broken. After breaking the window first of all I had thrown out my daughter from the coach and I had also assisted other passengers from going out from the windows. I was assisting all of them from going out from the window at that time the fire reached me and both my hands, back and forehead were burnt and I was injured and I had made efforts of going out from the window at that time several persons who had gone out from the window had pulled me out from the window. After coming out I made search for my wife, but I could not find her. At that time the police came and the police had fired. Therefore several persons tried to run, they were carrying swords, sticks, rods, pipes in their hands.

6 It is true that the train was on the platform at that time there was stone pelting. It is not true that the said stone pelting was free fight between the passengers and the persons on the platform. **The witness states that the stole pelting was done on the train from outside the platform boundary area.** It is true that I had taken tea from the platform and gone at that time I had heard that there was stone pelting on the train. It is true that therefore I had closed the windows. It is not true that in this manner the windows were close and at that time there was fire in the coach. **The witness states that after the windows were broken thereafter there was fire. It is not true that in my statement before the police I had stated that, 'we had shut the windows. Thereafter after about one kilometer distance the train stopped and the stone pelting started, and when the stone pelting started and the coach was on fire we had tried to run.**' the witness states that due to stone pelting the windows were broken. It is true that in none of my statements before the police I have stated clearly that,

'inspite of this there was heavy stone pelting both the windows were broken. Thus for saving ourselves we had climbed onto the upper seats.' it is true that in any of my statements before the police I have not stated that, 'in the meanwhile the stones started flying in from the broken windows, and the fire from the rear side of the coach started' it is true that in my statement before the police I had not stated that, 'therefore for protecting ourselves myself, my wife and my daughter made efforts to go towards the front side. In the meanwhile the fire had spread and it had reached behind me. 'it is true that in none of my police statements I have not stated that, 'at that time for protecting ourselves went near the window on the opposite side of the platform where there is single seat there I had broken the rods of the window and there was another one rod broken.' **The witness states that in my statement before the police I had stated that, 'the window was opened and using strength broken the rod'.** It is true that in none of my statements before the police I have stated clearly that, 'the injuries that were caused to me were caused when I was trying to make efforts to help Archana and other passengers to go out from the windows at that time I had sustained injuries.' it is true that in none of my statements before the police it is clearly stated that, 'at that time the police came and the police had fired and therefore several persons had tried to run away, they were carrying swords, sticks, rods, pipes and etc. in their hands.' **the witness states that on 6/3/2002 in my statement before the police it is stated that, 'the police had fired so the people in the mob ran away I had seen them. They were about 1000 to 1500 Muslim women, men, children they were carrying swords, sickle, steel pipes, sticks and carboys filled with liquids.**'

8 In this coach at that time how many passengers were there approximately I do not know. The stone pelting that was going on at that time it was not from both sides but was from the platform side. I am not aware of the fact that when the stone pelting was done at that time platform side windows of the coach were close or not, it had not happened that the seat on which I was sitting on the said seat and at that time the burn injuries that were caused to me. It is not true that when I got burnt at that time I was sitting in front of my daughter Archana. **It is true that when I had gone out from the window at that time there was fire in the**

coach. It is true that at that time the passengers were pushing each other for going out from the coach. It is true that during the incident I did not have any burns injuries below my waist. It is true that the pant worn by me at that time was also not burnt at that time from any place. The witness states that on certain parts there were holes formed. I have not produced the clothes worn by me at the time of incident before the police. It is not true that when the fire broke out at that time in the coach the windows and doors of the coach were closed. The witness states that the windows were broken. It is true that in the passengers in the coach and the persons of the mob outside were shouting at the time of incident. **It is not true that on 18/3/2002 in my statement before the police I had stated that, 'who had set fire to our coach and who had pelted stones or to which community they belong I have not eye-witnessed it, therefore I cannot identify anyone.'** it is not true that the people in the mob were of Muslim community, this I came to know after the incident on watching the TV news and daily newspapers. It is not true that on 18/3/2002 in my statement before the police I had stated that, 'but from the news media I came to know that on the date of the incident the persons who had pelted stones on the coach No. S/6 of the Sabarmati Express Train on the Godhra Railway Station were Muslim community persons.' **It is true that in the coach there was smoke and so there was burning in the eyes and choking of breath. It is true that due to the smoke nothing could be seen. It is not true that due to the smoke I could also not see anything outside the coach.**

9.3 **Pravinkumar Amthalal Patel, passenger in Sabarmati Express , PW-170** Exh.873 stated in paragraphs 3, 10 and 14, as under:

"3. On 27/2/2002 in the morning at about 7.30 our train had arrived at the Godhra Railway Station. After the train stopped then we had descended at the railway station and had tea and refreshments. Thereafter in a short while the train started and in the meanwhile there was scuffle at that time we had seen and there was stone pelting on the train. When this stone pelting was done at that time the train was on the platform, thus we had shut the windows. Thereafter the train

had started from the platform and went a little ahead then we had opened the windows. **In the meanwhile from the Godhra side the stones started coming. After traveling about one kilometer the train had stopped suddenly and there was heavy stone pelting, therefore we had shut the windows. The glass windows were close, we had seen through it that 1500 to 1000 persons mob carrying stones, sticks, sickle and etc. and these persons were saying that, 'Karsevaks bahar niklo ham maar dalenge, Ram Mandir nahin banega, Pakistan Zindabad' [Karsevaks come out we will kill you, Ram Mandir will not be formed, hail Pakistan]. At that time there was smell of kerosene, and I had seen that from the rear side from the third window the kerosene was sprayed from the carboy. Thereafter after some time from the Godhra side there was smoke started coming inside the coach, and we started choking and people started shouting.** In this coach on the engine side towards the highway road side door near the window there was seat for two persons, I was sitting on it. At that time Ranjitsinh was also sitting with me. Opposite to me one military man was sitting, whose leg was cut, he and his wife and son were sitting. At that time the stone pelting was going on. Since there was stone pelting so the military man had kept his suitcase on the window, and hid his son below the seat. The suitcase moved so the stone hit the military man on his nose. There was fire in the coach so myself and Ranjitsinh had taken out the military man and also taken out his wife and son. **I could also not bear so. I had also come out. When I had descended from the coach then at a distance of 70 feet there were two persons standing, I went there. They had spread out their hand so I had gone towards them. Over there 6 to 7 persons had gathered, someone had stick and someone had rod, these persons started to assault me. From them one person had said that, 'finish him', therefore I sat down and these persons were assaulting me using sticks I had raised my left hand so due to stick hitting me I had fracture, and I was also assaulted on my back using stick and rod. Below the knees of two legs I was assaulted using sticks and rods, therefore I had acted of becoming unconscious. These persons had assaulted me and taken my two gold rings and gold chain**. From my trousers pocket they had taken out Rs. 3000/-. in the meanwhile I had taken out other money from my pocket and offered them and on seeing the mandaliya on

my hand I said to them that, 'main aisa hun, main aisa mantaa hun' [I am like this, I believe this], so from amongst them one said that, let him go. Thereafter I had saved my life and ran and came to the road.

10. When the train started for the second time from the platform then thereafter after about one kilometer it stopped again. In this one kilometer distance the train was running at that time I had not seen the stone pelting with my eyes. The witness states that there were sounds of stones falling. During this time period the windows were opened, and left open. It is not true that during this period from the window there was no stone landed inside the coach and it did not hit anyone, this had not happened. I say that during this period the stones came in and also hit. **I was inside the coach at that time I was hurt by one – two stones. The said stone hit me on my shoulder and head. The train stopped at the place of incident and the mob was seen so the doors and windows of the coach were shut. The side on which I was sitting doors and windows were shut. It is true that after the doors and windows were shut then what was the mob doing outside could not be seen. I had seen the smoke spreading in the coach. The witness states that after the windows were broken thereafter seen the smoke forming**. After the fire in the coach, first, the military man was providing help and thereafter after some time I had also come out. I am not aware of the fact that due to smoke and fire in the coach the commotion had started or not. The side on which I had descended on the said side how many other passengers had descended. When I had descended at that time there were no policemen. At that time on that side there was no mob. It is true that when I came out from the coach till then I did not have any burn injury. It is true that due to smoke in the coach I had breathing problem and burning sensation in the eyes, after descending from the coach I had not provided the assistance to anyone else for descending from the coach.

14 It is true that on 17/4/2002 in my statement before the police I have stated that, 'on 27/2/2002 in the morning at seven o'clock I had come to the Godhra Railway Station and so myself and other Ram Sevaks had descended at the Godhra Railway Station for tea and refreshments, and after the tea and refreshments we and other Ram Sevaks had

boarded Coach No.S/6, and from the Godhra Railway Station the train had started and thereafter after travelling for about one kilometer there was chain pulling and I had seen that about fifteen hundred to one thousand persons mob was pelting stones on the train, and after some time the coach No. S/6 which I had boarded they started to break the doors and glass of windows of the said coach and in our coach they had thrown kerosene and set on fire. Therefore myself and other Ram Sevaks started to choke. Thus, we had opened the off side door and came out and started running at that time at a little distance an unknown person wearing pant shirt called me. And I had gone towards him so six persons mob was there, they had assaulted me using fists and kick blows and dealt stick blows on the left hand and my hand was fractured and on the right and left leg also I was assaulted using stick and so I had become faint like.' I am not aware of the fact that in my statement before the police I had stated that, 'I was assaulted so I had become unconscious therefore Rs.3000/- and two gold rings and one gold chain were taken by these two unknown persons. This is my request to investigate the same. I had become scared and therefore I cannot identify the persons who had taken this ring and gold chain and cash amount Rs. 3000/-.' it is true that in my statement dated 17/4/2002 I had personally not gone anywhere for making my statement. During the period of my statements I was not knowing any of the police officers in Mehsana by their names, I am not aware that who are called the constable, PSI, and PI. My neighbour Rameshbhai was not knowing the name of any Police Officer. It had not happened that any Bajrang Dal member had given me the name of any police officer or not, this had not happened. In this case the investigations were carried out by Mr. Noel Parmar, I was not knowing this. Who is the Superintendent of Police I am aware of the same. I have not heard the name of Mr. Mothaliya. I did not have any occasion to meet Mr. Mothaliya personally. Mr. Mothaliya had called me and recorded my statement this had not happened. For identification of chain a certain officer had called me, but whether he was Mr. Noel Parmar I cannot say. How was the appearance of the police officer and how was his physical appearance or any other identification marks I cannot state. How was the appearance of the Executive Magistrate I cannot say".

10 The testimonies of the above witnesses not only establish intention of members of unlawful assembly, but their presence in furtherance of their common object to commit the crime and their testimonies are inextricably interwoven to establish execution of conspiracy by the core group of conspirators and to make an assault on the train and to set on fire coaches inasmuch as members of unlawful assembly were armed with deadly weapons, acid bulbs, burning rags, iron pipes, etc. and in spite of round of firing, the mob refused to disburse and continued to make violent attack. When members of unlawful assembly were apprehended and they were rounded off by the police once again an attempt was made by such members to release them. All these would collectively reveal purpose and design viz. object of unlawful assembly to commit the crime for which they were charged.

PART XII-C

RAILWAY EMPLOYEES

1 **The next group of witnesses are the Railway Employees who were discharging their duties either on the field or in the train; they are**:

[1] P.W.111 Fatehsinh Dabesinh Solanki (Points Master)

[2] P.W.138 Gulabsinh Laxmansinh Tadvi (Parcel Office Clerk)

[3] P.W.153 Points Man

[4] P.W.126 Harimohansinh Meena (Assistant Station Master)

[5] P.W.127 Traffic Inspector “A” Cabin

[6] P.W.116 Uday Chandrakant Katiyar (Electrician, Vadodara)

[7] P.W.128 Aakhirlal Gurjarilal Verma (Station Master “A”

Cabin)

[8] P.W.185 Janak Bhupendra Popat (Jr.Engineer, Godhra Railway Stn)

[9] P.W.131 Mukesh Raghuvir Prasad Pancholi (Wagon Repairer, Godhra Yard)

[10] P.W.162 Gangaram Javanram Rathod (Senior Section Engineer, Ahmedabad).

[11] P.W.135 Satyanarayan Panchuram Verma (Railway Guard)

[12] P.W.136 Sajjanlal Mohanlal Raniwal (T.C.)

[13] P.W.228 Rajendrarao Raghunath Jadav (Engine driver).

2 Witnesses other than karsevaks on platform No.1 or platform No.2 private witnesses.

PW-138 Gulabsinh Laxmansinh Tadvi (Parcel Office Clerk)

Particulars of Crucial facts	**Prosecution Witnesses who corroborate the crucial facts**
1. Duty hours 6:00 a.m. to 2:00 p.m. dated 17.02.2002	
2. He went for other work to platform nos.2 and 3 then returned and saw commotion at 'A' Cabin	

Contradictions/omissions, etc.	
1. Disputes the omission in the statement dated 01.03.2002 that the passengers were pelting stones on the people standing behind the parcel office.	
2. Admits that the peoples standing behind the parcel office were pelting	

stones and bottles.	

PW-228 Rajendrarao Raghunath Jadav (Engine Driver)

Particulars of Crucial facts	Prosecution Witnesses who corroborate the crucial facts
1. Himself, Assistant Driver Mukeshbhai Panchori and Guard-S.N. Verma were present with him on the train.	
2. Informs that he was sending Assistant Driver Panchori.	
3. Resetting of chain pulling.	
4. Vacuum drop at 'A' Cabin.	
5. Double P.V. switch on steel train stopped at Kilometer No.468/1990, informs the guard, mob comes, closes the engine doors, threats.	
6. Mob goes to the coach.	
7. Informs SS Godhra, asking them to help.	
8. Lifted the windows and notices stones pelting on the coach.	
9. Goes for the help of police, fire brigade and asks the Assistant Engine Driver Pachori and engine Assistant Driver to help the passengers by fire extinguishers.	PWs-127, 128
10. Failed	
11. Instructs the unclipping of the affected coach.	
12. Could not be unclipped for want of electricity supply.	
13. Puts the wooden obstruction to	

prevent them.	
14. Goes to Railway Godhra Police Station for lodgment of the complaint.	
15. Was frightened and therefore gave complaint in brief.	
16. Takes the train to yard, affected coaches were unclipped.	
17. Taken to the scene of offence	
18. Recovery of burn pieces of cloth and other articles.	
19. Informs at 08:05 hours incident ? or informed the incident occurred at 08:05 hours to Deputy SS and made entries in the driver notebook.	
20. Reason for drop of vacuum stated by him can be; (I) chain pulling, (II) dislodgement of hose-pipe or puncture in it or upsetting of disk by outsider.	
21. Learns from Assistant Virendra Khuswa who was in the lobby as also carriage department personnel that two punctured hose-pipe were replaced.	
22. His statements were recorded on 02.03.2002 and 26.04.2002.	
23. Whistle,	PW: 127
24. Gets on the driving seat	
25. Gunshot	
26. Gets down from engine	

Contradictions/omissions, etc.	

1. Admits the omission as regard his going to Police Station and revealing the information to the police.	
2. Admits the omission regarding arrival of mob at 'A' Cabin, closing of shutters of windows, threat by mob, its proceeding towards the coaches, weapons with them, his informing to deputy SS by walkie-talki and guard, his lifting of windows shutter and noticing mob pelting stones on the coach and attempts of the mob to break open the shutter of the windows of the coach by use of weapons, his instructing assistant driver to unclipped the affected coach and his reluctance, the loss of electricity supply and other omission (Para-25)	PWs-135

PW-136 Sajjanlal Mohanlal Raniwal (T.C.)

Particulars of Crucial facts	**Prosecution Witnesses who corroborate the crucial facts**
1. In-charge S-3 and S-4, S-3 and S-4 overcrowded, not permitted to let in, not entered into other coaches also because of over-crowdedness.	
2. Gets down to go to other coach.	
3. Finds commotion between some persons on the platform.	
4. Guard and himself come down.	
5. Again gets into the guard coach.	
6. Guard coach on railway garnada.	

7. Passage of the fire brigade was blocked by some people – police tried to dispel them, firing and then arrival of the fire brigade.	
8. Guard resets disk	

PW-135 Satyanarayan Panchuram Verma (Railway Guard)

Particulars of Crucial facts	**Prosecution Witnesses who corroborate the crucial facts**
1. On chain pulling comes down.	
2. Resets the disk – chain pulling.	
3. Notices Assistant Driver, who had also come for resetting the chain pulling.	
4. Movement of the train at 8:00 o'clock, stoppage at 8:05 o'clock again.	
5. Locks himself in the guard coach after shutting down the windows and doors.	
6. One of the windows broke because of stone pelting.	
7. Learns about burning of the coach, calls for help.	
8. Comes down on the off-side.	
9. Notices fire.	
10. Statements recorded on 27.02.2002, 09.03.2002 and 11.02.2005.	

Contradictions/omissions, etc.	
1. Exh:778 guard-book notings that	

he went to GRP Office for lodging the FIR but disputes that he and driver both have gone together.	

PW-127 Rajendraprasad Mishrilal Meena (Traffic Inspector "A" Cabin)

Particulars of Addl. facts	**Prosecution Witnesses who corroborate the crucial facts**
1. Instructs Shri Akhil Kumar to give signal at 7:45 a.m.	
2. Gets down to reset chain pulling.	
3. Notices 300 to 400 people, running with train from station side.	
4. Climbs into the cabin	
5. Instructs disconnection of electricity supply	

PW-128 Aakhirlal Gurjarilal Verma (Station Master "A" Cabin)

Particulars of Crucial facts	**Prosecution Witnesses who corroborate the crucial facts**
1. Statements recorded on 01.03.2002 and 04.05.2002.	
2. Goes for resetting of chain pulling,	
3. Police caught some witnesses	

Contradictions/omissions, etc.	
1. Admits the omission in the statement dated 04.05.2002 that the police personnel resorted stick winging, firing and apprehended some persons.	

PW-131 Mukesh Raghuvirprasad Panchori

Particulars of Crucial facts	**Prosecution Witnesses who corroborate the crucial facts**
1. The train started at 7:57 in the morning.	
2. Statement recorded on 27.02.2002.	

Contradictions/omissions, etc.	
1. Standing on the metal heap and pelting stones.	
2. Important omission in Para-15.	
3. Admits that second time stoppage was not on account of chain pulling, but was on account of drop in the vacuum, which is not chain pulling.	
4. Admits that he did not inquire the support from which vacuum had dropped.	
5. Admits that vacuum pipe opens accidentally, there may be droppage of the vacuum.	

PW-162 Gangaram Javanram Rathod (Senior Section Officer)

Particulars of Crucial facts	**Prosecution Witnesses who corroborate the crucial facts**
1. Did maintenance work of 1 to 50 coaches of Sabarmati Express after 17:30 hours.	
2. Relevant Paras-4 to 8	

Cross: New system of chain pulling no possibility of chain

pulling from outside if the train is not on the platform, the vacuum disk cannot be reached from ground level. Height of the train from railway track is 13 ft. 1 inch.

3 **PW-111 Fatehsinh Dabsinh Solanki -** This witness was a pointsman who unclipped the effect and took the train to line No.10. Only significance of evidence of this witness in the context of the arguments that the accused were involved in managing the chain pulling for halting of the train at a convenient and agreed place i.e. 'A' cabin, is that he does not whisper about resetting of the chain pulling system before unclipping the effect took and taking the train to line No.10. From his testimony, it appears that he noticed boggy No.S-6 inflames and after the restoration of electricity supply, he could move the train for the aforesaid purposes, in the usual course, without having to reset the chain pulling system.

However, in the cross-examination (para–6 of PW–126 - Harimohan Fulsing Meena, who was also a pointsman), it is made clear that droppage of the vacuum on account of chain pulling may be responsible for the halting of the train and after the release of the pulled chain, vacuum would automatically returned within two or three minutes. In evidence of Rajendraprasad Raghunathrao Jadav, Engine Driver of Sabarmati Express PW-228 in his testimony before the trial court admits to have repaired the hose pipe and even Ajay Kanu Bariya PW-236, who witnessed the incident also make reference to such damage to the hose pipe. This aspect could explain that movement of the train after restoring the electricity supply upon repairing the hose pipe.

4 It also appears from the cross-examination PW–126 that **at the time of first chain pulling, there was a stone pelting from both the**

sides i.e. from the back of parcel office and from the persons standing opposite to those persons.

PW–110 Bhupatbhai Maniram Dave

[1] Supports all material particulars including possession of carboy, sprinkling of inflammable therefrom etc.

PW–118 Ashwinbhai Govindbhai Patel

[1] Supports the story of carboy. He also supports the existence of heap of metal. He also supports the exhortation through mike of the mosque.

Testimonies of Railway Employees

5 **Rajendrarao Raghunathrao Jadav, PW-228**, who was Engine Driver of ill-fated Sabarmati Express train and took up the control and command of the train from Ratlam Station along with Assistant Driver Mukesh Pachori, PW-131 and guard of the train Satyanarayan Pachuram Varma PW-135. The above witness in paras 1 to 6 stated as under:

> "1 I have been performing my duty as an engine driver of train in Western Railway since 1995. I have been residing in Ratlam, Madhya Pradesh at my aforesaid address since my birth.
>
> 2 On 27/2/2002, I was present at my house. At that time, at about 3-30 hrs. I received a phone call at my house that I have to go to Vadodara taking the Sabarmati Express Train. Therefore, I came to Ratlam Station. Sabarmati Train arrived at Ratlam station at 4-25 hrs. At this time, Mukesh Pachori and Mr. S. N. Varma were on duty with me in the train

as assistant driver and guard respectively. Number of the said train was 9166-Up. We left for Vadodara from Ratlam Station at 4-40 hrs. We reached to Godhra Railway Station at 7-40 hrs. in morning. On receiving signal at 7-45 hrs., I blew whistle and received a sign of "all right" from the guard and started the train from the station.

3 The train may have gone about one-two coaches ahead and as chain was pulled, I blew whistles of the chain pulling. I informed the guard through walkie-talkie about chain pulling. I informed the guard through walkie-talkie and said that I am sending the assistant driver from front side; inquire about the coach where chain pulling has taken place. **The assistant driver and the guard re-set the chain pulling in the coach where it had taken place and informed me about this. After receiving sign of "all right" from the guard, I started the train. The train left but meanwhile stone pelting started on the train. "All right" was received with a flag in connection with signal near from ASM of 'A' cabin. Our train may have gone about four-five coaches ahead from 'A' cabin and it was found that vacuum drop had taken place in the train. Considering the situation of stone pelting on the train, I switched on double PV switch in the train and hence double exhauster got started. Though there were 1000 amperes, 700 volts and 6 notches in the engine, our train stopped near kilometer No.468/19. I immediately blew whistle about chain pulling. I also informed the guard in this connection through walkie-talkie. At this time, a mob came near the engine. As they were seen rushing towards us, doors and windows of the engine were shut for our protection. This mob gave such warning that "Master, if you will get down, you will be chopped (killed)." Thereafter, this mob went towards backside of the engine i.e. towards the coaches.** I had seen deadly weapons like sword, gupti, sticks, etc. with the persons of this mob. I immediately informed about this to Deputy S.S., Godhra through walkie-talkie. Along with this, I also informed to the guard of the train. I asked them to send persons of RPF, GRP and staff for the protection of passengers.

4 **I lifted window of the engine and saw towards the coaches that the persons of mob were pelting on the coach. Persons of the mob were trying to lift and damage windows of the coaches with pipes, etc. which had been**

closed by the passengers. After some time I saw smoke coming out of the coach. I informed regarding this to Deputy S.S., RPF and GRP of Godhra. I also told the master through walkie-talkie that immediately sent fire-brigade. Thereafter I called my assistant driver and assistant driver of our dead engine and asked them to try to put out the fire with fire extinguishers which we had. Both of them had gone with the fire extinguishers and after some time they returned and told that they could not succeed in extinguishing the fire. Thereafter, I again reminded Deputy S.S. through walkie-talkie as to whether he has informed fire-brigade or not; we have tried to extinguish the fire but we could not succeed. Thereafter, I told the assistant driver to unfasten coupling of the coach in which fire has taken place. But he was giving excuses for doing so. Therefore, I told him that you are an employee of railway, go with flag and because of this you will not face any problem. **As the assistant driver was seeking for a sign from me in order to loose the coupling, I started the train and tried to take it little backward. But, electric supply stopped suddenly at that time**. The assistant driver came to me and said that though I am asking for a sign to unfasten the coupling, why don't you do so. Therefore, I told him that electric supply has stopped. I informed Deputy S.S. of Godhra station through walkie-talkie about the stoppage of electric supply. I also informed that as electric supply has stopped and as it is necessary to protect other coaches from the fire, send a diesel engine. As electric supply had stopped, in order to avoid "roll back" of the train, I put wooden obstacles and as electric supply had stopped, I switched of the engine and instructed the assistant driver to remain present in the engine.

5 Meanwhile, three to four police personal arrived towards engine and told me that come to Godhra Railway Station and inform about the incident. Therefore, I went to Godhra Railway Police Station with them. As I had got frightened due to the incident, I dictated facts of the incident in brief before the officer in Godhra Railway Police Station. Thereafter, I came towards the engine within some time. Officers of Railway told me that electric supply will be restored in some time and hence you remain present in the engine. Thereafter, I made pressure to start the engine. **Instruction was received from railway officer that electric supply has been restored and you lift "pento" of the engine. Therefore, I lifted "pento" of the engine so that it can touch with the**

wire of electricity. Thereafter, as electric supply was restored, I started the engine and removed the obstacles which I had placed below the wheels of the train. Thereafter, I received an order to brake the train in yard. Meanwhile, a mob arrived there and they started heavy stone pelting. Meanwhile I heard sound of firing. I performed the work of centering with the help of walkie-talkie after closing the windows of the engine. Thereafter, I took the train front side and backside for two-three times. Two burnt coaches were separated in the yard and the train along with other coaches was kept in the yard. As I was very much frightened due to the incident, I requested the railway authority to relieve me as a driver of this train. During the time between 12-30 to 12-35, charge of this train was handed over to another driver. **Thereafter, I again went to Railway Police Station. After some time, the police personals took me to the place where the incident had occurred where burnt pieces of clothes and other articles were lying. The police carried out procedure in that regard. As our ADRM had arrived from Vadodara, he was briefed about the incident. Thereafter, at about 5 - 6 hours, police personals took me in the yard where 58 dead bodies were lying covered with cloth. I am being shown the complaint at Mark-28/1. It bears my signature in the margin at the backside of first page and at the end of the write-up. I identify my signatures. I had put my signature for receiving copy of the complaint. The facts written therein are true. Mark-28/1 has been given Exh-1190. I am being shown 'driver note-book' at Exh-761. Viewing the same, I state that name of stations, time of arrival and departure of trains are written and they have been written in the handwritings of my assistant driver Mukesh Panchori.** I identify them. Coach numbers of the coaches in which chain pulling took place, the entries about informing the Deputy S.S. in connection with the incident took place at 8-05 hrs, etc. have been written in my handwritings. I identify them and the facts written therein are true. Necessary entries regarding our work performed during the time when we are present on duty in the engine, have been made in this 'driver note-book'.

6 **There is one vacuum gauge in engine which indicates position of the vacuum. After starting the train, the train gets braked with quantity of vacuum becoming less. As the speed of train gets slower, we come to know about vacuum drop in the meter of vacuum which is fitted in the**

engine. There is also arrangement of meter of vacuum gauge in the coach of guard and in the case of vacuum being dropped, the guard can know the same through its meter. Initially it was not known as to why vacuum got dropped. The reason for vacuum being dropped can be such that chain pulling may have taken place or hose pipe may have got separated or torn. It may also happen when chain pulling is done by passengers or some miscreants may have turned the disk from outside.

Que. In this case, what reason did you find for vacuum being dropped near 'A' cabin?

Ans. It can be any one reason out of the aforesaid reasons stated by me.

When I asked as to how vacuum was created, assistant Ravindra Kushvah who was in the lobby of station and employees of carriage department told that as two hose pipes had torn, they have been changed. Police took my statement on 2/3/2002 and 26/4/2002 in connection with the incident.

Cross-examination by Ld. Adv. Mr. A. D. Shah for accused persons.

(Accused No. 4, 6, 10, 13, 38, 42, 51, 54, 58, 59, 61, 69, 75, 78, 79, 81, 82, 84, 85, 86 to 89, 91 to 99)"

In his cross-examination about incident of chain pulling, in paras 14, 18, 20, 21, 22 and 25, it is stated as under:

"14 It is true that when chain pulling took place for second time, the train had reached on Vadodara line. It is not true that persons of the mob came from front side of the engine. The witness states that they came from 'A' cabin side i.e. from masjid. It did not happen that the mob may have come from the direction of Vadodara side. I have seen the masjid which I have mentioned. That masjid is situated in backside direction of 'A' cabin at about 150 meter away in somewhat Vadodara side. I do not know name of that masjid. I do not know name of Single Faliya. It has not happened that the mob might have come towards me. It happened that the

persons of mob came from bushes. I do not know as to whether other persons of the mob were present at the backside of coach or not when the persons of mob came to me i.e. the engine.

18 It is true that there were two machines for creating vacuum in this engine of the train. It is true that there are four types of brake system in the train like air brake, vacuum brake, hand brake and emergency brake with the guard. It is true that there are two types of PV exhausters i.e. single and double. **It is true that train can move even with a single PV. It is true that if train in on single PV and if it is taken to double PV, it is my say that the train may go little further. It is not true that on taking it two double PV the train can go up to 4 to 5 km. further**. It is not true that if the train is on single PV and if any risk is found to the train, the engine driver can take the train up to 4 to 5 km. ahead from that place by taking it on double PV. The witness states that it depends on speed of the train at the relevant time and on the geographical condition. As per my say, if the train is on single PV at the speed of 90 to 100 and if it is taken to double PV, it can go 4 to 5 km. further. It is not true that level of railway track was flat at the place of incident. The witness states that the track at that place is ascending. I cannot say as to how high that ascent is. It is not true that there is no ascent at all in railway track in this area.

20 At the stage, along with load, there is 53 cm. vacuum in the engine of train. If you are saying that there is 58 cm. vacuum in train along with load, it is false. I do not have exact information as to maximum how much vacuum can drop from one ACP. **As per my say, after reaching in any coach, it may take about one minute to re-set ACP. If vacuum is dropped in middle coach of train, the assistant driver may come from the cabin of driver or the guard may come from his backside coach in the middle part, re-set the ACP and inform about the same after returning, it may take about 4 to 5 minutes to start the train**.

21 **It is true that there are two types of ACP. It is true that in old ACP, vacuum was getting dropped on pulling the chain. Whereas, in new ACP system, vacuum will only get dropped, if one keeps on holding the chain after pulling it. During the period of this incident, ACP system**

which was in this train was old. New ACP system was about 15 years old. It is true that the driver who takes charge of the train does not check ACP of each coach in the train.

22 It is true that when I was in the engine at the time of incident, Chief Loco Inspector and his staff arrived there. It is not true that the Chief Loco Inspector noted down my statement at that time and took my signature in that statement. It is true that earlier I have deposed before two Commissions. It is true that Chief Loco Inspector of Godhra is under Pratapnagar Divisional Electrical Engineer. It is not true that when any incident takes place in the train, Chief Loco Inspector or Divisional Electrical Engineer come to the spot and take statements of concerned employees. I want to say that on the day of incident the Chief Loco Inspector or Divisional Electrical Inspector has not taken my statement or statement of the assistant driver at all. I do not want to say that the Railway Department has not taken my any statement till date in connection with the incident. As per my say, on 28/2/2002 and 1/3/2002, Ratlam Divisional Electrical Engineer conducted my interrogation regarding the incident. It is true that my signature was taken below that statement. It is true that I have not dictated in that statement that persons of the mob arrived near the engine.

25 It is true that I have not dictated such fact in my complaint that "'All right' was received with a flag in connection with signal near from ASM of 'A' cabin and our train may have gone about four-five coaches ahead from 'A' cabin and it was found that vacuum drop took place in the train. Considering the situation of stone pelting on the train, I switched on double PV switch in the train and hence double exhauster got started. Though there were 1000 amperes, 700 volts and 6 notches in the engine, our train stopped near kilometer No.468/19." It is true that I have not dictated such fact in my any statement that "though there were 1000 amperes, 700 volts and 6 notches in the engine." It is true that I have not dictated such fact in my complaint that, "At this time, a mob arrived near the engine. As I saw them coming, doors and windows of the engine were shut for our protection. This mob gave such warning that "Master, if you will get down, you will be chopped (killed)." Thereafter, this mob went towards backside of the engine i.e. towards the coaches. I had seen deadly weapons like sword, gupti, sticks, etc. with

the persons of this mob. I immediately informed about this to Deputy S.S., Godhra through walkie-talkie. Along with this, I also informed to the guard of the train." It is true that I have not dictated such fact in my complaint or statements that "I lifted window of the engine and saw towards the coaches that the persons of mob were pelting on the coach. Persons of the mob were trying to lift and damage windows of the coaches with pipes, etc. which had been closed by the passengers." It is true that I have not dictated such fact in my complaint or statement that "I again reminded the Deputy S.S. through walkie-talkie as to whether he has informed fire-brigade or not." It is true that I have not dictated such fact in my complaint or statement that "thereafter, I told the assistant driver to unfasten coupling of the coach in which fire has taken place. But he was giving excuses for doing so. Therefore, I told him that you are an employee of railway, go with flag and therefore you will not face any problem. The assistant driver was seeking for a sign from me in order to loose the coupling. So, I started the train and tried to take it little backward. But, electric supply stopped suddenly at that time. The assistant driver came to me and said that though I am asking for a sign to unfasten the coupling, why don't you do so. Therefore, I told him that electric supply has stopped." The witness states that the assistant driver was told to unfasten the coupling. It is true that I have not dictated such fact in my complaint or statement that "I also informed that as electric supply has stopped and as it is necessary to protect other coaches from the fire, send a diesel engine." It is true that I have not dictated such fact in my complaint or statement that "meanwhile, three to four police personals came towards engine and told me that come to Godhra Railway Station and inform about the incident." It is true that I have not dictated such fact in my complaint or statement that "thereafter, I came towards the engine within some time. Officers of Railway told me that electric supply will be restored in some time and hence you remain present in the engine. Thereafter, I made pressure to start the engine. Instruction was received from railway officer that electric supply has been restored and lift "pento" of the engine. Therefore, I lifted "pento" of the engine so that it touched with the wire of electricity." It is true that I have not dictated such fact in my complaint or statement that "I performed the work of centering with the help of walkie-talkie after closing the windows of the engine." It is true that I have not dictated such fact in my complaint or statement that

"thereafter, at about 5 - 6 hours, police personals took me in the yard where 58 dead bodies were lying near coach covered with cloth." The witness states that I dictated that I saw 58 dead bodies. **It is true that I have not dictated such fact in my complaint or statement that "when I asked as to how vacuum was created, assistant Ravindra Kushvah who was in the lobby of station and employees of carriage department told that as two hose pipes have torn, they have been changed**." It is true that today for the first time I am stating in the court about the fact of changing hose pipe. It is not true that I did not see any incident at all but I am giving a false deposition at the instance of the police.

Cross-examination for accused persons. Ld. Adv. Mr. L. R. Pathan is not present.

(Accused No. 7, 9, 14, 17, 36, 55, 60, 66)
No cross-examination.

No re-examination."

6 **Harimohan Fulsing Meena, PW-126** who was Assistant Station Master, in paras 2 and 3 of his examination in chief has stated as under:

"2 On 27/2/2002, I was present on my duty in my office at Godhra Railway Station at 00.00 hours. Deputy Station Superintendent Mr. Y. M. Saiyed was also present on duty with me. In the meantime, Sabarmati Express train having no. 9166 arrived at 7.42 hours in the morning from Dahod to Godhra Railway Station on platform no.1 and it halted. At 7.48 hours as Saiyed Sir informed the Asst. Station Master of 'A' Cabin over telephone to give signal, signal was given for departure of this train. Therefore, this train departed towards Vadodara. Thereafter, as the driver of the engine blew whistle suddenly, we came to know that there was chain pulling in the train. Therefore, Saiyed Sir asked me to go to the train and find out as to in which coach the chain pulling has been done. Therefore, I went towards this train. On seeing, it was found that some part of the train was ahead of platform and chain pulling was done in three to four coaches of this train. I found

that chain pulling had been done in the rear coaches of the train. I informed the numbers of the coaches, in which chain pulling had been done, to Saiyed Sir. As the chain pulling was done in the train, Saiyed Sir informed the staff of RPF and GRP and dispatched them towards that side. The train departed after some time.

3 During the period at about quarter to eight o'clock, again chain pulling was done. At that time Mr. R. P. Mina, Assistant Station Master of 'A' Cabin and guard of the train informed over walkie talkie that chain pulling has been done in the train near 'A' Cabin. There was crowd on the off side at that time. Now I state that the crowed was towards 'A' Cabin. They also stated that these people are pelting stones and coach no. S/6 has been set on fire. At that time, I informed this fact to the Station Superintendent Mr. Katija and stated to inform fire brigade and police control. As Saiyed Sir asked me at that time to go towards the coach, which was set on fire, I went. After reaching there, I noted down the number of the coach, which was set on fire, and thereafter I returned to my office. At this time as the duty time of Saiyed Sir was over and as Mr. Sujela was on duty on his place, I informed the coach number which was set on fire. The police recorded my statement regarding the action taken by me. Charge register is maintained at my office that means the office of A.S.M., wherein entries are made about the important incident taking place on the station or important incident concerned to our office. I made short entry in my handwriting in the Charge-Book Register regarding the incident of the Sabarmati Express train having no. 9166 taken place on 27/2/2002. When the police recorded my statement, I had produced a copy of the entry which I had made in the Charge-Book Register. I am shown the register of Muddamal No. 33/09 Article no.3 , wherein there are total 1 to 95 pages. Out of the same, I am shown the entry on Page no.93. It is written in my handwriting and the fact written therein is true. I have made my signature at the end of the writeup and I identify the same. Page no. 93 is given Exhibit-743".

In his cross-examination it is important to refer to paras 6, 7 and 8 in which the above witness confirms departure of train at 7:55 and Mr. R.P.Meena, PW-127, Assistant Station Master A Cabin and Guard, PW-

135 of the train gave the message over walkie talkie after 3 minutes and it was informed in that message that fire has been set in coach S6. As per the above testimony it comes on record about fire in coach S6, arrival of fire brigade from the pond side and second chain pulling was done for the first time, the above witness was as to what slogans were shouted by whom and who were pelting stones from which place. However,r the above witness is unable to state that who and how the chain pulling, that was done in S6 near A cabin.

7 **Rajendraprasad Mishrilal Meena, who was working as Traffic Inspector, Dakor Head quarters – Godhra, PW-127**, in paras 2, 3 and 4 of his examination in chief stated as under:

> "2 Sabarmati Express train arrived on platform no.1 of the Godhra Railway Station at 7.43 hours in the morning on 27/2/2002. As this train was going towards Vadodara, I ascertained as to whether the line is clear on the first railway station towards Vadodara that means Kharsaliya Railway Station and line was clear. Therefore, I asked Akhilkumar Sharma working with me at 7.45 o'clock to give signal. Therefore, Mr. Sharma gave signal to Sabarmati Express train to start. Therefore, this train started and within one or two minutes, I had heard the whistles of chain pulling. Thereafter, the train halted. I informed the Deputy Station Superintendent regarding this and stated the whistle for chain pulling has been blown. Thereafter, this train started again at 7.55 o'clock. After moving little ahead, chain pulling whistles were blown again and during this time eight to ten coaches had passed from 'A' Cabin. As I came to know about the chain pulling in this train, I came down from my office to shut down the chain pulling. In the meantime, I saw that a mob consisting about 300 to 400 persons was coming along with the train from station side. As this mob was coming near to 'A' Cabin, I climbed up 'A' Cabin due to fear of them and the people of this mob started pelting stones on the train. The people of this mob were also armed with sticks and they were hitting those sticks on the coaches. I also saw the marks of stones appeared on the coaches due to hitting of stones. I gave instruction to the passengers of the

opposite coaches to close windows so that they are not hit by stones and sticks. Thereafter, I saw that smoke was coming out from a coach which was at the front side of the place where I was standing that means the coach towards Vadodara side. Therefore, I informed the Deputy Station Superintendent that smoke is coming out from the train and stones are pelted on the train. There was fire in the coach from which smoke was coming out. As more flames of fire appeared from the coach, I informed the Traction Power at Vadodara to stop electric supply of the line. In the meantime, GRP and RPF staff arrived from the railway station. This police staff did lathi-charge on this mob and the people of the mob started running. At this time, the Railway Officers and fire brigade had also arrived and they put off the fire in the coach.

3 On examining about the coach on fire, it was found that it was coach no. S/6. As there was fire in the coach of train, this train was taken ahead and then it was taken on line no. 10 and thereafter, the train was taken to Railway Yard where two coaches were separated and the train was again brought on line no.10 and thereafter, the coaches of the train were connected and the passengers of the train got into the train. Thereafter, at about 12.40 hours, this train departed towards Vadodara. When the shunting work of the train was going on, some of our officers were present there and a mob was present little far from there. I do not know as to what the police did at that time. When the police did lathi-charge for the first time, there was stampede and as that stampede took place at the place about three coaches ahead of Cabin, I do not know as to what actually happened over there.

4 **M. R. no. 33/09 Article no. 7 is the workload booklet of 'A' Cabin, Godhra. There are total 1 to 94 pages serial number wise in this register. After seeing the entry made therein on Page no. 91, I state that this entry has been made in my handwriting and the fact written therein is true. There is my signature at the end of the writeup, which I identify.** Underneath my this signature, Harvindarsing, Station Master, has made signature, which I identify. Page no.91 of this register is given Exhibit-745. I am shown the register of M.R. no. 33/09 Article no.6, the Train Signal Register (TRS), wherein page no. 1 to 99 are there at present. On seeing the entry dated 27/2/2002 on Page no. 22 and 23 thereof, I state that it is in my handwriting and the fact written therein is true.

I have made my short signature against each entry therein, which I identify. The fifth entry on left side of page no. 23 is made regarding Sabarmati Express Train dated 27/2/2002. The same is made in my handwriting. Page no. 22 and 23 of this register are given Joint Exhibit no. 746. The police inquired to me whatever I had seen of the incident and whatever work done my me and my statements were recorded on 1/3/2002 and 4/5/2005 and the fact written therein is true".

The above witness confirms stoppage of Sabarmati train within 1 or 2 minutes after the departure and again around 7:55 hours, the train started and after moving little ahead, chain pulling whistle was blown and by that time 8 to 10 coaches had passed from A cabin. In the meanwhile, he saw a mob consisting of 300 to 400 persons was coming along with the train from station side and he climbed up 'A' Cabin due to fear of mob as the mob started pelting stones on the train and they were armed with sticks and they were hitting those sticks on the coaches. He, therefore, instructed passengers to close windows and informed Deputy Station Superintendent that smoke is coming out from the train and stones are pelted on the train. Besides, there was also fire in the coach from which smoke was coming out and as more flames of fire appeared from the coach he informed the Traction Power at Vadodara to stop electric supply of the line. In the meantime, GRP and RPF staff arrived and upon resorting to lathi charge, the mob started disappeared. Likewise, arrival of fire brigade immediately was also taken note by this witness. In paras 6 to 8 of the cross-examination, the above witness reiterates what is stated in examination in chief and for ready reference, paras 6, 7 and 8 are reproduced herein below:

"**6 It is true that when the chain pulling was done second time, I had got down from the cabin but on seeing the mob, I climbed up back to the cabin due to fear. It is true that**

after going back to cabin in such manner, I asked Akhilkumar working with me to close the windows of the cabin. It is not true that I also told to close the doors of the cabin. It is true that I have dictated in my police statement dated 4/5/2002 that "I was very much frightened, therefore, immediately I went up the staircase of 'A' Cabin and after reaching into the cabin, I told Akhilkumar Sharma to close the doors of the cabin and windows of all four side." The police did not make any of my inquiry on 27/2/2002 after the incident. Our Railway Traffic Inspector inquired to me on that day in connection with the incident. I was called to G.R.P. Office on 1/3/2002 to record my statement and as it was asked to me at that time as to when the fire fighter arrived, I informed them that fire fighter arrived at 9.30 o'clock. The police had also asked me at that time as to when the fire was extinguished by the fire fighter. It is true that I informed them that the staff of fire brigade had extinguished the fire at about ten o'clock. It is true that the staff of fire brigade extinguished the fire while coming on the off side of the train. Track no. 10 is located in the yard.

Cross-examination for the accused persons by Ld. Adv. Mr. Y. A. Charkha

[Accused no. 16, 32 to 35, 44, 45, 49, 50, 62, 72,73, 76]

7 It is true that after reaching little ahead of 'A' Cabin, the railway track takes turn and heads towards Vadodara. It is true that the culvert located behind the 'A' Cabin starts from the underpass situated towards platform and it goes ahead while passing from near 'A' Cabin. It is true that there is no space between 'A' Cabin and the underpass. It is true that at the time of the incident, there were thorny babool trees in the area located behind the cabin after the culvert. The witness states that those were small. I am not able to state that these babool tress were so dense that no person can pass therefrom. I am not able to state that the culvert located behind the cabin is such deep that no person can come to the cabin or the track therefrom. The witness states that I have not seen anyone passing from there.

8 **It is true that the persons of GRP and RPF arrived after the fire fighter had arrived. It is true that I have dictated in my police statement dated 4/5/2002 that "coach was set on**

fire and thereafter police RPF arrived." It is true that I have dictated in my police statement dated 1/3/2002 that "I have come to know from hearsay that altercation took place between the karsevaks and tea stall owners on the railway platform and stone pelting was done." It is true that I have not dictated in my police statement that "in the meantime, I saw that a mob consisting 300 to 400 persons coming with the train from the station side." The witness states that I have dictated in my police statement dated 1/3/2002 that "mobs consisting about 200, 500 persons rushed towards train from the rear part of train and from surroundings and started pelting stones at the train". I have also dictated the same in my statement dated 4/5/2002".

8 **Akhilkumar Guljarilal Sharma, Station Master, PW-128** in paras 2, 4, 5 and 6 deposed as under:

"2 On 27/2/2002, Sabarmati Express train arrived at Godhra Railway Station at 7.43 o'clock in the morning and as this train was given signal at 7.45 to depart towards Vadodara, the train started from the railway station at 7.48 o'clock. Soon after the train started, as there was chain pulling, the train stopped. Thereafter, the train started again at 7.55 hours and as there was chain pulling again, the train stopped near cabin after going little ahead of 'A' Cabin. Therefore, Mina Sir got down from 'A' Cabin. Mr. Mina went towards the coaches to repair the chain pulling, but as a mob arrived from opposite side, he came back on 'A' Cabin. **There were about 500 persons in the mob. The people of this mob were running and pelting stones at the train. The persons of this mob were armed with stones, sticks and rods etc. The stone pelting continued for a long time and Mina Sir stated that smoke is coming out from a coach of train and it is set on fire. When I also saw, smoke was coming out from a coach and the coach was on fire. As stones were pelted on the coach of train and it was on fire, Mr. Mina informed Deputy Station Superintendent Mr. Saiyed on Godhra Railway Station over phone and asked to send fire brigade to extinguish the fire. Therefore, police persons arrived over there and tried to disperse the mob.** Police detained some persons running from the mob at that time. As fire brigade arrived after some time, the fire was extinguished and the train

was taken on line no.10. The coaches that were on fire were taken to yard from line no.10 and the train was again brought on line no.10 and thereafter, the rear coaches were joined again. After the passengers got into this train, at about 12.40 hours this train departed towards Vadodara. As the information of the incident was received, our railway officers also arrived at the place of occurrence. The police inquired to me regarding the incident and I dictated in my statements dated 1/3/2002 and 4/5/2002 whatever I had seen and whatever had taken place.

Cross-examination for the accused by Ld. Adv. Mr. A. A. Hasan

[Accused no. 1 to 6, 10, 13, 18, 22, 24, 31, 37, 38, 41, 42, 43, 47, 51 to 54, 58, 59, 61, 63, 65, 67, 69, 74, 75, 77 to 79, 81, 84 to 100]

4 It is true that message was received on 26/2/2002 at 11.30 hours at night that Sabarmati Express train going from Ahmedabad to Ayodhya was arriving and I gave information regarding this to the Deputy Station Master and employee on duty at 'B' Cabin. It is true that on 27/2/2002, a message was received from 'B' Cabin that Sabarmati Express train was coming from Ayodhya side to Godhra Railway Station at 7.43 hours and Mr. Mina on duty with me made entry in the concerned register regarding the same. It is true that the duty hours of Mr. Mina and me were getting over at 8.00 o'clock in the morning on 27/2/2002. Other employees Mr. Harvindarsing and Mr. R. K. Varma were to report on duty at our place.

5 When Sabarmati Express train departed from Godhra Railway Station to go towards Vadodara, no message was received at 'A' Cabin from the station. I had to give signal from 'A' Cabin to allow the train to go ahead from the platform. It is not true that entry has to be made in the concerned register at 'A' Cabin for giving signal in such a way. The witness states that entry of departure time is made when the train departs from the platform. It is true that when this train started from the platform of Godhra Railway Station, Mina Sir and I were sitting at the first floor of 'A' Cabin. **It is true that in cases of chain pulling after the departure of the train from platform, the engine driver first blows two short whistles and then one long whistle. It is true that after the duty gets over in 'A'**

Cabin, when the other employee or officer reports on duty, the handing over of charge is done in writing. It is true that when the whistle of chain pulling was heard, the duty time of me and Mina Sir were about to get over. It is not true that only one minute was left for getting the duty time over when the whistle was heard. The witness states that my duty time was till 8.30 o'clock because half an hour is taken to handover the charge. It is true that I have not dictated in any of my police statement that after the duty time is over, one has to remain on duty for half an hour more to handover the charge. It is not true that on hearing the whistle after Mr. Mina got down some steps of the staircase of the cabin, he immediately came back to the cabin. **The witness states that after getting down from the cabin, he went to check about the chain pulling near the coaches of the train and thereafter, he returned to the cabin.**

6 **It is true that I have dictated in my police statement dated 4/5/2002 that "the driver started to blow whistles for chain pulling and when Rajendrasing Mina began to get down by the staircase of 'A' Cabin to check as to why the chain pulling has been done, on seeing the mob coming towards the train, he immediately climbed up the cabin." It is true that after returning into the cabin, Mr. Mina told me to close the doors and windows of the cabin immediately. It is true that when I was closing the doors and windows, I was stunned to see the condition outside and I was frightened. It is true that I did not get down from the cabin even after the incident. It is not true that I have not dictated in my police statement that "therefore, the police persons arrived over there and tried to disperse the mob. At that time the police detained some persons running from the mob." It is true that I am not able to state the exact number as to how many persons the police detained from the mob. I am also not able to state exactly as to how many police persons were present there at that time. I had seen police running after the mob. The police ran after the mob towards Singal Faliya. It is true that the area of Singal Faliya is towards the lower part from the cabin. I do not know as to whether the police that ran towards the mob, were armed with guns. I saw the persons whom the police detained from the mob and as per my say, they were detained by the police near the slope towards Singal Faliya.** I am not able to state as to how many persons were there in the mob near the slope,

when the police detained persons from the mob in this way. I have not seen any such thing that the persons detained by the police were tied with rope or in any other manner. I heard the sound of police firing. I heard the said sound at eleven o'clock. Now I state that the said firing was done from the staircase of 'A' Cabin. At that time the direction of the gun was towards Singal Faliya. I do not know as to whether I have dictated in my police statement that after this firing, the police detained persons from the mob".

As per this witness stone pelting, chain pulling on two occasions, members of violent mob attacking the coach, police resorting to lathi charge and statement recorded by police on 01.03.2002 are admitted. Even this witness also confirms arrival of RPF and other forces and thereafter mob had disbursed. **In his cross-examination in paras 12 and 13 deposed as under**:

"12 When the train stopped near 'A' Cabin at the time of the incident, 8-10 coaches of the train had crossed towards Vadodara ahead of 'A' Cabin. I do not know as to at which number the coach, which was on ablaze, was from the engine. I have stated the fact in examination-in-chief that after the train arrived and stopped near 'A' Cabin, Mr. Mina working with me got down from the cabin and went down; this Mr. Mina did not go till the coach in which chain pulling was done, but after getting down from the cabin, he went to the nearby coach and returned immediately. It is true that at that time there was distance of about ten to fifteen feet between the cabin and the nearby coach of the train.

13 As per my say, after the duty is over I have to inform the facts to the other employee reporting on duty as to which trains have passed, which is late, which tracks are vacant and as to on which track there is train etc. Other than this, I have to inform if any system failure has taken place or any unusual fact has occurred. Written note of all such things are made in concerned record. It is true that the employee reporting on duty can also come to know about all these above matter from the entries made in the registers. We have to maintain charge book. The charge book of 27/2/2002 was seized at the

respective time. I state after seeing Exhibit-743 that such type of charge book is maintained. The witness states that my charge book is separate. As per my say, there is separate charge book for each employee who was performing duty in 'A' Cabin. Now I state that there is separate charge book for each table. It is not true that I have to make the same type of entry in the charge book, which is made in Exhibit-743. It is not true that I am falsely stating the fact that after the duty time is over, we have to stay back in the office for half an hour to handover the charge".

In the above testimonies the witnesses has stood by his version before police as well as in examination in chief and the charge book of 27.02.2002.

9 **Mukesh Raghuvirprasas Panchori, Assistant Driver of Sabarmati Express, Loco Pilot, Ratlam, PW-131**, in examination in chief, in para 3 stated about arrival of train around 7:40 am on 27.02.2002 at Godhra Railway Station and after halt for about 5 minutes a signal was received to start at 7:45 am and the train departed towards Vadodara. That first chain pulling was done just after the train went 3 to 4 coaches and the driver Rajendrarao Raghunathrao Jadav, PW-228, blew whistle for chain pulling and informed the guard, PW-135 on walkie-talkie about chain pulling and instructed this witness to reset ACP and accordingly he went to the rear part of the train and found chain pulling was done in 4 coaches, it was reset and returned to the engine and thereafter the train restarted around 7:57 am. The train went little ahead as it passed ahead of A Cabin and it stopped due to reduction of vacuum and the driver informed the Deputy Superintendent of Godhra Railway Station over walkie talkie about same. In paras 4 and 5 further description was given, which read as under:

"4 After we went little ahead that means as we passed

ahead of 'A' Cabin, the train stopped due to reduction of vacuum. As the train stopped in this manner, the driver informed the Deputy Station Superintendent of Godhra Railway Station over walkie-talkie. At this time the train was standing on a turning. As the train stopped, stone pelting started on the train within some time. A mob consisting about 800 to 1000 people was pelting stones in this manner. Stones were pelted at the train by climbing up the metal heap which was near 'A' Cabin. **The persons of this mob were armed with weapons such a sticks, sword, gupti etc. When the train stopped, as I was getting down from the engine to reset the ACP, they were saying that "master get back, otherwise you will be killed". As these persons pelted stones at engine, I closed the door of the engine and I did not get down. When the people of the mob stated in this manner, I got frightened and due to that reason I did not get down.** The driver informed the Deputy Station Superintendent of Godhra Railway Station over walkie-talkie and asked to send police force. Smoke was seen coming out from rear side after some time. **Therefore, the driver again informed the Deputy Station Superintendent over walkie-talkie to send medical van and fire brigade. At about 8.30 o'clock, the staff of GRP and RPF arrived and they dispersed the people of mob. Thereafter, the driver gave instruction to me and Mr. Vora, Assistant Driver of dead engine, to take fire extinguisher and go to the coach which was set ablaze and extinguish the fire.** Therefore, Faruk Vora and I took about six fire extinguishers, which we had and started attempts to put off the fire in the coach. But as the coach was engulfed with fire, despite using these fire extinguisher, the fire could not be controlled. Thereafter, we returned to the engine with the empty fire extinguishers. At that time the driver gave instruction to separate the coach by cutting so that the other coaches do not catch fire also. **Therefore, I went towards the coach which was on fire and I tried to get coupling, but as the driver did not give the same, I went towards the driver and asked as to why he was not giving coupling. Therefore, the driver informed that electric supply has been stopped. In the meantime, fire brigade had also arrived. They started the work of extinguishing the fire.** The electric supply started at about 10.00 to 10.05 o'clock. Therefore, we started the shunting work of the train. We took the train forward to do shunting and after crossing the line, the train was brought on line no.10 and at that time the persons of staff started to work

of cutting the coaches. After cutting the coaches in this manner, the train was taken to the yard along with the coach which was on fire. Two coaches were cut there. The coach, which was on fire, was S/6. After separating two coaches in this manner, the train was brought on line no.10 and the coaches lying at that place were joined with this train.

5 **Second time that mean when the working of shunting was going on, a mob consisting many people was there and they started pelting stones from the opposite side of the cabin. The police fired at this time. As the train was ready, the charge of the train was given to driver R. C. Lodha. Driver Rajendrarao lodged complaint regarding this incident.** The police recorded my statement regarding whatever I had seen after inquiring to me. A diary is given to the driver in our train, which is known as driver diary that means L-66. **I am shown the document having Mark-28/2 and I state after seeing the same that it is the entry regarding the engine no. 20432 and 20632 dated 27/2/2002 of the driver notebook – L-66 maintained in our engine. This notebook is maintained by the assistant drivers. The entry time that is written in this notebook dated 27/2/2002, is written in my handwriting and all the fact written therein is true**. Whatever entry is made in this notebook dated 27/2/2002, is made in my handwriting. At the end of the writeup, the seal of the designation of "Station Superintendent Western Railway Godhra" is affixed and he has also made signature thereat. **The xerox copy of the concerned page of diary of Mark 28/2 is given Exhibit-761 with the consent of the advocate for the Defence. My first statement in connection with the incident was recorded on 27/2/2002. Thereafter, my statements were recorded on March-2002 and April-2002"**.

In his cross-examination, the above witness in paras 6 and 7 confirms to have made statement on 27.02.2002 before police around 9:00 am. However, the witness denies to have dictated in police station dated 27.02.2002 about lathi charge was done to disburse the mob and ten tear gas shells were busted. He further denies to have stated about violent mob pelting more stones and that when he saw the coach of the train completely burnt due to fire and burning bodies were seen lying

one upon other. However, in cross examination in paras 10, 11 and 12, the above witness admitted that in his statement recorded on 27.02.2002 he had stated that fire in the coach was extinguished and when the chain pulling was done first time he came to the left side of engine from left side and had not looked towards signal falia. That significant version comes in para 12 of the cross-examination in which it is admitted that when chain pulling was done in second time, the front portion of the train was on the turning leading towards Vadodara and that it is true that at that time the coach, which was on fire, was after eight coaches after the engine. That para 15 of the cross-examination of the above witness is reproduced herein below in which the above witness did not deny to have made statement before the police that members of mob pelted stones on the train by climbing up on metal heap and he was threatened by the mob not to get down from the train. Para 15 of cross-examination of the above witness reads as under:

> "15 It is true that I have not dictated in any of my three statements that "at this time the train was standing on a turning." **It is not true that I have not dictated in my police statement that the people of mob pelted stones at the train by "climbing up the metal heap"**. All three of my statements have been recorded in Gujarati and therefore, I myself cannot read the same. **It is not true that I have not dictated in my police statement** that "while I was getting down from the engine, they were saying that master get back otherwise you will be killed. As these persons pelted stones at engine, I closed the door of the engine and I did not get down. When the people of the mob stated in this manner, I got frightened and due to that reason, I did not get down." It is not true that I have not dictated in my police statement that "smoke was seen on rear part after some time." It is not true that I have not dictated in any of my police statements that "At that time the driver gave instruction to separate the coach by cutting so that the other coaches also do not catch fire. Therefore, I went towards the coach which was on fire and I tried to get coupling, but as the driver did not give the same, I went

> towards the driver and asked as to why he was not giving coupling." It is true that I have not dictated in my police statement that " the coach which was set ablaze was S/6." It is not true that I have not dictated in my police statement that "when the work of shunting was going on, a mob consisting many people was present and they were pelting stones from the opposite side of cabin." It is true that from the time I went towards the coaches to separate the coaches which were on fire till I returned from there, the driver was alone in the front engine. It is true that there was no electric supply in the train from 9.00 to 10.00 hours. It is not true that I have not seen any incident as stated in examination-in-chief and I am giving false deposition at the behest of the police. It is not true that the driver with me did not leave the train and go anywhere till 10.00 o'clock in the morning".

In paras 16 and 17, it is stated as under, which include his position as an Assistant Driver of the engine and possibility of getting down from the right side of the engine in a case of chain pulling and resetting the disc and can return to engine from the right side itself.

> "16 It is true that the engine of the train was running with electric power. It is true that such type of engines have cabin in front part. It is true that there is such passage in the rear part of cabin on the both side of machine for movement. There are only two employees in the engine – driver and assistant driver. It is fixed as to in which part of the engine the driver and the assistant driver has to perform duty. It is true that the assistant driver has to perform duty on the right side in engine. It is true that there is also a door to get down in the right side from the engine and the assistant driver can get down on right side from that door. It is true that in cases of chain pulling, one can get down from the right side of the engine and reset the disk and can return to engine from the right side itself. It is true that if there is chain pulling on the way, it is not necessary for the assistant driver to get down from the left side to go to the concerned coach to do resetting. It is true that if the coach, in which chain pulling has been done in this manner, has come out of the platform, then it is not necessary for me to get down from the left side of the engine to reach near the coach for re-set work.

17 There are two reasons for drop in vacuum. One of which is chain pulling and the other is separation of hose pipe. It is not true that when chain pulling is done in a coach, the train goes little ahead from the place where the chain pulling is done and stops. I am not able to state that coach no. S/6 was not included in the four coaches in which the chain pulling was done for the first time. It is true that it has not happened that the train stopped for the second time due to chain pulling. The witness states that as the vacuum dropped excessively, it was not a case of chain pulling. It is true that I did not examine as to from where the vacuum level dropped at the second time. It is true that the vacuum can drop sometimes if the vacuum pipe gets opened accidentally.

The above witness further stated two reasons for dropping of the vacuum.

10 **Satyanaranan Panchuram Verma, Guard, PW-135**, in para 2 described timings of arrival of the train at Godhra Railway Station and there were total 18 coaches and that included reservation coaches from S1 to S10, 6 general coaches and 2 SLR. In para 3 of examination in chief, the above witness stated as under:

"3 As the train departed from Godhra Railway station and went two to three coaches ahead, the train stopped due to chain pulling. As the chain was pulled, I got down and as the chain pulling was done in front four to five coaches, I reset the chain pulling. At the relevant time, Assistant driver also came from the engine to reset chain pulling. As Assistant driver reached to the engine, I blew the whistle to start the train. Thereafter, the train started again at 8-00 hours and the train stopped again at 8-05 hours after going ahead. At the relevant time, the compartment of a guard stopped near the pole whereon 468/45 km was written. As the train stopped, the driver sent me a message through walkie talkie regarding chain pulling and stone pelting and as I saw, this stone pelting was done from on side i.e. from platform side. Therefore, I informed Deputy Railway Station Superintendent of Godhra

Railway Station through walkie talkie set and told him to send GRP and RPF personnel. On account of stone pelting, I sat inside after closing door and window of my coach. Due to stone pelting, the stone hit the glass window of my compartment and it broke and therefore I closed the second window. After sometime, the driver stated me through walkie talkie that the mob has attempted to torch and they have also torched. Therefore, I informed Deputy Station Superintendent through walkie talkie set regarding this and told him to send fire-brigade. GRP and RPF personnel arrived within short time and fire-brigade also arrived. On account of stone pelting on train, I got afraid and sat down after closing the door. But, due to firing, I opened of-side door and got down. As I saw, public was going by making shouts. I went towards the coach which was torched and instructed passengers to get down from train on account of fire in the train. At the relevant time, when I went towards the coaches, fire brigade personnel were functioning to put out the fire. At the relevant time, TXR staff personnel were also attempting to separate the coach. Then, I came to my coach and applied hand brake and put wooden obstacle below the wheel. As the fire was doused in the coach and the train was to be taken in a yard, I released hand brake and wooden obstacle was removed from below the wheel. After shunting the train, the train was taken on Line Number 10 and then, after taking the train in a yard, coach no. S/5 and S/6 were separated. **The persons of the mob assaulting on the train were of Muslim community. I am being shown extract of guard book at Mark-28/5. Viewing the same, I state that the time and other entries made therein are in my handwriting and the facts written therein are true. There is my signature at the end of the writing therein and I identify the same**, It is produced at Mark-28/5 and it is given Exhibit-778. Police interrogated me in connection with the incident and recorded my first statement on 27/2/2002. Then, after ten days i.e. two statements were recorded on 9/3/2002 and thereafter, my statement was recorded on 11/2/2005.

Cross examination by Ld. Advocate Shri A.A.Hasan for the accused persons

[Accused No. 1 to 3, 5, 18, 22, 24, 31, 37, 41, 43, 47, 53, 63, 65, 67, 74, 77, 90,100]

and

Cross examination
by Ld. Advocate Shri Y.A.Charkha
for the accused persons,
Shri A.A.Hasan by a transfer letter.

[Accused No. 16, 32 to 35, 44, 45,
49, 50, 62, 72, 73, 76]

4 The entries made in Exhibit-778 by me has been done on the day of incident after 12-30 hours at noon. It is not true that firstly I gave the copy of Exhibit-778 on 9/3/2002 when my statement was recorded. It is true that on the day of incident, when the train departed from Godhra Railway station to Vadodara at 12-30 hours at noon, I handed over my charge to another guard. It is true that the driver of the train also handed over his charge to another driver. It is true that the driver and I stayed in Godhra thereafter. It is not true that the driver and I went to GRP/RPF office to lodge FIR thereafter. It is true that it is noted in Exhibit-778 that, "Thereafter we went to GRP office to lodge FIR." The witness states that the entry is not proper that the driver and I went together. It is true that police recored my three statements after the incident. It is true that on 16/7/2002, police recored my statement on oath. It is true that I have neither clarified in my three police statements nor in the statement recored on 16/7/2002 that the fact entered in my note that the driver and I went together, is not proper. (Note :- At this stage, Special Public Prosecutor Shri Panchal has stated by drawing attention to section-6 of Commissions of Inquiry that the witness can not be asked any question regarding contradiction or addition or alteration during cross examination or the same may be noted in connection with the statement recored before commission. After hearing both parties regarding his this objection, adjourned for decision.) I got my statement recorded by police in March-2002 after understanding the same. It is true that when my statement was recorded in March-2002, I handed over my note to police. Now, I state that I do not remember as to when I handed over the said note. It is true that I dictated two different timings in my police statement after viewing the note that I had. It is true that I have not explained anywhere or in my police statement that it has been falsely entered in my note that after making note, I went to GRP office to lodge FIR. It is true that I voluntarily got my statement recorded to Nanavati Commission without any type of pressure. It is not true that the fact noted

in my note that the driver and I went to lodge FIR and explanation made in cross examination in that regard has been falsely explained at the instance of someone else. It is not true that I have made contrary explanation today to conceal regarding the wrong committed by police in noting the time of FIR and to be helpful to police".

In cross-examination, the above witness in para 7 stated as under:

"**7 When the train stopped for the second time, my compartment of a guard was prior to a culvert that is towards Godhra Platform. It is true that it can not be seen from the compartment of a guard as to what happens at a part ahead 'A'. On account of stone pelting, I had sat in my coach for about 20 to 25 minutes after closing its doors and windows. Thereafter, as I heard sound of firing, I saw outside after opening on-side door. It is true that as I saw, the persons of a mob were running at that time. After seeing this, I immediately got down on of-side from of-side door. It is true that thereafter, when I was going to the coach which had caught fire, I went stating to passengers of all coaches that, "Get down as the coach has caught fire." No passengers were coming towards Godhra Railway Station from towards the coach which had caught fire. The witness states that they were going towards of-side road. It is true that when I reached near the coach which had caught fire, fire-brigade personnel started to put out the fire of the said coach**".

In para 9 of the cross-examination, the above witness confirms that when the train halted again, his compartment was near the pole whereon 468/45 km was written and there was a distance of 75 meters between two electric poles. It is admitted that when the train stopped for second time, the train engine moved towards Vadodara at a turning point. In para 10, the above witness denies to have stated before the police that that as a glass window of his compartment broke down

due to stone pelting he closed another window. In para 11 it is stated about Exh.778 and the said note was returned by him. It was a copy of register. Cross-examination of the above witness in para 11 read as under:

> "11 It is true that "copy by S.N.Verma" written at the end of Exhibit-778 on right side is proper. I have made the said note myself. According to this note of mine, this is not an original register, but a copy. According to me, the original register may be in Railway Board. It is not true that while making this copy, it came to my notice that there is a note therein, "Thereafter went to GRP office to lodge FIR." It is true that there is an entry therein thereafter that, "Station Superintendent relieved us at 20-00 hours." My compartment of a guard is called SLR. It is true that there is restriction that any person or a passenger except guard can sit in the compartment of a guard".

While cross-examining Rajendraprasad Raghunathrao Jadav, Engine Driver of Sabarmati Express, PW-228, learned counsel for the defence has no doubt succeeded in bringing out omissions found in the complaint, but the fact remains that the complaint is an information given about disclosing cognizable offence and though it is a brief statement, but contains narration of the crime which took place on 27.02.2002. As held by the Apex Court in many decisions that what is stated in the complaint cannot have mathematical exactitude and precise version, but what was witnessed by this PW viz. magnitude of crime was disclosed to the investigating officer at various stages which finds corroboration from other PWs and, therefore, such omissions are not vital touching to the core of the case of the prosecution.

All the above witnesses are Railway employees and in true sense their testimonies reflect the manner in which incident of stone pelting, throwing burning rags, acid bulbs, causing damage to coaches of the

train by usage of weapons and even setting the train on fire. They are independent, uninfluenced and had no animosity against anyone to falsely implicate and it is borne out from their testimonies that members of violent mob constituting unlawful assembly made violent attack on the train and passengers. They are, in fact, credible, trustworthy, inspiring confidence and, therefore, reliable. No material contradictions , major discrepancies or improvements appear, as shown earlier in tabular form of this part and relevant part of their testimonies for which we have supplied emphasis.

PART XII-D

POLICE & FIRE BRIGADE ALONG with VERSIONS OF OTHER WITNESSES

The following witnesses, [1] Kanu Chhagan Varia, Fire Brigade, Godhra Municipality, PW-129; [2] Kanti Rupsinh Damor, Driver of the Police Van, Godhra Town, PW-137, [3] Mansinh Nurji Vasava, Head Constable, Railway Police, Godhra Railway Police Station, PW-144, and [4] Ambrishkumar Shiyaram Sanke, Police Constable, RPF Police Station at Anand Railway Station, PW-171 and [5] Karansinh Lalsinh Yadav, Head Constable, RPF, Outpost Boisor, PW-173 are independent and their testimonies describe unfortunate events of a violent mob attacking the train, creating all possible hurdles in the way of authorities in preventing or mitigating crime and determination on the part of such unlawful assembly to indulge in violence in spite of firing and again making attempt to release those miscreants apprehended by the police.

1 **Kanubhai Chhaganbhai Varia, PW-129** describe the violent mob armed with stones, pipes, wooden sticks and other such weapons.

Attempts were made by fire brigade personnel to douse the fire, when stones were pelted and police fired in the air, attempt was made to release 15 persons of Muslim community, who were detained. In addition to the above, this witness confirms about entry made in occurrence book Register and facts stated and written down therein. In his further deposition, this witness confirms about arrival of D.S.P., Mr. Raju Bhargav. In cross-examination this witness referred to certain omission initially in the police statement. He further states that there was an approximate distance of 50 to 60 feet between the fire fighter and the nearest first railway tracks and presence of the police. Even summoning the fire fighters from the nearby towns like Kalol, Lunawada and Thermal Power Station has been deposed by this witness.

PW–129 Kanubhai Chhaganbhai Variya is a fireman who was instructed by PW–133 on receipt of the information that fire had taken place to Godhra Railway Station.

According to PW–129, the fire fighter was obstructed near Garnala at the instance of Bilal Haji so as to prevent the timely help to the victims. A damage is also said to have been caused to the fire fighter because of the stone pelting resorted to by the mob at the instance of Bilal Haji.

According to PW–129, such incident and the causation of damage to the fire fighter is to be noted in occurrence book maintained by Santri i.e. (PW–133) who also confirmed such fact. PW–129 claims to have seen such noting in the occurrence book. However, it appears that in the original occurrence book, there is no such noting. However, in the Xerox copy such noting were found (verified). [**Credibility in question**]

2 **Kantibhai Rupsinh Damor, PW-137** deposed that upon receiving a message from the control room, Godhra town, immediately left for the place of incident and another Alpha mobile van had left prior thereto. That police personnel and SRP javans made an attempt to disperse the mob but stone pelting continued, while on the way clear message was received on wireless message station that a mob of Muslims had stopped Sabarmati Express near A cabin and they were pelting stones. This witness had seen Mr. Kalota, the President of Godhra Municipality, who was present in the mob. In para 18 of his cross-examination, he deposed as under:

> "18. We stayed at the place of the incident up to 9-00 hours. It is true that I was not present at the place of the incident after 9-00 hours. I do not know the fact that when we reached at the place of the incident, DSP Mr. Bhargav had also reached there. It is true that we were present on the road from Aman Guest House to the culvert up to 8-45 hours in the morning. It is true that if D.S.P. - Mr. Bhargav had been present on the road from Aman Guest House to the culvert up to 8-45 hours in the morning, we would have noticed the same. It is not true that Mr. Bhargav was standing near the culvert at 8-35 hours in the morning. It is not true that both Mr. Mohammad Hussain Kalota and Bilal Haji were with him at the relevant time. It is not true that as I was not present in this area during the relevant day, I deny the presence of D.S.P. - Mr. Raju Bhargav with Mohammad Hussain Kalota and Bilal Haji near the culvert at 8-35 hours in the morning. The witness states that I reached near the culvert after 8-35 hours. It is not true that I have not deliberately produced the Log Book so that it may not come on record from logbook of the vehicle as to where we were present at which time. It is true that, both the area of station and the area of Aman Guest House are different areas".

3 **Mansinh Nurjibhai Vasana, Head Constable, PW-144 was informed by PSO and nearby A cabin via platform No.1 he saw extreme smoke coming out from the coach and mob of 900 to 1000**

persons of Muslim community armed with weapons like sword, scythe, iron pipes, strips, sticks and pelting stones on the train while shouting religious slogans "Kill Hindus and set them on fire". It was seen that in spite of lathi charge, mob could not be dispersed, two rounds were fired by PSI Mr. Zala and one person was apprehended by him. During this period, fire brigade personnel came with fire engine from Godhra town for extinguishing fire. In his cross-examination, he makes certain improvements and admits not to have stated some facts in clear terms before police. However, the fact about apprehending one person armed with weapon from the spot and identification of 2 persons in the court remained unjustified.

4 **Mr. Ambrishkumar Shiyaram Sanke, Constable in RPF, PW-171** and Karansinh Lalsinh Yadav, Head Constable, RPF, Exh-173. Both these witnesses have almost deposed on the same line of above witnesses that violent mob was pelting stones and making an assault with weapons. He denied that though the incident took place accidentally, he being the instrument of state government and local politicians, falsely state that it has been done by miscreants mobs. In cross-examination this witness confirmed that firing took place to disburse the mob and that he deposited cartridges. In paras 20 and 21, PW-173 state as under:

> "20. It is not true that I have not dictated in my statement given before the police that, **"thereafter, the train stopped due to chain-pulling after two or three coaches moved ahead from the signal."** It is true that when my statements of 1-3-2002 and 8-3-2003 were read over before SIT, I had raised no objection in respect of any fact in it written falsely in it or any fact missed out in writing." The witness states that at that time, the main points were read over to me. I do not know as to where my duty was on 25-2-2002. On 2-3-2002, my duty was to take the driver and guard of the

train from their houses and drop them on account of curfew. On 2-3-2002, my duty started at 8-00 hours in the morning and there was no precise time of its being over. I cannot state the fact as to till what time I was on duty on that day. It is true that no curfew had been imposed in the area of the jurisdiction of railway. It is true that the persons performing duty in railway had been allotted quarters in GL yard and down-yard. The witness states that all the employees had not been allotted quarters. I do not know the name and residential area of the driver and the guard, for taking and dropping whom I had gone in the city on 2-3-2002. It is not true that I did not remember any fact regarding the duty of the day of the incident, but as my statement has been read over to me, I have stated the facts accordingly in the examination-in-chief. It is true that when the train came at the platform, karsevaks had got down and gone to the tea-stall over the platform for taking refreshment.

(iv) **It is not true that I had not dictated in any of my statements given before the police that, "at that time, slogans of "Jay Shri Ram" were being uttered and stones were being hurled on the train from the side of the parcel-office. Thereafter, the train started again after about five minutes." It is not true that I had not stated in any of my statements before the police that "at that time, we found that..". It is not true that I have not dictated in my statement before the police that the persons of the mob had rods also with them. It is not true that I had not dictated in any of my statements before the police that, "they were shouting loudly that – 'cut asunder the Hindus, burn them..", its announcement had been made from the microphone of the Mosque. Thereafter, I had gone to the lobby of the driver on the platform no. 2." It is not true that I had not dictated in any of my statements before the police that, "the phone-call had been received by the constable Ambishkumar." It is not true that I had not dictated in any of my statements before the police that, "Muslim persons are hurling stones in a large number, you come with maximum personnels, we are going there. Thereafter, the constable Shri Mohan and I got down from the lobby and went running towards the train. The coach of the guard of the train was on the culvert, and hence, we went towards the direction of "A" Cabin from below the coach after crossing two or three coaches from the side of the yard. It is**

not true that I had not dictated in any of my statements before the police that, "we found that Muslim persons were breaking windows and doors with sword, scythes and pipes." It is not true that I had not dictated in any of my statements before the police that, "I fired one round of shots in the air towards the coach of S-6." It is not true that I had not dictated in any of my statements before the police that, "we had formed a siege." It is not true that I had not dictated in any of my statements before the police that, "after cordoning the persons caught, they were seated near "A" Cabin." It is not true that I had not dictated in any of my statements before the police that, "hence, I and Shri Mohan and Ambishkumar who were there with me, went towards the burning coach from below the coach and took out four or five persons from the coach, Nawabsinh, PSI of RPF who was earlier in fire-brigade had also come and the fire of the coach was extinguished. The injured persons were seated outside the coach and they were moved to hospital for treatment." It is not true that I had not dictated in any of my statements before the police that, "I had submitted the box of the empty cartridges with which I had made firing, with Shri Prithvipalsinh, ASI of RPF at night, that is, at 20.00 hours. He received the same after tying it in paper and writing my name. Thereafter, on 8-3-2002, the police of GRP called me and I went to the Deputy Superintendent of Police, Western Railways with the said box". It did not so happen that at the time of the statement, the officer recording it kept on asking questions to me and I was answering accordingly. The witness states that he was asking "what happened thereafter, what happened thereafter?" It is true that I was being interrogated in Hindi. I asked the officer recording my statement to record it in Hindi, so that I can see as to whether the fact recorded is proper or not. My statement was recorded in Hindi. The witness states that it was recorded in Gujarati. After it had been recorded, it was read over to me in Hindi. The witness states that the main facts were read over. I do not know the fact as to whether any clear note had been made below my statement or not in respect of this reading of the facts to me in this way".

5 **PW–140 Punjabhai Bavjibhai Patanvadiya** (at the relevant time he was serving as Head Constable, Godhra Railway Station, D-Staff)

Contradictions: [**CREDIBILITY IN QUESTION]**

- Arrival
- Over crowdedness
- Movement
- Stoppage
- Chain pulling
- Restart

Personal Facts

- 11:00 a.m., In-Charge S.P., Simpy, LCB PSI, Mirza, LCB PSI, Gadhvi, along with their staff arrived.
- RPF Commando Mr.Pandey also arrives with his battalion
- 2500to 3000 Muslim people with weapons like sword, axe, sticks, carobs filled with inflammable for release of the persons caught.
- Simpy asked the mob to disburse, but it was violent and therefore ordered firing.
- RPF Commando Shri Pandey also ordered to RPF Battalion for firing
- The mob ran helter-skelter
- Received injuries on his chest
- Went to the Civil Hospital for treatment
- Police statement 127 to 202
- Identification
- Identifies Juniyad Farukh Hayad (A-5 of Sessions Case No.65 of 2009); Idrish Abdula Umarji (A-4 of Sessions Case No.69 of 2009) Siddik Abdul Rahim Bakar (A-1 of Sessions Case No.80

of 2009).

Cross

- Identification, did not draw the arrest memo; neither informed about the arrest of the persons stated by him to their family members.
- Disputes the suggestion that the identified the accused on the basis of photographs, maintained by the Police Station.
- Admits that he had not stated the names of the accused as Juniyad Abdul Ansari / Juniyad Yusuf Dhantiya / Juniyad Yusuf Hayat / Guljar Agnu Ansari and Idrish Abdula Umarji Shaikh. He did not recover and submitted the weapons from t he accused, nor did he give the acknowledgment receipt thereof.

Contradictions

- In the statement dated 27/02/2002 buckle No.1558 attributed to him which is not belong to the witness.

Omission

- The surname of Jiniyan Farukh, Idrish Abdulla was not stated in the statement dated 27/02/2002.
- Guljar Ali's father's name as well as surname, age, address were also not stated.

Corroborates:

- 900 to 1000 people
- Weapons, carbos, stone pelting.

6 **PW–144 Mansing Nurjibhai Vasava – Police Constable, Godhra Railway Police Station**.

- He was involved in Bandobast at platform No.2.
- Reached the scene of offence when the train was already on fire.
- Hears exhortation from Ali Masjid on the mike.
- Ambish Kumar, Constable filed two rounds as instructed by PSI Zala.
- Apprehends Fakruddin Yusf Musalman with iron rod.
- Notices Gulzar Ali with iron Patti and Ismail Chngi with iron pipe.

Corroboration:

- 2500 to 3000 people came
- They had come for getting this apprehended released
- Fire 01+03+01+02 round in air under instructions of Simpy.
- Notices Mohmmed Shaikh, Tayub Aziz, Saiyadkhan Sikandar in the mob.
- States that police had caught some of the persons from the mob
- Receives injury on the left eye
- States that Mr.Pandey had also ordered firing through their gunman
- Statement on 27/07/2002
- Identifies Bilal Binam - A-3 of Sessions Case No.73 of 2009) and Suleman Ahmed Pir - A-29 of Sessions Case No.29 of 2009. (two persons named by him in the examination-in-chief are not

accused – Fakruddin Yusuf Musalman and Gulzar Ali. Ismail Chungi, Mohmmed Shaikh, Taiyab Ajij and Saidkhan Sikandar named by him above are not the accused.

- Fakruddin Yusuf Musalman and Gulzar Ali had died during trial.

7 **From the above stated evidence, a broad consensus amongst the witnesses as regards arrival of the train, its halting for about five minutes, its movement, its stoppage near parcel office, stone pelting, its movement again and halting near 'A' cabin, can be noticed. There is also no dispute as to the incident of teasing and harassing a Muslim girl and / or the woman. It also seems that quarrel was picked up by Karsevak with one Muslim tea vendor; although no clear evidence is borne out on this count, but there are circumstances indicating such occurrence**.

PART XII-E

FURTHER EXAMINATION OF EVIDENCE ON CONSPIRACY BASED ON TESTIMONIES OF WITNESSES

It is thus required to be examined as to whether incident is an outcome of a conspiracy or a spontaneous reaction to the above two incidents.

1 The prosecution case is that on the previous night a conspiracy was hatched with an object to kill and / or injure the passengers of coach S-6 in particular. It is the case of the prosecution that to achieve their criminal object, the conspirators took disadvantage of the above two incidents of teasing the girl / woman and / or the quarrel between

the Karsevaks and tea vendors. It is alleged that taking advantage of the said two incidents, the accused raised false alarm that the muslim girl was being abducted by Karsevak whereas according to the prosecution, she was safe in the office of Station Master / Superintendent. It is alleged that the said false alarm, instigated other muslim people to come to the rescue of conspirators and lodge assault on the train. It is alleged that taking disadvantage of the situation, the conspirators managed the chain pulling as also managed to see that the train halts at the desired spot i.e. 'A' cabin, to enable them to execute their plan.

2 On the other hand, the story of conspiracy is seriously disputed. It is stated that unfortunate incident had taken place all of a sudden on account of two incidents aforesaid and none of the accused were involved in the conspiracy.

3 It can be noticed from the testimony of various witnesses that something went wrong during the final stoppage of the train before pelting stone on it by the miscreants. The witnesses have deposed that they were advised to close the doors and windows, sensing trouble, after the train started moving, after its initial halt. PWs-82, 85, 97 and 113 were the passengers travelling in coach S-6 at the relevant point of time and they throw considerable light as to the manner in which the incident started.

4 PW-82 had testified that he wanted to buy a cup of tea for his wife from a Muslim vendor who had come inside coach No.S-6 but the Karsevak did not allow him and the tea vendor was taken out of the coach by the Karsevaks. He continued to occupy his seat and after sometime there was a commotion. Police Official testified having accused – Shokat complained to him for having been beaten by

Karsevak.

5 PW-97 also deposes that after purchasing the tea by him on the official stoppage of the train, a commotion was heard by him which was followed by stone pelting.

6 PW-113 also corroborates the happening of commotion after official halt of the train.

7 PW-85 also deposes that after the official halt of the train he had disembarked to the platform and heard shouts from engine side that stone pelting is being done. He saw Muslims from outside the street pelting stone and then rushed to the train. PW 86 deposes having been advised to close the door and windows as the stone pelting was apprehended. PW-164 also deposes the stone pelting by the mob during the official halt of the train.

8 Pertinently, the two incidents aforesaid had also occurred immediately before such commotion and stone pelting. There is therefore the reason to believe that the starting point of the incident was the commotion either on account of teasing of the girl and / or the woman or on account of Karsevak resisting the sale of tea by a Muslim boy.

9 For better appreciation of evidence, two statements of Muslim women viz. **Sofia Dhantiya, PW-183** and **Jetunbibi Shaikh, PW-184** are very necessary about harassment and molestation on the platform at Godhra Railway Station on the date of incident i.e. 27.02.2002 and hatching conspiracy and execution thereof, which read as under:

"PW-183

1 I have been residing with my family at the aforementioned place in Vadodara since last two years. As my marriage was solemnized in 2005, I am residing at Vadodara with my husband. My father Sirajbhai Majidbhai Shaikh is performing duty as Fitter in Vadodara Railway, and he is residing in the quarters near 'D' Cabin at New yard in Vadodara only. We are two sisters. The name of one of my younger sister is Saidaben. The name of my mother is Jetunbibi. My maternal aunt (*Mausi*) – Taherabibi is residing in Bhatook Plot in Signal Faliya in the Godhra City.

2 As there was the festival of Eid on 23-02-2002, my mother and we both the sisters had gone at the house of my maternal aunt – Tehrabibi situated at Godhra by traveling in Deluxe Train from Vadodara at 06:00 o' clock in the evening. Thereafter, as we have to come to Vadodara on 27-02-2002, we were waiting for the Memu Train at Godhra Railway Station. We were standing on platform no. 1. After some time, Sabarmati Express Train came from Dahod side and stopped on platform no. 1. In that train, some people had put on saffron ribbons. These people were speaking the slogans of "Jay Shree Ram Jay Shree Ram". These people got down to take tea and breakfast as the train was stopped. I do not know that, for what reason the quarrel had taken place, but they were beating beard Muslim, and were speaking that, "kill the Muslims, slaughter the Muslims". Hence, we were frightened, and started to go towards the ticket window. Meanwhile, a saffron ribboned person had gaged my mouth. He had left my mouth as we started to shout. Thereafter, when we were going towards the office of ticket window, at that time those people had molested one women dressed in veil. Thereafter, we had gone near the ticket office, and went back at the house of my maternal aunt by hiring the rickshaw. Then we came back from Godhra to Vadodara at our home after 10- 15 days. Police had taken my statement on 28-03-2002.

Cross Examination

by Ld. Advo. Mr. Y.A. Charkha

on behalf of the accused persons

[Accused nos. 16, 32 to 35, 44, 45, 49, 50, 62, 72, 73, 76]

3 It is true that, the person who had pressed my mouth had started to drag me towards the coach of train, and at that time, as my mother had started shouting " help, help", hence the person who had caught hold of me had left me, and thereafter, we all three had gone towards booking office. I do not know about that, whether we had left to go at the house of my maternal aunt before the departure of Sabarmati Express Train from the platform or not. It is true that, we both sisters and my mother were frightened due to the aforementioned incident.

Cross Examination
by Ld. Advo. Mr. A. A. Hasan
on behalf of the accused persons
[Accused nos. 1 to 6, 10, 13, 18, 22, 24, 31, 37, 38, 41, 42, 43, 47, 51 to 54, 58, 59, 61, 63, 65, 67, 69, 74, 75, 77 to 79, 81, 82, 84 to 100, 101]

No Cross Examination

Cross Examination
by Ld. Advo. Mr. L. R. Pathan
on behalf of the accused persons
[Accused nos. 7, 9, 14, 17, 36, 55, 56, 60, 66]

No Cross Examination

Cross Examination- By Ld. Advo. Mr. I. M. Munshi
Ld. Advo. Mr. L. R. Pathan – by transfer letter
[Accused nos. 11, 12, 15, 20, 21, 23, 40, 48, 68]

No Cross Examination

Cross Examination- By Ld. Advo. Mr. J. M. Pathan
on behalf of accused
[Accused nos. 26 to 30, 70, 71]

No Cross Examination

Cross Examination- By Ld. Advo. Mr. S. M. Dadi
on behalf of accused - not present
(Accused nos. 39, 57)

No Cross Examination

No Re-Examination"

"PW-184

1 My husband is serving in Railway as a Fitter. I have two sisters, among them one – Taherabanu has been married at Godhra, and she is residing with her family in Singal Faliya. As my sister and brother-in-law (*behnoi*) had gone for the pilgrimage of Haj at Makka – Madina on 10-02-2002, and came back from there after Haj, and also there was the festival of Eid, so I went to meet them with my two daughters namely – Sofiya and Saheda on 23-02-2002 from Vadodara to Godhra in the Train at about 06:00 o' clock and had reached at about 08:00 o' clock and had stayed at the house of my sister Tahera.

2 I and my both the daughters had gone to Godhra Railway Station to come back from Godhra to Vadodara on 27-02-2002, and were waiting on platform no. 1 for Memu Train. Meanwhile, Sabarmati Express Train came from Dahod at about 07:30 o' clock, and when the train was stopped on platform then some people got down from the train. They had put on saffron ribbons and were speaking the slogans of "Jay Shri Ram". Thereafter, some among them were beating one bearded person of Muslim community and were bringing towards us, and at that time they were also speaking that, "kill, slaughter the Muslims", hence I and my daughter were frightened, and we all three had started to go towards the booking office. At the same time, one person wearing the ribbon had gaged the mouth of my daughter Sofiya who was walking behind me, and as he had tried to drag her towards the coach, I shouted "help, help", on hearing that, the said person had freed my daughter Sofiya. Thereafter, we all three had speedily gone towards the booking office. At that time, one person among them, had tried to pull the veil of a women of Muslim community came. After some time we came out from the booking office and dropped the idea to go back to Vadodara, and went at Singal Faliya at the place of my sister Tehra in rickshaw. Then, after about 10 days we had gone from Godhra to Vadodara. The police had recorded my statement by inquiring me about the aforementioned matter on 28-03-2002.

Cross Examination
by Ld. Advo. Mr. A. A. Hasan
on behalf of the accused persons
[Accused nos. 1 to 6, 10, 13, 18, 22, 24, 31, 37, 38, 41, 42, 43, 47, 51 to 54, 58, 59, 61, 63, 65, 67, 69, 74, 75, 77 to 79, 81, 82, 84 to 100, 101]

No Cross Examination

Cross Examination
by Ld. Advo. Mr. Y.A. Charkha
on behalf of the accused persons
[Accused nos. 16, 32 to 35, 44, 45, 49, 50, 62, 72, 73, 76]

No Cross Examination

Cross Examination
by Ld. Advo. Mr. L. R. Pathan
on behalf of the accused persons
[Accused nos. 7, 9, 14, 17, 36, 55, 56, 60, 66]

No Cross Examination
and
Cross Examination- By Ld. Advo. Mr. I. M. Munshi
Ld. Advo. Mr. L. R. Pathan – by transfer letter
[Accused nos. 11, 12, 15, 20, 21, 23, 40, 48, 68]
No Cross Examination

Cross Examination- By Ld. Advo. Mr. J. M. Pathan
on behalf of accused
[Accused nos. 26 to 30, 70, 71]
No Cross Examination

Cross Examination- By Ld. Advo. Mr. S. M. Dadi
on behalf of accused - not present
[Accused nos. 39, 57]
No Cross Examination

No Re-Examination"

9.1 The prosecution itself had relied upon the incident of

teasing of the muslim girl. The muslim girl and her mother is examined as **Sofia Dhantiya, PW-183** and **Jetunbibi Shaikh, PW-184** respectively. They have deposed to the teasing and chasing of the girl by some of the people. The chasing of the girl in the manner aforesaid was sufficient to give rise to the apprehension in the mind of the accused that the girl would be taken away or abducted. No evidence is adduced to show that the said accused had the knowledge that girl was at the safe place. He was thus justified in raising the alarm for help to save the girl. Such a reaction was thus prudent and obvious and unless contrary intention was proved, the Court would not be justified in raising an inference that such alarm was raised by the accused falsely in order to create conducive room for execution of the plan by the conspirators and if the prosecution was interested in attributing the intention of raising false alarm to the said accused, heavy burden lay upon the prosecution to prove that the aforesaid was not natural spontaneous conduct of the accused, but was a pretext to gather help of the mob in execution of the plan of the conspirators.

10 Before the incident of burning the train at 'A' cabin, the train had halted twice i.e. once during its official halt and on the second occasion, near parcel office, on account of the 1st chain pulling. The train moved for few movements after official halt, before stopping at parcel office. No other major incidents between these two halts had taken place.

11 **The evidence of PW-135 reveals that the chain was pulled from three or four coaches but certainly not from coach No.S-6. No passengers travelling in the train or other persona on the platform, except PW-236 Ajay Baria deposed accused having loosened the valve for the vacuum to drop for the purpose of stopping the train.**

12 That apart testimony of PW-84 in cross-examination indicates that they had heard, after movement of the train after official halt, that some of the passengers were left out on the platform and thus the possibility of pulling of the chain first time to help the said passengers boarding the train, from three or four different compartments, cannot be ruled out. PW 84 deposes that when the train stopped after its official stop of five minutes, some of the left out passengers boarded it. Thus, the evidence of the passengers and by-standers on the platform do not cogently and conclusively establish the first chain pulling by accused as part of conspiracy.

13 S**econd chain pulling of the train after its movement from the parcel office by accused, as a part of their conspiracy, as per the evidence of Rajendraprasad Raghunathrao Jadav, Engine Driver of Sabarmati Express PW-228. In his testimony before the trial court he admits to have repaired the hose pipe and even Ajay Kanu Bariya PW-236, who witnessed the incident also make reference to such damage to the hose pipe. This aspect could explain that movement of the train after restoring the electricity supply upon repairing the hose pipe.**

14 True that, no acts of violence can be justified, however, when it occurs, spontaneous behavior of a mob intending to save their girl being abducted would be similar to what is discerned from the evidence on record i.e. stone pelting. Evidence of PWs-82, 85, 97 and 113 would indicate the commotion and stone pelting during the official stoppage of the train; evidence of other witnesses being PWs – 77, 82, 84, 87, 91, 92, 94, 95, 98, 99, 102, 103, 78, 86, 89, 120, 79, 81, 113, 202, 152, 154, 155, 159, , 172, , 138, 228, 136, 135 and 127 would indicate that stone pelting had taken place after the 1st chain pulling

near parcel office where the train had stopped. The act of teasing the girl was uncertain and thus was not a part of the plan of the conspirators. The very basis for the offence under Section 120-B is the entering into the conspiracy and formation of a plan to execute it. A conspirator would rely upon his own plan rather than waiting for some uncertainty to occur. No doubt, a conspirator may plan for provocation to the victim and act upon such provocation; in the facts of the present case, according to the prosecution, the conspirators relied upon uncertainty afore-stated for provoking a crowd to attack the train. Unless the provocation is planned, on some certainty, the conspirator would normally lodge unprovoked assault or unprovoked action towards achieving his goal. Since the teasing of the girl was uncertain, such uncertain fact could not have been the basis for the conspirator to execute their plan and it is not brought on record as what other independent acts were done by the conspirators before the teasing of the girl, for execution of their plan. In other words, there is no evidence to show as to how the conspirators were prepared to execute their plan, had the teasing of the girl not occurred.

15 **It is not as if that the whole incident occurred at 'A' cabin. It was initiated during the official stoppage of the train and again an attempt was made at parcel office and then ultimately at 'A' cabin. If all these three "sub incidents" are taken into consideration as one incident, it would appear that initially incident of misbehavior with Muslim women and/or beating the Muslim tea vendor may have resulted into pelting of stones. The evidence also came on record that some of the accused exaggerated the above version and thereafter mob turned violent and attacked the train and passengers and damaged the train not only to coach S/6 and S/7, but to other bogies and broken window pans, etc. would go to show that unlawful**

assembly participated in the crime and accordingly they were charged. That members of unlawful assembly attacking the train with deadly weapons without having knowledge of conspiracy and the members of such unlawful assembly who overtly participated in breaking open windows by damaging iron rods and other such weapons, throwing acid bulbs and burning rags inside the coach and their role in furtherance of common object needs to be examined though members of such unlawful assembly may not have initially hatched conspiracy, but participated actively in commission of crime viz. burning of S6 coach and damaging other coaches severely.

16 As stated above, stone pelting was resorted to at three different places i.e. during official stoppage of the train; near parcel office and lastly at 'A' cabin. It was therefore natural for the witnesses to close the windows and door as deposed to by PWs-114, 87, 91, 92, 95, 102, 120, 79, 81, 97 and 119 to save themselves.

<u>Carboys</u>

PW- 94 (omission),

PW-173 (carboys) (companion of PW:164 vital contradiction with the testimony of PW:164,

PW-152 (no omission but contradiction omission on other vital aspects),

PW-155 (omission),

PW: (omission),

PW-159 Rajeshbhai Vitthalbhai Darji

17 PWs-94, 173, 152, 155, and 159 attribute the possession of carboys and sprinkling inflammable therefrom on Coach S-6, to the assailants.

18 PW-159 Rajeshbhai Vitthalbhai Darji seems to be unsure about the contents of carboys i.e. petrol or kerosene, as is evident from his cross-examination.

19 PWs-173 and 164 were on patrolling duty together throughout the incident except when they went for telephonic call requisitioning extra force for controlling the assault on the train. Both of them have to say the different account of the incident. According to PW-173 the people of the mob possessed carboys and were sprinkling the inflammable on the train, whereas no such facts are referred to by PW-164. PW- also testifies about the possession of carboys and sprinkling of inflammatory substance therefrom on the train and setting of the Coach S-6 ablaze. PWs-94, 155 and seems to have omitted the attribution as to the assailants possessing carboys, in their statements recorded under Section 161 of Cr.P.C. Statements of PWs-173 and 152 were recorded on 01.03.2002. Statement of PW-159 Rajeshbhai Vitthalbhai Darji was recorded on 27.02.2002 , 03.03.2002 and 17.10.2003 (for completing the names) and T.I .Parade was held on 20.11.2005. Thus, it can be noticed that the statements of PWs-173, 152 and 159 recorded within the immediate proximity of time of occurrence referred to the possession of carboys and sprinkling of inflammable therefrom on the train. PWs-94, 155 and also referred to the possession of carboys and sprinkling kerosene therefrom on the train by the assailants, in their evidence, with

the omission in their statements. However, in view of the testimonies of PWs-173, 152 and 159 such omission pales into insignificance. Therefore, the argument that story of the carboys/petrol was developed subsequently has no substance.

20 To avoid duplication of evidence, other witnesses examined by the prosecution are not referred to in details hereinafter, except to the extent necessary.

21 PW-233 Dilipkumar Gaimal Chelani deposes the obstruction to the firefighters by the mob as exhorted by accused Bilal Haji. He also deposes the firing of gunshots twice. His statement was recorded on 03.03.2002 and another statement on 03.05.2002. The witness names and identifies following persons:

22 Siddiq Matunga, Saukat Badam, Shaka, Bilal Badam, Sattar Gadi, Rajak Kurkur and Bilal Haji. Except Shaka, Siddiq Matunga and Sattar Gadi, rest of the four seems to have been identified by him correctly in the Court.

23 Several persons including the above four are named in the evidence by him as the assailants with weapons in the mob. His statement was recorded by Shri Jadeja. Second statement dated 03.05.2002 was given by him to complete the names of the assailants given by him in his statement dated 03.03.2002. In his statement dated 03.05.2002, it was stated that full names of the assailants were available to him now, however, in reply to the question put to him, the witness states that he knew the full names from the inception. If that was so, nothing could have prevented him revealing full names at the inception and there was no necessity of recording his further statement dated

03.05.2002. Therefore, question arises as to whether the witness knew the full names of the assailants or names were suggested to him by the person interested to rope in the innocent persons as assailants. The question also arises as to whether the testimony of the witness on this count can be rejected when he was able to name and identify four persons as assailants in the open Court.

25 The witness admits commotion with the tea vendor on Platform No. 1. The witness disputes the omission that Bilal Haji came on motorcycle near the firefighter and exhorted the people.

26 PW-214 Laxmandas Gyanchand Rajai is a panch witness for panchnama of the apprehended accused. He was not able to identify such accused in the open Court.

27 PW-204 Nainsing Sevasing Rathod is a panch witness qua the arrest and physiognomy of accused Mujaffar Usman Hayat. He identified him in the open Court.

28 PW-201 Dipakkumar Chinubhai Trivedi is a panch witness for arrest and physiognomy of accused Ibrahim Adam Dhantiya alias Kachuka. He identified him in the open Court.

29 PW-212 is the Executive Magistrate, who held T.I.Parade for accused Ibrahim Adam Dhantiya through witness Kakul Pathak.

30 PW-207 Ambalal Ranchhodbhai Patel was a Railway Magistrate, who recorded statements of Ajay Kanubhai Bariya, Iliyas Husen Mulla, Anvar Abdul Sattar Kalandar under Section 164 of the Cr.P.C.

31 **PW-206 Bhikhabhai Harnambhai Bariya** (wrong address) is a Bidi, Cigarette hawker. He deposes the presence of other hawkers being Sokat Lalu, Mahmmed Lalu, Hasan Lalu, Ajaybhai Kanubhai Bariya, Mahebub Popa, Sokat Bibino and others on Railway Platform on 27.02.2002. He also deposes the quarrel/commotion with tea vendor Siddiq Baqar on Platform No.1 after arrival of Sabarmati Express. The quarrel was also taken up with Mahebub Latika, who ran on the hill towards Singal Falia and called Muslims for help, who came and started pelting stones on the train. The train started and the chain was pulled; left out passengers boarded it; the train restarted whereupon Salim Panvala shouted for stopping the train and Anvar Bhopa, Kadir Pataliya and Sokat Bhano got into the train and Kadir Pataliya entered between two couplings and loosen the valve and the train stopped near 'A' Cabin. The stones pelting started on the train near 'A' Cabin after arrival of the mob and the train was set ablaze. He was standing behind the 'A' Cabin and Anvar Bhopa was standing near the train. The witness deposes the presence of Hasan Lalu, Sokat Lalu, Mahmmed Lalu, Kadir Pataliya, Babu Pataliya, Soeb Kalandar, Yunus Ghadiyal, Mahebub Popa, Salim Panvala, Sokat Bibino, Sokat Bhano, Salim Panvala and Ramjani Bibino. His statement was recorded on 25.07.2002. The witness identifies following persons :

32 Sokat Bhana, Hasan Lalu, Sokat Bibina, Mahebub Latika, Irfan and Mahebub Popa, who on verification stated their names respectively thus (1) Sokat Faruk Pataliya (A-5 Session Case No. 75/09), (2) Hasan Ahmed Lalu (A-4 Session Case No. 71/09), (3) Mahmmed Sokat Yusuf Mohan (A-1 Session Case No. 85/09), (4) Faruk (Mahebub) Ahmed Yusuf Hasan (A-1 Session Case No. 84/09), (5) Irfan Abdulmajid Kalandar (A-2 Session Case No. 81/09), (6) Mahebub Yakub Mitha (A-

2 Session Case No. 71/09).

33 **The Court noted that persons named by the witness namely Sokat Lalu, Mahmmed Lalu, Hasan Lalu, Kadir Pataliya, Babu Pataliya, Soeb Kalandar, Yunus Ghadiyal, Salim Panvala, Ramjani Bibini are not the accused and there is no accused by name Yusuf Ghadiyal but, there is accused named Yusuf Abdulhaq Samol. There is no accused named Ramjani Bibino but, there is accused named Ramjani Binyamin Behra. Court further noted that the person named Soeb Kalandar named by the witness is present in the Court (if necessary referred to his cross-examination).**

34 PW-205 Shardul Bhalchandra Gajjar is a photographer, who photographed, 12 in number, the burning coach/train Exhs-1048 to 1059. He admits the sting operation by Tahelka (Shri Ashish Khetan) and the interviews of Murlidhar Mulchandani, Kakul Pathak and Kalabhai Petrol Pump employee Ranjitsinh Jodha. He also admitted the fact that during such interview Murlidhar Mulchandani and Kakul Pathak stated that both of them were not present at the scene of offence but at their respective residence. He also admitted that during the interview Ranjitsinh Jodha stated that Noel Parmar has given to him Rs.50,000/- after showing the photographs and telling him to identify those persons as accused in the offence.

35 PW-200 Karansinh Ranjitsinh Zala is a witness evidencing the distance of 750 meters in 10.04 minute in a tempo rickshaw with 9 carboys and 8 persons from Aman Guesthouse to Ali Masjid on experimental basis.

36 PW-252 was Chief Judicial Magistrate, Godhra, who issued

certificate under Section 32(5) of the POTA for the verification of the statement of accused Salim Jarda.

37 PW-251 Jayeshkumar Kantilal Bhatt was DSP (Administration), who recorded the statement of Salim Jarda under Section 32 of the POTA.

38 PW-250 was 2nd Additional Senior Civil Judge and Judicial Magistrate First Class, who verified the statement of accused Mahebub Ahmed Yusuf Hasan alias Latiko recorded by Superintendent of Police (PW: 248) Anupamsing Gehlot (under Section 32 of POTA?).

39 PW-249 Siddhrajsinh Gulabsinh Bhati recorded the statement of accused Sokat alias Bhano Faruq Abdul Sattar Pataliya (under Section 32 of POTA).

40 PW-247 was Police Inspector, CID Crime, Vadodara, who reached to the scene of offence along with the Police Force at about 17 Hours and reported to Deputy Police Superintendent Shri Simpi. He recorded statement of Dilip Gehumal Sindhi on 03.03.2002 and that of PSI R.G. Parmar (PW-147), Head Constable Mangalbhai Ramjibhai (PW: 142), Constable Jasvantsinh Kalusinh (PW-139) and others on 07.03.2002 and on 08.03.2002, those of Head Constable Babubhai Bhaljibhai (PW-169), Police Constable Jasvantsinh Gulabsinh (PW-141), Police Constable Vinubhai Kasnabhai (PW-143) and on 09.03.2002, those of Police Constable Mansing Kurji (PW-144) (Nurji/Hurji PW-177) and Constable Kantibhai Rupsing (PW-137).

That charge of conspiracy further gets strength by corroborative evidence from the following witnesses:

41 It is true that PW-93 Shardaben Manubhai Patel (Exh.657) deposed about petrol smelling beyond the sliding door and knocking and thrashing the sliding door. It may be true that somebody might have succeeded entering upto sliding door on the rear of S-6, but that fact by itself would not establish beyond reasonable doubt that the persons with petrol and those who were knocking sliding door were accused named and identified by Ajay Baria.

42 The endeavour is to find out as to whether there was any conspiracy as is alleged by the prosecution and is sought to be proved by relying upon various witnesses including the confessional statement of accused Jabir and testimony of Ajay Baria.

43 Testimony of the victims / occupants occupying the seats on and around Seat No.72 would have extra edge over other testimony and therefore it will be important to discuss the same at this stage.

44 PW-88-Shantibhai Shankerbhai Patel (Exh.642) was occupying Seat No.70 and PW-93 Sharadaben Manubhai Patel (Exh.657) was occupying Seat No.72.

45 Likewise PW- 114 Subhash Chandra Ramchandra Mishra (Exh.719) with his family had reserved seat No.69 but was allowed to occupy seat No.69, 70 and 71, PW-82 Virpal Chhedilal Pal (Exh.627) was having Seats No.58, 59 and 61. Rajendrasing Rafesing Rajput have reserved Seats No.62, 63 and 64 and was actually occupying Seat No.61.

46 Their deposition is relevant to an extent that who was occupant of Seat No.72 which was a single seat and on halting of the

train on arrival at platform No.1 of Godhra Railway Station in the morning of 27/02/2002, some of the passengers got down for refreshment and train started and after some movement there was a stone pelting and the train had stopped and again after some movement. The train had stopped nearby `A' Cabin. There was extensive stone pelting resulting into breaking of glass and windows, was herself hurt by stone and to save herself she went to the passage between two toilet. The rear door (sliding door) was closed and she heard knocking from behind. Thereupon she jumped out of the train. According to her, the assailants were Muslim because they were wearing round cap and that the people were throwing burning rags into the coach. She names the deceased co-passenger-Champaben, Manubhai, Shilaben, Mafatbhai and others. Their postmortems are placed on record.

47 PW-114 Subhashchandra Ramchandra Mishra (Exh.719) had their reserved seats in S-6 being 69, 70 and 71. The material relevant facts which come out from his testimony are that there was heavy stone pelting on the train on 27/02/2002 as stated by other witnesses and because of that they closed windows, but one of the windows did not have aluminum protection but was made of glass which protection was not because of heavy stone pelting. This witness corroborates the factum of breaking of windows deposed to by PW-93. [However, some contradictions are in respect of the setting of hey of grass and thereby setting ablaze the coach and generation of smoke therefrom as well as knocking of the sliding door in his statement dated 08/05/2002, otherwise there are no material contradictions in the evidence of this witness.]

48 PW-99 Prakash Harilal Teli (Exh.674) had reserved seats in S-7 coach, but was not allowed to occupy those seats by the

unauthorized occupants of S-7 and was directed to move forward and therefore he occupied the space between two toilets of coach preceding S-7 (i.e. end of S-6). He was accompanied by his uncle and others and to secure himself from cold, his uncle closed the door (sliding door) between S-6 and S-7.

49 Apart from this fact, while stopping of train, its movement, stone pelting on two occasions, etc., his testimony is relevant to an effect that the door (sliding door) which was closed, was being knocked by someone from the backside (S-7 side). There is improvement in his evidence that fire started from the side of the latrine outside outside the said door i.e. S-7 as admittedly, he did not make such statement under Section 161 of Cr.PC. Because of the smoke in the coach, he felt suffocated and after someone opened the door (of side door) he and his family members climbed down from S-6 and thereafter saw the burning coach.

50 PW-180 Dr. Zuber Mohammed Yusuf Mamji :- he treated accused Jabir for his injury at 9:30 a.m. on 27.02.2002.

51 PW-181 Bhupatdan Vishnudhan Gadvi drew inquest of one Prahaladbhai Jayantibhai Patel.

52 PW-182 Tahirbibi Idarish Yusuf Mafat is a hostile witness; the wife of accused-Idarish Yusuf Mafat.

53 PW-183 Safiyaben Suleman Datiya was a witness present on platform No.1 on 27.02.2002 bears the testimony to arrival of Sabarmati Express alighting of some people therefrom chanting “Jay Shree Ram, Jay Shree Ram”, for refreshment; their taking up quarrel with bearded

Muslims exhorting “kill the Muslims”; their going to ticket window, closing of her mouth from behind by one orange belted person teasing of one other burga clad lady by those persons. Her statement was recorded on 28.03.2002.

54 PW-184 Jaitunibibi Sirajahmed Sheikh was present on Platform No.1 on 27.02.2002 and her testimony is almost similar to testimony of PW:1. In addition to that, she states that mouth of her daughter Sofiya was gagged by one belted person and she was attempted to be taken towards the coach. She was released after screams for help and then both of them went to booking-office for shelter.

55 PW-185 Janak Bupendrabhai Popat is the witness who prepared the map of Platform No.1 at the instance of the Police Department in April-2004.

56 PW-186 Mustak Ahmed Hussein Mohammed Boba is the hostile witness and was sought to be examined in support of meeting for criminal conspiracy.

57 PW-187 Kishorsinh Juvansinh Sarvaiya is a fire officer employed at Alang Ship Breaking Yard at the relevant point of time and bears the testimony to his inspecting the coach on 23.04.2002.

58 PW-188 Mustak Ahmed Nurmiya Rangraj was a receptionist in Prince Hotel under one Rafikmiya Jabbarmiya Shaikh and bears the testimony to the police collecting certain registers from his custody which contained entries concerning Nannumiya for his stay in the hotel and other details.

59 PW-189 Firojbhai Ibrahim Posti is the hostile witness and was sought to be examined in support of recovery of certain articles from Aman Guest House on 04.09.2002.

60 PW-190 Vinodbhai Ganpatbhai Chauhan is a hostile witness and was sought to be examined in support of the whole occurrence.

61 PW-191 Ahmed Nabimiya Nakuda bears the testimony to recovery of registers concerning stay of Nannumiya Tomajadali.

62 PW-192 Riyazuddin Amiruddin Pathan is a hostile witness and was employed by Rajak Kurkur in Aman Guest House and was sought to be examined in support of the fact that Nannumiya Tamjidali Chaudhari, CRPF Constable was a frequent visitor whom Irfan Siraj Pado, Jabir Binyamin Bahera, Imran Ahemad Bhatuk @ Sheru, Kasim Abdul Satar @ Kasim @ Biryani, Hasan Ahemad Charkha @ Lalu, Mahammed Khali Chanda Nannumiya used to meet and who impart them the training of operation of rifle throwing of bomb, etc.

63 PW-193 Suleman Mohammed Bhatuk is a hostile witness and was sought to be examined in support of the fact that certain named accused were throwing stones on the train and were carrying out assault of other nature.

64 PW-194 Rehanaben Sabbirhussein Badam is the hostile witness and is the wife of accused-Sabbirhussein Badam and was sought to be examined for production of iron axe by the said accused.

65 PW-195 Yusuf Hussein Bhatti bears the testimony to recovery of original register from Classic Hotel, Bharuch concerning stay

of Nannumiya in the hotel.

66 PW-196 Irfan Yakub Mitha is the hostile witness.

67 PW-197 Chandrashankar Purshottam Mehta was a Mamlatdar and extra-chitnis on 14.02.2002 and bears the testimony to his having issued a Notification under Section 37(1) of the Bombay Police Act prohibiting the possession of weapon in public on the defined dates in the notification.

68 PW-198 Gulabsinh Andarsinh Chauhan was the ASI on 08.08.2003 and bears testimony to his and Head Constable Bhikhabhai and Head Constable Dilipsinh having arrested and having drawn panchnama of arrest of Rol @ Rahul Amin Husain Hathila and identifies the arrestee in the Court.

69 PW-165 Sureshgiri Mohangiri Gosai was the Fireman employed with Godhra Nagar Palika on 27.02.2002 and bears the testimony to Bilal Haji Sujela obstructing the passage of the fire-brigade and exhorting the Muslim mob armed with deadly weapons, by gesture, for pelting stone on the fire-brigade, etc. He also bears testimony to the police having recorded his testimony on 03.03.2002 and above-stated incident having not been entered into occurrence book and he and other fire personnels having given the writings and his Supeior Officer having acknowledged the same. Xerox copies of the writings were produced at Mark 855/1 and 855/2 by this witness. The witness identified Abdulraheman Abdulmasjid Dhantiya and Bilal Ismail Sujela as the person obstructing the fire-brigade.

70 In the cross-examination, he admitted that Kanubhai Variya,

Pradipsinh Bhodasinh Thakor and Rupsinh, and fire-brigade officer were asked certain questions in relation to occurrence book in their testimony and that therefore he realized that the incident of stone pelting on the firefighter should be brought on record. It also transpires that, without being asked, the witness produced the xerox copies of the above writings. Being confronted with the various precedents statements made by the witness, it was admitted by him that he had not revealed any way the fact that written report about stone pelting of firefighter was made to an acknowledge in writing by the fire-brigade office. When confronted with the statement before Nanavati Commission, he had to admit that due to insufficiency of water in the firefighter, it had to be refilled from the well of Dhantiyakaka. The witness was confronted with the statement dated 04.11.2008 recorded by SIT wherein the presence of Abdul Raheman Yusuf Dhantiya was shown at the well **(garage of Abdul Raheman Yusuf Dhantiya is at a distance of 50 to 60 ft. towards Godhra side from railway Garnala/under-bridge)**. The kachcha writing contained in the written report about stone pelting on the firefighter was written by all the above-referred witnesses after about one month of the incident. Before that occurrence book was not perused, Abdul Raheman Yusuf was the Chairman of Motor Vehicle Department at relevant point of time. The witness admits the omission that they had given a written report afore-stated because no entry in relation to the above incident was made in the occurrence book.

71 PW-166 Dhulabhai Amlabhai Bariya was deployed as Police Constable on Godhra Railway Station in 2002. He mainly bears testimony to the firing, lathi-charge, warning and apprehension of the accused named by him in the testimony.

72 PW-168 Mandakiniben Nilkant Bhatia was the passenger in

S-6 on 27.02.2002 and bears testimony of above-referred facts including weapons held by the mob, stone pelting, breaking of windows from metal heap, closing of windows, throwing of acid bulbs, burning rags into the coach. She also bears testimony to the fact that from her back, some inflammable was poured and fire was lit. She also refers to Nitaben Panchal, her husband-Harsadbhai Patel, her two daughters viz. Pratiksha and Chhaya, Sudhaba Rawal, Satishbhai Vyas and others as the person who lost their lives. Her husband sustained serious burn injuries on his legs and was admitted to in the Civil Hospital and where first aid was given her also and thereafter, both of them subsequently transferred to Civil Hospital, Ahmedabad and then they got admitted to private hospital where plastic surgery was performed on them. Her statements were recorded on 06.03.2002, 21.01.2005 and 22.01.2005. She also bears the testimony to the fact that the accused were having carboys with them. The witness identified Usmangani Mohammed Kofiwala (accused no.4, Sessions Case No.78/2009); Siddiq Ibrahim Hathila (accused no.1, Sessions Case No.86/2009); and Abdul Rajjak Yakub Ismailwala (accused no.52, Sessions Case No.69/2009) by face and not by names.

73 In the cross-examination, she disputes the suggestion that the windows of the coach were closed when the train stopped after moving about a kilometer with an explanation that the windows were opened after it moved after first halt. She however admits that after the train stopped as above, windows of the coach were closed by the passengers. She admits that there was enormous smoke in the coach due to which things were invisible. When the police statement dated 21.01.2005 was shown to the witness, she identified Seat No.54 in S-6 in place of her sitting at the relevant point of time. The omission regarding throwing of acid bulbs, burning rags through the broken windows in her

statement dated 06.03.2002 was brought on record. Similarly, the omission regarding someone pouring the inflammable from backside and setting it on fire was also brought on record in her statement dated 06.03.2002. However, in her statement dated 06.03.2002, she had stated that petrol and acid bulbs were coming inside through the windows initially and there was enormous smoke.

74 PW-169 Babubhai Balajibhai Patel was ASI of Godhra Town Police Station deployed in Alfa Mobile Inchage on 27.02.2002, who bears testimony to his receiving yadi as regards pelting of stone in single fadiya and having reached there, found the mob indulging into the stone pelting and burning of the coach in his presence other mobile vans.

75 PW-170 Pravinkumar Amthalal Patel bears the testimony to his traveling in S-6 coach of Sabarmati Express on 27.02.2002. He refers to the sprinkling of kerosene by carboys from third last window. After that, he saw the smoke, felt suffocated. He refers to Ranjitsingh and a personnel from military and his family. He bears testimony to his having been beaten after he coming out on the off-side.

76 It appears that the Karsevaks travelling in the train on its arrival at platform No.1 at Godhra Railway Station were chanting slogans like Jai Shri Ram. The prosecution has come out with the case through PW-183 – Safiyaben Suleman Dantiyar and PW-184 Jaitunbibi Sirajmohmmed Shaikh that PW-183 was teased and harassed by one person who gagged her mouth by his hand and on her raising alarm for help, she was released. PWs-813 and 184 corroborate each other and in absence of any serious dispute regarding occurrence of this incident, it is not necessary for this Court to dwell upon the same in greater detail.

77 It also appears from testimony of PW-206 that quarrel was picked up with Mehbub Latiko / Latika and Siddik Bukkar after arrival of the train at platform No.1. Testimony of PW-199 Prabhatbhai Unabhai (Unarmed Police Constable), who was deployed for Bandobast on the railway station from 26/02/2002 testifies that Siddik Bukkar and Siraj Rickshawala showed him the injuries sustained by them and complained to him that some Karsevaks had beaten. It appears that the above incident gave rise to commotion and unrest on the platform which is borne out from testimony of PWs-82, 120, 97, 136, 82, 113 and 233.

78 Witnesses being PW-86 who deposes having been advised to close the doors and windows of the coach as the stone pelting was apprehended, PWs-85 and 78 deposes having heard the shouts from engine side that the stone pelting is done, PW-78 who heard that PW-86 who also learnt that there would be stone pelting, a suggestion was made to him to close the doors and windows and when the doors and windows were being closed, stone pelting started, PW-96 who got down at the platform and heard that the stone pelting is being done. Several other witnesses deposes to stone pelting either during official halt of the train after its arrival at platform No.1 or when it started moving.

79 From the above discussion, it is clear that the above two undisputed incidents and advent of the mob on the call given by the accused – Mehbub Latiko, the initial point of the main incident of assault on the train and the ultimate burning of S-6 coach.

80 One of the charges however against the accused was they having taken that they had entered into a criminal conspiracy on the previous night to burn coach S-6 and that the accused grabbed opportunity of occurrence of the incident of harassment to PW-183 and

capitalized on that by misguiding the mob that PW-183 was being kidnapped in the train; whereas in fact she was safe in the booking office. At this stage suffice it to observe that the incident of teasing or harassing PW-183 was a spontaneous sudden incident and was admittedly not a part of conspiracy and simultaneous occurrence of other incident i.e. beating of Siddik Bukkar and Siraj Rickshawala by Karevaks was also spontaneous and sudden incident and reaction of Mehbub Latiko of running on to the top of the hill and shouting for help as also Siddik Bukkar and Siraj Rickshawala complaining to PW-188 were spontaneous reaction of a prudent man who would have behaved in the aforesaid fashion in the similar circumstances.

What happened after movement of the train, its chain pulling and halt at parcel office:

81 As discussed above, after the incident of harassment of PW-183 and beating of Siddik Bukkar and Siraj Rickshawala, stone pelting was apprehended and in fact stones were pelted during the official halt of the train and on when it started moving.

82 As indicated above, PW-85 heard shouts from the engine side that the stone pelting was being done on the train. If his deposition is further perused, he saw the mob pelting stones from outside street. The factum of arrival of the mob at that juncture gets corroboration from PW-81 Pujaben Bahadursing Kushwa (mob omission) and PW-164 Mohan Jagjitsing Yadav, a Police Constable, who was deployed as such between 26/02/2002 and 27/02/2002.

83 PW-97, PW-164 (pelting omission), PW-152 (pelting omission), PW-138 (pelting omission), PW-126, PWs-82, 85, 97 and

113 bear testimony of the commotion and stone pelting.

84 During the official stoppage of train; evidence of other witnesses being PWs-77, 82, 84, 87, 91, 92, 94, 95, 98, 99, 102, 103, 78, 86, 89, 120, 79, 81, 113, 202, 152, 154, 155, 159, , 172, , 138, 228, 136, 135 and 127 bear testimony to stone pelting after the first chain pulling near the parcel office where the train had stopped. During the stone pelting the people were closing the doors and windows (PW-86) and that juncture windows were closed by some of the passengers (PW-81) and were reopened after the restart of the train (windows omission). The evidence of the above witnesses demonstrate a natural conduct of a person of closing the doors and windows for safety when attacked and opening of the doors and windows when relieved of the attack. It is seen from the above evidence that during movement of the train after its official stop and its halt at parcel office, mob had arrived and had started pelting stones and the witnesses, in order to save themselves were either in the process of closing windows and / or had closed windows and doors and reopened and were closing or had closed when again attacked at parcel office.

85 That initially formation of unlawful assembly, commencement of pelting of stones then throwing of acid bulbs and burning racks and attacking the train may be due to incident of molestation of PW-183 and spontaneous reaction to some extent, but an overt act of participation in the crime by members of unlawful assembly in setting the coach S6 on fire with conspirators in furtherance of the object and conspirators and irrespective of any knowledge about intention and object of the conspirators, such members of unlawful assembly and their role clearly emerge on record and that can be gathered from the very fact that such members armed with deadly

weapons like dharia, sword, guptis, iron rods and even acid bulbs and burning rags sufficient enough to hold them guilty of the crime. That reasons recorded by the Trial Court in believing the evidence qua such members of unlawful assembly and convicting them for offence under Section 302 and other offences of the IPC and sentencing them for life imprisonment is enough evidence appears on record. We have also referred to such evidence while referring to the evidence of injured passengers and other witnesses viz. RPF, GRPF, GTP, fire brigade and railway personnel, who were present at the scene of offence.

PART XII-F

FOR THREADBARE APPRECIATION OF EVIDENCE AND NATURE OF CONFESSIONAL STATEMENT OF JABIR BINYAMIN BEHRA AND STATEMENTS OF WITNESSES VIZ. RANJITBHAI JODHABHAI PATEL PW-224, PRABHATSINH GULABSINH PATEL PW-231 AND SIKANDAR MOHAMMAD SHAIKH PW-237 RECORDED BY RAJNIKANT KHODIDAS PARMAR, PW-246, THE THEN CJM, GODHRA, STATEMENT OF AJAYKUMAR KANUBHAI BARIA, PW-236 UNDER SECTION 164 OF THE CODE, 1973 RECORDED BY AMBALAL RANCHODLAL PATEL, RAILWAY JUDICIAL MAGISTRATE, GODHRA PW-207 AND THEIR TESTIMONIES BEFORE THE TRIAL COURT ON WHICH PROSECUTION HAS HEAVILY RELIED AND OPPOSED TOOTH AND NAIL ARE REPRODUCED HEREIN BELOW FOR OUR ANALYSIS FINDINGS ABOUT LEGALITY, VALIDITY AND WHETHER SUCH EVIDENCE IS ADMISSIBLE, INSPIRING CONFIDENCE, TRUSTWORTHY AND RELIABLE FOR WHICH WE HAVE FOCUSED ON TRUTHFULNESS AND VOLUNTARY ASPECTS OF SUCH STATEMNETS AND PROCEDURE FOLLOWED UNDER SECTION 164 READ WITH SECTICTION 281 OF THE CODE, 1973:

1 **Accused, Jabir Binyamin Behra, in his confessional statement recorded under Section 164 of the Code, Exh.1469, stated as under**:

"Name : Jabir Binyamin Behra,
Age : 20 Years.
Resi. : Signal Faliya, Godhra.
Occu. : Cattle grazing

Q Are you willingly giving confession ?
A Yes, I am giving the confession willingly.

Q Do you have any pressure from any one to give the confession ?
A No, I do not have any coercion from any one to give the confession. I am giving confession willingly.

Q Whether any Police Officer has misbehaved with you ?
A No, no any Police or other Officer has misbehaved with me.

Q Do you have fear of Police Custody or any other?
A At present I do not have any fear of Police or that of any other ?

Q Do you have any fear of getting misbehaved?
A No Sir, at present I do not have any fear about misbehavior or misconduct with me.

Q Does any one has given you temptation to give this confession ?
A No sir, no any temptation has been given to me for giving confession. I willingly give the confession.

Q Do you know that, this confession which you give will be used against you ?
A Yes sir, I know such fact that, the confession which I give will be used against me in the case against me.

Q Do you know that, by doing so, you could be given serious sentences ?
A Yes sir, I know that I could be sentenced with life imprisonment or death sentence.

Q Despite of knowing all these facts, you give this confession ?
A Yes Sir, I am giving confession after knowing all these

facts.

After taking the answers as above, the accused has been explained that, by giving such confession you could be sentenced, then also the accused has stuck to give confession. Hence, the accused has been given time of 24:00 hours for thinking again, which has been willingly accepted by the accused, and the signature to that effect has been made by the accused before the Court in open Court.

Signature of the accused : LHT impression of Binyamin

Before Me,
sd/- (illegible)
Chief Judicial Magistrate,
Panchmahal, Godhra.

Dt. 04-02-2003

The accused has been given the time of 24 hours to think again for giving confession. He should be produced before the court ***tomorrow on 05-02-2003*** *at 11:00 o' clock.*

sd/- (illegible)
Chief Judicial Magistrate,
Panchmahal, Godhra.
11:35 - 04-02-2003

Dt. 04-02-2003

The accused Jabir Binyamin Behra has been produced before the court at 11:30 o' clock. He remained present in the Court yesterday on 04-02-2003 and was stated to give the confession as per section 164 of Cr.P.C., the said accused was given the time of 24 hours for thinking again (_____) and has been produced today before the Court.

The procedure was started further as the accused Jabir Binyamin Behra has remained present before the Court.

Q Have you been given the time of 24 hours for re - thinking?
A Yes, Sir.

Q Do you want to confess?
A I want to give the confession.

Q Do you willingly want to give this confession?
A Yes, Sir.

Q Have you came to give such confession due to any threat, allurement, promise, or temptation ?
A No Sir, I am not given any such temptation, threat, promise or allurement.

As the accused has replied aforesaid questions during his deposition, it has been found that the accused is conscious and he is willing to give confession voluntarily. Therefore, it has been started to note down confession of the accused in my own handwritings which follows as under.

My name is Jabirbin Yamin Behra. My age is 20 years. I graze buffaloes. I reside in Signal Faliya, Godhra.

On 26th, I was having tea at the hotel of Posty. I was having tea there at 9-00 hrs in night on 26th, i.e. on the previous day of the occurrence of Sabarmati massacre. At that time, Salim Panwala, Shaukat Lal and Salim Jarda came to me and said that 'come, Razak Kurur is calling you.' I went with them. I asked Razak as to why he called me. Razak told that I have not called you and therefore those three persons started making fun of me. I told them as to why they were making fun of me. At that time, Salim Panwala told that we have to bring petrol. Razak said that do not discuss here. Razak said that go to upstairs in room No.8. Therefore, we went upstairs. We were having tea brought from the hotel of Ahemad Husain Bhola. Thereafter, Razak Kurkur came upstairs. He said that we have to go to bring petrol. I asked as to why petrol is to be brought. At this time he said that you go and bring petrol. We got down from there. **A parrot coloured small tempo was there in which seven carboys were kept. I shouted for Siraj Bala therefrom. Salim Panwala told him that he has to drive.** Therefore, Shaukat Lal, Salim Jarda and I sat at the back side. Salim Panwala was sitting with Siraj Bala. Razak had reached to the petrol pump on his M-80. After going there, we saw that Razak was standing at the petrol pump. Salim Panwala went inside the room. I do not know as to what he discussed after going therein. It was a room of the petrol pump. The manager

gave a sign to the labourers indicating to give petrol. **Siraj Bala went near the pump with the small tempo where 7 carboys, each having capacity of 20 liters were filled and given. Razak left with his M-80. We returned taking petrol. This petrol pump belonged to Kalabhai. From there, we went to a street situated behind Aman Guest House with the small tempo. Imran Sheru, Hasan Ahemad Lalu, Mehbub Khalid Chanda had arrived there. We unloaded the said petrol in the room of Razak Kurkur. At 11-30 hrs. i.e. at half past eleven , we went to a pan parlour where Bilal Haji and Faruk Bhana had arrived.** This pan parlour belonged to Razak Kurkur. They told us that we have met the Maulvi. The Maulvi has said that Sabarmati train is coming from Ayodhya; burn its coach No.6. Saying this much, he went in the room of Razak. After some time, Salim Panwala came out side. We asked him as to where he was going. At this time he told that he was going to ask whether Sabarmati Train is running late or on right time. We told him to return earlier. After some time, he returned and said that the Sabarmati train is late by four hours. From there, he returned to his room. At about 1-45 hrs he came outside and told that you all go to your houses and sleep. Come at 6-00 hrs in morning.

At 6-00 hrs in morning on 27th, I went there and stood near Aman Guest House. I saw that the pan-parlour of Razak had already opened. His servant Sadik was sitting there. Within some time, Shaukat Lalu and Salim Panwala arrived there. They told that come, let us go to the house of Razak. We went to the house of Razak and were watching T.V. I came out at about 7-00 to 7-15 hrs. I was standing near S.T.D. After some time, the Sabarmati Train arrived. Mahebub Latifa came there by running. He stopped near the wall of platform No.1 and started shouting that 'they are beating, they are beating.' I ran and went to inside and saw that the office at backside was being pelted with stones. I came outside by running. Irfan Patariya, Yakub Patariya, Rafik Bhola, Hasan Lalu, Yunus Ghadiyali were pelting stones on the train from the road situated outside. Shaukat Lalu came from there by running. He told that you all come after me. Hasan Lalu, Mehbub Latifa and I went after him. Shaukat Lalu entered the street where Aman Guest House was situated where he talked with Razak, Iliyas Husain and Mulla. Razak made a gesture towards us from there. When we were running, Ajay Bariya was standing there. Shaukat

Lalu caught hold of his hand and said, 'come'. We all reached there by running where Razak Kurkur and Salim Panwala came outside of the room from backside door. At that time, Imran Sheru, Irfan Bhola and Shaukat Lalu took out carboys from the room of Razak and loaded them in the small tempo. Razak Kurkur said, 'go behind 'A' cabin with the small tempo.' At that time, my brother Ramzani was driving. Mahebub Latifa and Shaukat Lalu were sitting behind him. Imran Sheru, Rafik Bhatuk, Yunush Gadiyali, Irfan Bhola and I were sitting at the backside. Ajay Bariya was standing there only. Shaukat Lalu made him sit in the vehicle by abusing him. Our tempo was going towards Ali Masjid. I turned back and saw that Salim Panwala was coming with his M-80 and Razak was sitting behind him with carboy. He was sitting in reverse position. Sound was being heard from the Masjid at that time. It was being heard from Ali Masjid. 'Allaah ho Akbar, Islam is in danger.' From there, we reached behind 'A' cabin with the tempo where Salim Jarda had arrived. Shaukat Lalu ran from there with a carboy and he shouted that you all come after me with carboys. We all ran after him and went to the place where Anar Kalandar Anvar Bala, Yunush Ghadiyali, Irfan Patariya were standing near Coach S-2 with sticks, pipes and scythes in their hands. They were breaking closed doors and windows of the Sabarmati Train. Meanwhile, a mob of about 250 to 300 persons of our community arrived there. We had gone in the middle of coach No. S-6 and S-7. Irfan Patariya, Yunush Ghadiyali, Anwar Kalandar, Anwar Bala and Mehbub Pocha all followed us and came at the coach No.6. Carboys were placed on the ground at that place. At that time, Mehbub Latifa made holes in the carboys with a knife without wasting time. Thereafter, partition of canvas between S-6 and S-7 was torn. Mehbub Latifa entered first from there and I entered after him. We saw that the inside iron door was closed. We broke it by kicking. Shaukat Lalu lifted two carboys and gave us. I threw away the knife which was in my hand. I caught those two carboys. We went inside and Shaukat Lalu followed us. He opened the door of the side of 'A' cabin from where Imran Sheru, Rafik Bhatuk and Shaukat Lalu entered with carboys of petrol. Hasan Lalu and Irfan Patariya were sprinkling petrol from outside through broken windows. At that time, we got down off side. The coach caught fire immediately. The passengers were running here and there. We caught one passenger out of them and

beat him up. Ashik Husain, nephew of Shaukat Bibino and I robbed gold rings and chain of one passenger. One ring was given to me out of them. We six to seven persons ran after one man and cordoned him. Imran Sheru, Siddik Moriya, servant of Mala Garage and I caught him. There person told, 'do not kill me, I am an army-man.' We asked him, 'do you have any proof that you belonged to Army?' He took out one paper from his pocket. Salim Bhatuk was standing near us. We told him, 'take, read this.' He read it over and said that he belongs to Army. I asked as to what was his name. He said, 'Govindsinh.' At that time, the servant of Mala Garage had a rod in his hands. He gave a blow on the head of that person with the rod saying, "*sala*, he is a Hindu.' Suddenly, a stone was hit from somewhere on the forehead at upper part of right eye. Sulim ran towards Usmani Masjid taking that army-man with him. Police arrived there at that time. Seeing the police, I ran away. A boy named Ishak Durga of my street met me in Polan Bazar. I told him, 'come, let us go to hospital.' We went to hospital of Jubed Mamaji. Taking help of his compounder, three stitches were taken. After giving medicines, he charged Rs.50/-. From there, I directly went to home. After some time, I heard that curfew has been imposed in Godhra due to riots. I did not come out of the house. On second day I came to know that Hasan Lalu had thrown a burning piece of cloth and thereafter we started running helter-skelter. After throwing this burning piece of cloth in the coach, we started running helter-skelter.

Thereafter, we went to maulvi Husain Umarji. He told us that you are not supposed to go to police without asking me. We give Rs.1500/- to the persons who have been caught from there. I have not received this amount.

On next day, I went to maulvi Husain and told him that 'my wife and children are dying of hunger and I will appear before the police.' At this time, he said that these people are arrested. Once they get released on bail, you appear before the police. Do not appear before the police at present. Otherwise you won't get released. Clothes worn by me were old and got torn and hence I threw them. The ring was given to me after about two-three months. Shaukat Bibino and I went to Anand to sell the ring. It was sold in Rs.2000/-. I spent those money.

> The above confession has been read over to the accused Jabir Bin Yamin Behra in the open court. As he is illiterate, thumb impression of his left hand has been taken before the court.
>
> Thumb impression of left
> hand of Jabir Bin Yamin Behra.
>
> [Emphasis supplied]

It is hereby certified/given yadi that it has been explained to the accused Jabir Bin Yamin Behra that he is not bound to make the confession and if he does so, the confession made by him can be used as an evidence against him in the case. On the basis of the answers given by him for the questions asked to him, I believe that the said confession was made voluntarily. It has been recorded in my presence and in my own handwritings. It was read over to the said accused and he admitted the same to be true and it contains complete and correct report of the confession. The accused has thumb impression of his left hand for the same in my presence in the open court".

2 **Ranjitbhai Jodhabhai Patel, PW-224 in his statement recorded under Section 164 of the Code, Exh.1470, stated as under**:

> "The Additional Sessions Judge of Godhra, namely Shri K. C. Kela gave imperative instruction on 26-2-03, and as the Prosecution Witness Ranjitsinh Jodhabhai Patel, Resident of – Sampa (Kundala), Ta. Godhra, Dist. Panchmahal appeared in respect of the offence registered at Godhra Railway Police Station vide I C. R. No. 9-2002 punishable u/s 143, 147, 148, 149, 337, 338, 332, 186, 435, 153 (a), 120 (b), 302 and 307 of I.P.C., Sections - 141, 150, 151 and 152 of Indian Railway Act, Sections – 3 and 4 of The Prevention of Damage to Public Property Act, Section – 135 (1) of Bombay Police Act, and Section – 3 (2) (3) of The Prevention of Terrorism Act, 2002, it was asked to record statement as per Criminal Manual and Section – 164 of Cr. P. C.

The said witness Ranjitsinh Jodhabhai Patel, Resident of – Sampa (Kundala) Ta. Godhra Dist. Panchmahal, appeared today to give his statement before me, R. K. Parmar, the Chief Judicial Magistrate, Godhra, Dist. Panchmahal. Hence, his statement has been recorded as per **Section – 164 of Cr. P. C.**, which is as under.

Name –	**Ranjitbhai Jodhabhai Patel**
Age –	36 years
Occupation –	Farming
Resident of –	Sampa (Kundala), Ta. Godhra.

Q Is it true that you have come here to depose voluntarily?
A Yes, sir, I have come to give deposition voluntarily.

Q Do you want to give the deposition willingly?
A Yes, sir, I want to give deposition willingly.

The Learned Court administered oath to the said witness and accordingly the witness has given deposition on oath as under and has given the following replies.

Q Do you want to give the deposition willingly?
A Yes, sir, I want to give deposition willingly.

Q You are not bound to give such deposition. Do you still want to depose?
A Yes, I want to give deposition voluntarily.

Q Is your deposition being taken privately right now as per your application?
A Yes, I am giving deposition privately at present.

Q Are you afraid of police or do you have fear of it?
A No, sir, I have no fear of police.

Q Has the police misbehaved for giving this deposition? Or has it pressurized in any way?
A The police has not misbehaved with me in any way. I have not been pressurized in any manner or no mal-treatment has been meted out to me.

Q Have you been offered any temptation for giving this deposition?

A No, sir. No temptation has been offered to me for giving deposition.

Q Has any enticement, threat or promise been given to you for giving deposition?
A No, sir. No temptation, enticement, threat or promise has been given to me for giving deposition. I have not been told of being benefitted in any way.

Q Despite this fact, are you giving the deposition willingly and voluntarily?
A Yes, sir. I am deposing voluntarily and willingly.

Q Do you require time for re-thinking for giving deposition?
A No, sir. I do not need any time for re-thinking.

Deposition of the Witness on Oath

I was serving at the petrol-pump of Haqim Miyan. It is known as the petrol-pump of Kalabhai. This petrol-pump is situated at the entrance of Signal Street. I had been serving on this petrol-pump since last three years. My office-hours started at 6-00 hours in the evening on 26-2-2002, I reported my presence at that time. Prabhatsing Gulabsing was also there with me on duty. Prabhatsing was doing the work of receiving money and I was giving petrol. On that day, at about 10-00 hours, the owner of Aman Guest House namely Rajaq Kurkur came by M-80. He went in the glass-cabin directly and seated there. One rickshaw-tempo came after it. The said small tempo was of green colour. Siraj Bala was driving the said tempo. Salim Paanwala was there with him. Shaukat Lalu, Siraj Jarda and Jabir – these three were sitting on the back-part of the tempo. Salim Paanwala went into glass-cabin and talked to Prabhatbhai about petrol. Thereafter, he came out. Thereafter, Prabhatbhai told me that 'fill 140 litres of petrol for this person'. Thereafter, I filled 140 litres of petrol in the 7 carboys which were there in the tempo. Thereafter, they went away.

Thereafter, on the next day, it came to be known that stone-pelting took place on the railway-station in the morning. Thereafter, our boss Ajgaribhai came to the petrol-pump. Thereafter, I told him that it seems that something unusual

may take place, and so, it would be good if you drop me up to the Chowki No. 7. Thereafter, Ajgaribhai had come to drop up to Chowki No. 7. Thereafter, I went home. When I read newspaper on the next day, I came to know that as many as 58 women, children and men have succumbed to death in fire in the coach. **Thereafter, on 10-4-2002, the police called me when I was asked by them as to whether anyone took petrol from your place in small or big containers on 27th of date in the morning, to which I replied in negative, because, we had not given petrol to anyone in the morning in retail in small or big containers. When the police arrested a person named Jabir Binyamin after some days, he confessed in the Court that I had taken 140 litres of petrol from the petrol-pump of Kalabhai, this confession made by him is true. I had seen him when he had come for taking petrol at night.**

Hence, I request You, the Officer that I have to live in the area of Godhra, and there is much population of Muslims around. Hence, there is risk of my life. Hence, I request You, the officer that my statement is kept confidential.

Sessions Case No. 69-09, Exh. 1470.

I again request that my statement is kept confidential. My life is at risk.

The above deposition of mine has been written as dictated by me. I have read the same and it is true.

Sd/- Ranjitbhai Jodhabhai Patel

I, the Chief Judicial Magistrate, Godhra, Dist. Panchmahal, namely R. K. Parmar, hereby certify and state that -

The Prosecution Witness Ranjitbhai Jodhabhai Patel appeared before the Court of the Chief Judicial Magistrate for giving deposition. At that time, he was given the understanding that he is not bound to give deposition, and it was asked to the effect that 'are you deposing in spite of that?' He replied in affirmative and he has given deposition. The said deposition was recorded in my presence as dictated by the witness. The same was read over to the witness in his presence and he himself also read it. The witness has admitted of its being true and the deposition given by him has been recorded. It is true

and its report is true. He gave an application for keeping the deposition confidential, the same has been granted".

3 Statement of **Prabhatsinh Gulabsinh Patel PW-231 Exh.1471** recorded before the Chief Judicial Magistrate of Godhra, reads as under:

"On 26-02-2003, Additional Session Judge of Godhra Shri K.C. Kella directed to record the statement of prosecution witness Shri Prabhatsinh Gulabsinh Patel, a resident of Dharolakhurd, Taluka- Shahera, District- Panchmahal, as per Criminal manual and Section 164 of Cr.P.C., in the case of I-CR No.9/2002 registered at Godhra Railway Police Station registered for the offence u/s 143, 147, 148, 149, 337, 338, 332, 186, 435, 153 (a), 120 (b), 302, 307 of IPC and u/s 141, 150, 151, 152 of Indian Railways Act and u/s 3, 4 of The Prevention of Damage to Public Property Act and u/s 135(1) of Mumbai Police Act and u/s 3(2) of The Prevention of Terrorism Act-2002.

Witness- Prabhatsinh Gulabsinh Patel resident of DharolaKhurd has appeared before me- R.K. Parmar- Chief Judicial Magistrate of Godhra, District- Panchmahal to record his statement. His statement as per Section 164 of Cr.P.C. has been recorded, which is as under.

Name: Prabhatsinh Gulabsinh Patel, aged about 28 years, Business-Nil, Resident- DharolaKhurd, Taluka- Shehra, District- Panchmahal.

Q Is it true that you have come here to submit your deposition willingly.?
A Yes. I have come willingly.

Q Are you dictating your deposition voluntarily?
A Yes. I want to dictate my deposition voluntarily.

This witness has submitted his deposition before this Court.

Q Do you want to dictate your deposition willingly.?
A: Yes. I want to dictate my deposition voluntarily.

Q Though you are not bound to depose, you still want to

dictate your deposition?
A Yes. I want to submit my deposition voluntarily.

Q At your request, is your deposition being recorded privately.?
A Yes. At present, I am deposing privately.

Q Have you any fear of Police.?
A No. I have no fear of Police.

Q Have the police misbehaved with you or pressurized you to depose?
A Police have not misbehaved with me or pressurized me.

Q Have you been offered any temptation or benefit to depose?
A I have not been offered any temptation or benefit to depose.

Q Have you been offered any temptation, threat or promise to depose?
A No. I have not been offered any temptation, threat or promise. I have not been promised for any benefit.

Q Despite this, have you come here to depose voluntarily ?
A Yes. I have come to depose voluntarily.

Q Do you need any time to reconsider about your deposition.?
A No. I do not need time to reconsider.

Deposition of witness on oath.

I had been working at the petrol pump of Hakim Miya, which is also known as Kalabhai's petrol pump since last three years, which is situated at Singal Faliya in Muslim area. On 26-02-2002, I came to my duty at 06:00 hrs in the evening. At that time, Mr. Ranjitbhai Jodhabhai Patel was also present with me as a deliveryman. As there were not many customers at night, I was seated in the glass-cabin made at petrol-pump. At that time, my work was to collect money. During that period at 10:00 in the night, when I was seated in the cabin, Razak Kurkur came on M-80 and seated in the cabin before me. Thereafter, a green coloured rickshaw came at the petrol-pump and Salim Panwala who

was seated near the driver seat got-off the rickshaw and came to me. Thereafter, Salim Panwala told me that I want 140 liters of petrol. Then, he gave me money for 140 liters of petrol. Thereafter, I told him that Ranjitbhai Jodhabhai Patel is standing outside and tell him that I have given money, so that he will give petrol. Thereafter, I also went out with Salim Panwala and went near the petrol pump. I told Ranjitbhai that his money for 140 liters of petrol has been received, therefore, give him petrol. Jabir Binyamin, Saukat Lalu and Salim Jarda were sitting in that rickshaw tempo. After Ranjitbhai gave the petrol, those persons went away after taking the rickshaw tempo. Thereafter, Razak Kurkur also went after them taking his M-80.

Thereafter, on the next morning, that is, in the morning of 27/2/2002, we came to know that some stone pelting has taken place near Railway Station and something like riot has occurred. Having known such, we called our employer Ajgaribhai by making a phone call. Thereafter, Ajgaribhai came to petrol pump and then we told that it appears that riot has taken place, therefore, drop me up to police chawki number seven. Thereafter, they dropped me at police chawki number seven, and from there, I went to my home. Next day in the morning, I read in the newspaper that the coach of Sabarmati Express has been burnt, wherein around 58 women, men, and children have died due to burning and others have sustained burn injuries. Thereafter, our petrol pump remained closed. **When the police had recorded my statement on 10/04/2002, they asked me as to whether I had sold the petrol in the carboy on 27/02/2002, I had denied it. The fact is true that on that day I did not sell the petrol in the carboy. But, had I been asked whether anyone has purchased petrol in carboy during night time on 26/2/2002, I would have answered, but the Police did not ask.**

Recently before some days, I read in the newspaper that the person namely Jabir Binyamin, who has been involved in the offence of Sabarmati carnage, has stated while admitting the offence that at night on 26/02/2002, they had brought petrol from Kalabhai petrol pump, therefore I hereby declare the fact today before your honour that the above mentioned persons had taken the petrol. Since I have to visit Godhara for the business purpose and as I am afraid of Muslim people and there is a risk on my life, therefore it is my humble request to

keep my such statement confidential.

Above deposition has been written as per my dictation, I have read the same and it is true.

Sd/-
Patel Prabhatsinh Gulabsinh"

4 **Sikandar Mohammad Sidak Shaikh, PW-237** in his statement recorded **under Section 164 of the Code, Exh.1253** stated as under:

"Today, on 22/9/03, Monday, during the investigation in the case of Deputy Superintendent of Police, Western Railway, Vadodara Section, vide O/w. No. Godhra investigation/6752/03, Godhra Railway Police Station I CR No. 09/02 u/s 302, 307, 120(B) of IPC and Sec. 3(2)(3) of POTA 2002, witness Sikandar Mohmmad Sidik, age 19 yrs, originally residing at Indore, Gandhinagar and Basera, presently residing at Surat, Rander, Ikbalnagar slum area, is willing to give statement in connection with eye-witnessing the aforesaid incident. As he has been produced before me, R. K. Parmar, Chief Judicial Magistrate, Godhra, Dist. Panchmahal, I have recorded the statement. It follows as under in my handwritings. Time : 04-05.

Q Can you read, write and understand Gujarati?
A He could not answer the question completely in Gujarati asked by the Chief Judicial Magistrate and he informed that he could not speak Gujarati properly. Therefore, as he requested to ask questions in Hindi national language and to answer them in Hindi national language, the witness has been asked questions in Hindi language and their answers have been recorded in Hindi.
Q What is your name?
A My name is Sikandar Mohmmad Shaikh.

Q Age?
A. 19 years

Q What is your address?
A Earlier address : Indore, Gandhinagar, New Basera,M.P.

At present - Surat, Rander, Ikbalnagar Slum area.

Q Have you been forced to come before the court? Or have you

been threatened to be beaten or have you been misbehaved?

A. The police has not threatened me or they have not forced or they have not misbehaved with me.

Q How much have you studied?

A 1st Std. in Hindi.

Q How are you going to give the statement?

A I am stating what I have seen. I am stating willingly.

Q If you wish you cannot give the statement.

A No sir, I want to state whatever I have seen.

Q Now you are giving statement in the open court; do you feel

any fear of police or pressure?

A No sir, I have no fear or difficulty. I am not feeling the same.

Q You can still deny giving the statement.

A No sir. I don't want to say no. I want to say whatever I have seen.

Q Have you been tempted or induced for giving a job in order to give this statement? Or have you been tempted to give any reward?

Q Have you got ready to give the statement willingly?

A Yes, I am stating the facts willingly.

Q Before coming to the court, were you in police custody?

A No sir, I have just come yesterday.

Q How have you answered all these questions?

A I have answered them after understanding.

Before one day of the Godhra Sabarmati massacre, I was returning after selling water pouches at Godhra Railway Station. At about 9-00 to 9-30 hours in night, I was going

home via Signal Faliya road. Jabir Bahera and Soyeb Kalandar were sitting at the hotel of Posti and I know them as both of them are hawking at Godhra Railway Station. Thereafter, I went to my home and slept after having dinner. On next day morning I was sleeping at my home. When this massacre took place, I was sleeping at home. It was about 7-45 hours in morning. My family-members woke me up and said that uproar has taken place outside. Thereafter, I got up and went to the pond via kachcha road. At that place, I saw that a train was standing near 'A' cabin. People were pelting stones on it and they were damaging it. Meanwhile, announcement was made from Ali Masjid. “Allah ho Akbar, Allah ho Akbar, Islam is in danger, masjid has been burnt, kill, kill”. This was voice of the maulvi named Yakub Punjabi. Then I was going by running through kachcha road; I saw a parrot-coloured small tempo standing there on the road. **Thereafter, I reached near 'A' cabin. At that place, I saw that Rajaq Kurkur, Bilal Badam, Hani Badam, Sidiq Badam, Yakub Patadiya, Aiyub Patadiya, Qadir Patadiya, Faruk – brother-in-law of Rajaq Kurkur, Rahub Kamli and Salim Panwala were damaging the train. Rajaq Kurkur - owner of Aman Guest House and Salim Panwala had something like petrol in carboy. Rajaq Kurkur and Karim Panwala climbed on the coach of the train. Rajaq Kurkur and and Salim Panwala had supported from back side. There were windows near door where passengers sit. Rajaq Kurkur poured liquid from carboy from the window. Meanwhile, Mehbub Latika, Jabir Behra and Shaukat Lalu went to the partition situated in the middle of coach. Mehbub Latika split the partition with a knife. Mehbub Latika, Jabir Behra and Shaukat Lalu went inside with carboys and remaining persons were standing below. Rafiq Bhatuk, Irfan Bhopa, Imran Sheru, Hasan Lalu, Rahub Kamli, Irfan Pataditya and Aiyub Patadiya were standing below the coach. Meanwhile, the door got opened from inside.** Thereafter, Rafik Bhatuk, Irfan Bhopa, Irfan Sheru and others hurriedly entered in the coach with carboys. I was watching all these things standing on a heap of stones. I was near the coach on heap of stones. Meanwhile, Faruk Bhana and Bilal Haji arrived there. At that time, **Hasan Lalu, Ramjani and Irfan Patadiya were pouring liquid like petrol from broken windows of the coach. Meanwhile, Hasan Lalu burnt a rag of cloth, lifted it with the help of stick and threw it in the coach through a broken window**. Suddenly fire broke out and passengers of the trains started shouting i.e. they were

screaming. Thereafter, police arrived there and public started running. I also ran from there and I was passing through the road situated near Ali Masjid. At that time, I saw maluvi Yakub Punjabi on the terrace of Ali Masjid. Thereafter, I ran in the farms. I kept wandering in the farm for the whole day. In the evening, as it got little dark, I returned home. At this time I heard that many persons have died in the train due to burning. Communal riots have broken out in Godhra and curfew has been imposed in Godhra. As I heard all these, my mother, sister and brother went to the street due to fear. We were looking for a house on rent; we got house of Faruk. We stayed in that house for about six to seven months. Thereafter, we went to Surat from there. When we were living in Godhra, I knew Husain Umarji maulvi who was living at Vejalpur road in Godhra. Because, his elder brother had a saw mill near Ali Masjid. He used to come there sometimes. He used to come for Namaz in Ali Masjid sometimes. I used to go to the saw mill to buy woods in order to cook food at home. I used to see Husain Umarji Maulvi there. He also used to come for Namaz in Ali Masjid and because of this reason I know him. When we were staying in Godhra, Husain Umarji Maulvi used to give Rs.1500/- per month to the persons who had burnt the coaches. I had heard this fact and therefore I had gone to him for help. We are *fakir* and therefore I had gone to him so that he may help me. He told me that it is not for you. This is for the persons who have burnt the coaches and for the *Ghanchis*. Thereafter, the mualvi gave me Rs.200/- and said that don't say anyone else about what you had seen. I returned home with Rs.200/-. After some days I again went for help but he was not available. Thereafter, we stayed in Godhra for some days. Thereafter, we went to Surat. We got land at concession from the government. We are living there making a hut. Since, we have come to Surat, we have not received any help from Husain Umarji maulvi or I have not gone to him for help. I have not burnt any coach or I have not caused any damage. These are my true facts. I can speak Hindi. I can understand Hindi. I cannot speak Gujarati. I can understand Gujarati. These are my facts. I have told you all true facts. I do not know anything else apart from this.

Sd/- Sikandar Mohammad
(Thumb impression of left hand of the accused)

4.1 I have explained the witness Sikandar Mohammad Sidik that he is not bound to give the statement. In future, your confession can be used as evidence against you. Despite the fact, he has willingly given the statement. I have recored the same in my presence and in my own handwritings. The said statement was read over to him. He admitted it to be true and it contains report of the statement made by him".

4.2 We have produced confessional statements of Jabir Binyamin and three statements of **Ranjitbhai Jodhabhai Patel PW-224 Exh.1470, Prabhatsinh Gulabsinh Patel PW-231 Exh.1471 and Sikandar Mohammad Shaikh PW-237 Exh.1253** in this judgment.

5 **Rajnikant Khodidas Parmar, PW-246, the then CJM, Godhra** in his testimony before the trial court deposed as under:

> **Examination in chief**
>
> "2 When I was present in the Court during my duty hours on 29/01/2003, Mr. Noel Parmar, Deputy Superintendent of Police, Western Railway, Vadodara, came before me and stated that, "One accused, namely Jabir Binyamin wants to admit in connection with Godhra carnage." and produced an application to that effect before me. He stated that, "An application was made before Mr. A.R. Patel, learned Railway Magistrate, to produce an accused for confession.", **but Mr. Patel, learned Railway Magistrate, passed an order that learned Chief Judicial Magistrate, Godhra has jurisdiction in this regard. Based on the same, an application was made before me to seek permission for producing accused Jabir Bahera to give his confession. Therefore, I admitted the said application and made a yaadi to Vadodara Central Jail on 03/02/2003 stating that, "The said accused be produced before me at 11.00 hours on 04/02/2003." Taking into account the said yaadi, Vadodara Central Jail sent the said accused Jabir Binyamin Bahera to my court along with police japta(surveillance) on 04/02/2003**.

[3] The said accused was produced along with police japta at about 11 a.m. during court hours on 04/02/2003. At that time, I adjusted my board and started recording his statement i.e. confession. **Before recording this confession, I asked accused Jabir Binyamin Bahera some questions in the beginning. I asked such questions that, "Do you wish to give this confession voluntarily? Do you know seriousness of confession that you wish to give? It is not compulsory to give confession. By admitting the confession, which you wish to give, as evidence, it can be used against you also, and based on the same, you can get punished also." In reply to all these questions, accused stated that, "I am aware of all these facts." Further, I asked that, "Do you give this confession, which you wish to give, under pressure of anyone or police or under threat, enticement, temptation or in anticipation of any gain?" While replying, the accused stated that, "I do not give this confession on account of any pressure, threat, greed, temptation, and I do not give this confession in anticipation of any gain or profit." During this question-answer, the said accused Jabir Binyamin was found to be healthy and having understanding of giving reply. Therefore, I again asked, "Do you wish to give confession?" The said witness stated that, "I wish to give confession." Therefore, taking into account legal situation, I decided to give him 24 hours of time for thinking or being more aware about confession, which he is willing to give, and recorded statement giving him 24 hours of time. A yaadi-letter, intimating to bring accused on next day i.e. 05/02/2003, was forwarded to Central Jail, Vadodara. The statement was recorded in the open court in the presence of only one policeman and in the absence of police in the court i.e. without japta. The left hand thumb impression of accused was obtained in the said statement, and I put my signature and accordingly, accused was informed and it was stated to produce him**.

[4] Accused Jabir Binyamin Bahera was produced before the court in my presence at 11 a.m. on 05/02/2003. The board of my cases was adjusted on the said day and recording of confession of Jabir Binyamin was started within about ten minutes. **During this, I sent police, accompanied by accused, out of my court room and allowed only required constables. I started recording this confession in the open court. I asked accused that, "Are you sure about your confession? Is there**

any pressure of police upon you?" In reply, the accused stated that, "I have decided within time limit granted to me that I wish to give confession and there is no pressure or fear of police upon me. " I further asked that, "Have you received any threat, temptation, enticement or greed?" In reply, he stated that, "No such gain, temptation or enticement has been given to me, and I am willing to give such confession." Keeping in mind the said fact, recording of statement was started. I have recorded this statement in my own handwriting as dictated by accused. This statement has been recorded in my handwriting and it bears thumb impression of accused on each page and I have put my signature. Such has been certified below this confession that accused has willingly given this statement without any fear, threat, greed, enticement or temptation, and stating that such statement can be used as evidence against him, I have put my signature. As I read over and explained this confession to accused, he stated to have admitted this confession, and I have put my signature below it. I myself got this statement sealed in the cover in my presence and forwarded the same to learned Sessions Court.

[5] I am shown office copy of yaadi given to Central Jail, Vadodara vide O.No. 8-2003 for taking back accused and producing him again at 11 o'clock on 05/02/2003 in the case registered vide I C.R. No. 9-02 at Godhra Railway Police Station on 04/02/2003. It bears my signature and thumb impression of accused which I identify, and office copy is given exhibit no. 1468. After making preliminary inquiry on 04/02/2003, time of 24 hours was granted. A yaadi was made intimating to produce the accused at 11 a.m. on 05/02/2003, and the said yaadi is on the page no. 1 and 2, and confession recorded on 05/02/2003 is on the page no. 2 to 10. There is a thumb impression of accused in the margin of each page of the said confession and at the end of writing. My certifying signature and seal of Chief Judicial Magistrate Court, Panchmahal Godhra are in the end, which I identify. The confession recorded on 05/02/2003 is in my handwriting. The said original confession is given exhibit no. 1469.

[6] As per the order of Mr. Kella, learned Additional Sessions Judge, I recorded statements of witness Ranjitbhai Jodhabhai Patel and Prabhatsinh Gulabsinh Patel on oath

under section 164 as dictated by them in the case registered vide railway C.R. No. 9-02 after making preliminary inquiry of them and verifying that, "**They are not bound to give statement, they have not been given any enticement, temptation or pressure for giving statement." I am shown original statements of aforesaid both persons. On looking at the same, I state that each page bears signature of concerned witness therein and I have put my signature in the end making endorsement of certifying the statement**. The signature of both statements and handwriting of endorsement were identified and the same are given exhibit no. 1470 and 1471.

[7] **As an application was received from Investigating Police Officer on 22/09/2003 for recording statement of witness Sikandar Mahmad Sidik Shekh under section 164, after making preliminary inquiry of witness and giving him understanding that, "It is not compulsory to get statement recorded, whether any pressure, enticement or temptation has been given by police for recording of statement, and facts of statement can be used in future in the proceedings against him also", as witness showed willingness to get his statement recorded, after making note of preliminary questions, statement of witness was recorded in his language as dictated by him. After recording statement and reading over the same to him, as he admitted the facts of statement, his signature was obtained in the statement and I put my signature as before me below the statement in the end and made endorsement certifying it**. Thereafter, aforesaid statement was forwarded to learned District Court in the sealed cover. I am shown statement of witness, exhibit no. 1253. On looking at the same, I state that it is in my handwriting, the fact written therein is true. It bears my signature, seal and witness's signature as before me, which I identify.

Note:- *The present witness confirmed statement of other two accused persons u/s 32 of POTA. As Special Criminal Application was pending in the Hon'ble High Court against order of this Court, deposition of witness has not been recorded in respect of procedure carried out in connection with statement u/s 32 of POTA at this stage.*

Cross examination

by Mr. A.D. Shah, learned advocate for accused persons
(Accused no. 4, 6, 10, 13, 38, 42, 51, 52, 54, 58, 59, 61, 69, 75, 78, 79, 81, 82, 84, 85 to 86, 89, 91 to 99)

[8] No occasion has taken place for me to record any other statement u/s 164 prior to present confession statement during my service. When Mr. Noel Parmar came with application on 29/01/2003 before me for the procedure in respect of statement, he did not come with accused Jabir Binyamin Bahera before me. At that time, Mr. Noel Parmar stated me that Jabir Binyamin Bahera is presently in police custody. I do not exactly remember as to at what time he gave application on that day, but he may have given at about one o'clock in the afternoon. As per my memory, after receiving aforesaid application, the same was kept pending for passing order under it after hearing Mr. Noel Parmar. As per my memory, after submitting aforesaid application, Mr. Noel Parmar once came before me to make inquiry of order passed under the application and to collect a yaadi of order passed during the period of recording statement of accused. I do not exactly remember as to whether Mr. Noel Parmar came before me for making inquiry of order passed under the application on 30/01/2003 or not. **I do not exactly remember as to on which date I passed an order under the application submitted by Mr. Noel Parmar, but the same was passed before yaadi was made on 03/02/2003. When I passed an order under the application, I knew the fact as to where accused is lodged under whose custody. Mr. Noel Parmar informed me about this fact.**

[9] **It is true that when accused is in judicial custody, it is the responsibility of jail authorities to produce him before the Court. It is true that I wrote a yaadi to jail authorities to produce accused before me on the adjournment date for statement. When I passed an order for recording statement, I was not aware of provisions contained in the Criminal Manual regarding recording statement under section 164. I was not aware of as to whether the form for recording confession statement was given in the Criminal Manual or not. It is true that when accused is in judicial custody, an order in respect of producing him before the Court for recording his statement cannot be made to police officer or any member of his team. I wrote a yaadi to Central Jail,**

Vadodara on 03/02/2003 to produce accused before me on 04/02/2003. I forwarded one copy of the same to Deputy Superintendent of Police, Western Railway, Vadodara and also made note of it in the yaadi. In my opinion, a copy of yaadi was forwarded to Deputy Superintendent of Police, Western Railway, Vadodara to make him conversant with the fact of this yaadi. A copy of yaadi was forwarded keeping in mind the office of Deputy Superintendent of Police, Western Railway, Vadodara, but not Mr. Noel Parmar. No other police officer of the team of this case except Mr. Noel Parmar has met me during the period from 29/01/2003 to 03/02/2003.

[10] The name of Mr. S.B. Patel, Police Sub Inspector, was not referred to me. It is true that I wrote a yaadi to Central Jail, Vadodara wherein it was stated that custody of accused Jabir Binyamin Bahera be handed over to Mr. S.B. Patel, P.S.I. I have not recorded name of Mr. S.B. Patel, P.S.I. in the aforesaid yaadi at the instance of anyone. When Mr. Noel Parmar came with an application before me on 29/01/2003, other two or three police personnel were also with him. **In my opinion, I came to know about name of Mr. S.B. Patel in such a way that when Mr. Noel Parmar came before me in the Court on 29/01/2003, I found his conduct improper and thus, as I made Court Staff to inquire about name and address of other police personnel, I came to know about Mr. S.B. Patel. It is true that I recorded name of Mr. S.B. Patel in the yaadi for this reason only**.

[11] **It is true that Mr. S.B. Patel, P.S.I., came with accused Jabir Binyamin Bahera before me on 04/02/2003. It is true that I did not make any inquiry as to how many staff members of police department and jail were with him on that day**. The witness states that when accused was brought before me in the Court room, there were eight to ten police personnel. I do not know as to what was the situation outside the Court room. There is no note in the statement that I had stated that I am Chief Judicial Magistrate, Godhra when accused Jabir Binyamin Bahera was brought before me on 04/02/2003. The witness states that I stated that I am Mr. R.K. Parmar, Chief Judicial Magistrate, Godhra. On that day, I did not ask accused as to how long he had been in the police custody. I did not ask aforesaid accused as to whether he has given any confession before the police or not. I did not make

inquiry as to whether any videography was made in respect of him during police custody or not. I did not state accused that he is not bound to give confession statement before me when I made inquiry of him on 04/02/2003.

[12] There is a sub jail at Godhra. I do not have idea as to how many under trial prisoners could be accommodated in sub jail at that time. **When accused was brought before me on 04/02/2003, he was in judicial custody, and thereafter, he was in judicial custody on the next day also. It is not true that accused could have been lodged in Sub Jail, Godhra on 04/02/2003. It is true that custody of accused was handed over to Mr. S.B. Patel, P.S.I., on 04/02/2003 to take him back to Central Jail, Vadodara. It is true that a jail yaadi was forwarded to central jail to produce aforesaid accused before me on 05/02/2003 wherein I stated that his custody be handed over to Mr. S.B. Patel, P.S.I. I did not make note in the record that Mr. S.B. Patel, P.S.I., has produced accused before me on 05/02/2003**. It is true that I have not made any note in the statement of having ensured that any police employee involved in the investigation of the case is not present in the court room or any such police employee is not at such close distance that he can hear fact of statement before starting recording of statement when accused was produced before me on 05/02/2003. I have not recorded in the statement as to when procedure of recording statement of 05/02/2003 was started and completed. The witness states that production time has been recorded.

[13] **It has not taken place that accused may not have understood any question asked by me at the stage of recording statement on 05/02/2003 and I may have asked him the same question again. Such has not taken place that accused may have hesitated anywhere at the stage of dictating fact of statement and a question may have been asked to him regarding any fact of statement. When I recorded statement of accused in my handwriting, I was writing the fact of statement being dictated by accused speaking the same. Such has not taken place that when I was recording after speaking, accused may have suggested any correction in respect of some fact.** I am shown statement recorded by me. On page no. 4 of the said statement, at first 'Siraj Panvala' is written, out of these words, "Panvala" has been struck off and the word "Bala" is overwritten. It is true

that my initial is not there on the overwriting or no thumb impression of accused has been obtained there. It is true that word "pump" has been added by making arrow at the last line on the same page. It is true that on the page no.7, in the sentence - Salim Panvalo was standing with M-80, word "coming" is overwritten striking off word "standing". When thumb impression of accused was obtained in this statement, court staff and advocates were also present in the Court room. **Thumb impression of accused was obtained in the statement in my presence, and board clerk has made endorsement for identification of thumb impression. It is true that the person, who has made endorsement for identification of thumb impression, has not put any signature below endorsement. When statement was recorded, any copy of statement has not been prepared putting carbon. The procedure of putting aforesaid statement in the cover and sealing the same was immediately carried out in my presence on the same day. Mr. Noel Parmar was not present before me in the Court room at the stage of procedure of sealing statement in the cover. At that time, Mr. S.B. Patel, P.S.I., also was not present in the Court room. No xerox copy of this statement was made till it was sealed in the cover. The cover was forwarded to the Sessions Court on the same day after sealing it. I do not remember as to whether sealed cover containing statement was forwarded after putting it in other cover or not**. Such has not happened that Mr. Noel Parmar may have come before me after statement was recorded on the date of aforesaid statement. I do not remember as to whether any yaadi was received from Mr. Noel Parmar on the said day or not. Such has not happened that a copy of this statement may have been given to Mr. Noel Parmar on that day based on yaadi. Such has not happened that I may have given any sealed cover to Mr. Noel Parmar on the said day. I had not read case diary in connection with investigation conducted in this case during the period from 29/01/2003 to 05/02/2003. The witness states that the same was not produced before me. I am shown cover. On looking at the same, I state that such has not occurred that confessional statement may have been forwarded in the aforesaid cover. The witness states that the said cover does not bear my any signature. On looking at yaadi of railway court, I state that I had forwarded original cover containing statement of accused to Railway Court. It is true that no note has been made in the statement of 05/02/2003 in connection with process as

recorded in clause 7 and 9 of part II of Criminal Manual Form No. 35.
Further cross examination adjourned due to completion of court hours

Date:- 26/05/2010 Before me

Sd/-(illegible)
(P.R. Patel)
Additional Sessions Judge
Panchmahal Godhra,
Camp:- Sabarmati Central Jail,
Ahmedabad

The aforesaid deposition was
read over to the witness and
he admits the same to be true.

Sessions Case No. :- 69/09
Exhibit No. 1467

Date:- 27/05/2010

Oath administered,

Cross examination by Mr. A.A. Hasan,
learned advocate for accused persons
(Accused no. 1 to 3, 5, 18, 22, 24, 31, 41, 43, 47, 53, 63, 65, 67, 74, 77, 90, 100, 101 and 26 to 30, 70, 71)

[16] I was aware of as to what precautions I shall have to take as Magistrate before recording statement of accused u/s 164. When accused was brought before me on 04/02/2003 and 05/02/2003, I made oral inquiry of him in addition to note about questions having been asked in the statement. I did not prepare any memorandum in respect of oral inquiry in addition to note in the statement. I can state as to what I asked during oral interrogation in addition to note in the statement. I asked accused that, "Whether any harassment was meted out to you by police on two days when you were brought to Godhra Court from jail and vice versa? Whether any inquiry was made stopping you

somewhere on the way? Do you wish to depose though it is not compulsory for you to depose? Was care taken of you for daily routines on the way?" I found these oral questions important. It is not true that questions written in the statement are out of purview of questions which should be asked in the form of precaution as per the provision of section 164. It is true that if accused is in police custody for a long time, it is necessary to make inquiry as to whether he was given any kind of temptation, enticement, pressure, threat, mental or physical torture by police during custody or not. It is true that when accused was produced before me, application was submitted wherein such was declared that accused has confessed offence before the police during police custody. It is true that I had been aware of the fact that more than one person are involved as accused in the incident of Godhra railway train before accused was produced before me. It is true that during his interrogation, **I asked him as to whether police made him ready for confession statement during his police custody giving such temptation or making such representation that he would be acquitted from this offence or he would be made approver or not.** I have not made any inquiry of accused at the time of inquiry of aforesaid accused as to whether his brother or other members of family are involved in this case or not and they are in custody or not.

[17] **It is true that when accused was produced before me on 04/02/2003, he was not in police custody. It is not true that as accused was produced from judicial custody on 04/02/2003 and 05/02/2003, I did not require to make any inquiry in respect of police custody of accused during my inquiry**. It is true that when accused was produced before me on both of these days, I do not have any information as to how he was kept in Central Jail Vadodara. **It is true that any record, as to under whose custody and how accused was in Central Jail Vadodara during the period from 30/01/2003 to 05/02/2003, was not produced before me**. It is true that due to this reason, I do not have personal information as to how he was kept in Central Jail Vadodara and treated. It is true that I did not make any inquiry during interrogation as to under whose japta (surveillance) accused was kept in judicial custody and as to whether any one was allowed to meet or not.

[19] I do not know the fact as to whether the other 8 to 10

police-personnels who were there with Shri Noel Parmar who came to me with the application on 29-1-2003 were members of the Investigating Team or not. **It is true that in the Court of the Chief Judicial Magistrate, only one police-personnel remains on duty during office-hours. There were two doors to enter the Court-room from the lobby, in my Court of the Chief Judicial Magistrate at that time. It is true that the witness-box was on the right side from the dais**. It is true that the person standing in the witness-box can see the movement in the lobby and similarly, the person in the lobby can see the person being in the witness-box. **It is true that on 5-2-2003, when I recorded the statement of the accused in the Court-room, the lobby of the Court-room, the outer part of the window situated to the other side, and the Court-room were full of advocates and common people. During the period when I recorded the statement of the accused in the Court-room, there were common people in addition to the advocates. I cannot state it for sure as to whether there were any police-personnels in simple dress or not among the common people present. The witness states that I had instructed the persons of police to go out. It is not true that I had given no instruction to the persons of police clad in simple dress for going out. It is not true that during the procedure of recording the statement, there was movement of the advocates and common people in the Court-room. The witness states that the constable on duty in the Court had been instructed to take care that movement is not made**. It is true that the sitting-arrangement for criminal-staff had been made in the Court-room itself by making a partition of plywood in the end-part, and in that part, there was one door from outside for movement and one door was there towards the Court-room".

5.1 Further cross-examination is about unawareness of this witness about any additional police force was deployed outside the court room and that distance between the dais and witness box and movement and conversation between the accused and learned advocate.

5.2 Para 23 is about denial on the part of this witness taking any legal advise from anyone, but admits to have stated legal advise and

that he knew difference between the statement of confession by an accused and the statement by a witness. Para 24 is about Ranjitbhai Jodhabhai and Prabhatsinh Gulabsinh about instructions given to these witnesses by leaned additional Sessions Judge. Para 25 is again about procedure of giving an application for recording statement of these two witnesses at Exh.1470 and Exh.1471. That para 26 is about Sikandar Mohammad Sidik Shaikh Exh.237 whose statement was recorded on 22.09.2003. That in further cross-examination by learned advocate Shri I.M.Munshi in para 28, the witness states about procedure to be followed under Section 281 of the Code, 1973 while recording statement under Section 164 of the Code, 1973. That relevant portion of the above paragraph reads as under:

> **"It is true that in order to record the statement u/s 164, it is necessary to follow the procedure as u/s 281. It is true that the provisions of Section 281 are imperative. I cannot state for certain that as per the provision of Section 281, it is necessary for the Magistrate to put a signature after noting the procedure whatever may have been carried out, after recording the questions asked to the accused and the replies thereof, after obtaining the signature of the accused below the same. It is true that as per the provision of Section 164, the Magistrate is supposed to put his signature after giving a certificate with his name below the statement of confession of the accused. It is true that no name of mine or signature have been put down at the initial part in the certificate that I have given below the statement of confession of the accused Jabir Binyamin Bahera. It is true that at the end of the statement of the accused Jabir Binyamin Bahera, the accused has not given it in writing that the fact of the statement has been read over to him or that he has read it and that he has admitted that the fact written is true. It is true that I have not noted any rojkam in respect of the procedure of the statement of the accused of Section – 164".**

5.3 In further cross-examination by learned advocate Shri L.R.Pathan in para 34 this witness states as under:

> **"34. When I studied the legal provisions before recording the confession-statement of the accused, I had studied Sections 163, 164, 281 and the Criminal Manual. I cannot state for certain as to before how much time of recording the statement of the accused, I had done this study. Even approximately, I cannot state as to before how many days of recording the statement of the accused, I made this study. It is true that before recording the statement of the accused, I was aware as to what procedure is necessary to be made for statement under these Sections of law. Before I recorded the statement of the confession of the accused, I had done criminal work for the period of about 3 months. It is true that after the accused is produced before the Magistrate, his judicial custody begins from the time he is taken in it. It is true that after the accused is put in the judicial custody, the jail-authorities do the procedure of bringing him to and taking him from the Court under jail-surveillance. It is true that the police-persons of jail-surveillance who are there under jail-authority are not of the administrative branch of the concerned police-station".**

5.4 In para 35 this witness is not sure about what procedure was followed in the application dated 29.01.2003 submitted by Investigating Officer without looking to the record. In paras 37, 38 and 39 of his cross-examination, it is stated as under:

> "37. It is true that the police employee, who accompanied Mr. Noel Parmar on 29/01/2003, was Mr. S.B. Patel, P.S.I. I did not make any verification as to what role Mr. S.B. Patel played in the recent investigation. Though Mr. S.B. Patel came with Mr. Noel Parmar, I did not realize that he should be involved in the investigation of this case. I did not make verification as to which post Mr. S.B. Patel was holding at which place at that time. I did not have any belief that Mr. S.B. Patel is an honest officer. It was not in my notice as to how Mr. S.B. Patel performs his duty as a police officer. The witness states that I saw him first time on that day. **Though I was aware of the fact that when accused is in judicial custody, jail authorities bring him before the Court with separate japta (surveillance), this work was handed over to Mr. S.B.**

Patel because offence had taken place within jurisdiction of Railway, and considering conduct of Mr. Noel Parmar with Court on that day, the work was handed over to Mr. S.B. Patel. I do not know that Mr. S.B. Patel was discharging his duty in the Railway Police Station or not. It is true that main purpose of sending accused in the judicial custody giving 24 hours of time before recording his confession statement is to free him from the effect of police custody and therefore, it is main intention of keeping him away from police custody. It is true that I did not make any effort before passing an order of producing accused before me through Mr. S.B. Patel so that jail authorities directly produce him before me. I cannot state that Mr. S.B. Patel was directly involved in investigation of this case.

[38] It is true that it is not a subject of discretion of Magistrate recording statement as to whether question asked to accused and answer given by him at the time of recording his confession statement, should be recorded or not. It is true that Magistrate has to write all the questions and answers. **It is not true that I have stated in the earlier cross examination that considering answers of some questions given by accused, I have not recorded these answers of questions, which I did not find necessary, thereby I have violated mandatory provisions u/s 281 of Cr.P.C. As per my memory, I have not recorded three or four answers of questions. I myself have not kept any separate note in respect of procedure of recording confession statement of accused done by me. It is true that I do not have any documentary evidence showing that police personnel were instructed to leave the Court room at the time of recording statement of accused**. It is true that I have not made entry of time as to when accused came before me and went on 04/02/2003 and 05/02/2003.

[39] It is true that it falls under the discretion of the Magistrate to record the confession statement of the accused or to record the statement of witness under section 164. I cannot state that no senior officer can compel the Magistrate to record confession or statement of witness under section 164. It is true that any order without jurisdiction is null and void. I am not able to state that as the order of Mr. Kella was out of jurisdiction, it was prima facie null and void. **It is true that Ranjeet Jodha, Prabhatsinh Gulabsinh and Sikandar Shaikh**

- three of them were produced before me to record their statements as witnesses. It is true that as they were witnesses, it can be assumed that they were not under police custody. The questions asked to these witnesses regarding police custody are generally asked to the accused under custody. It is not true that I asked such questions to these witnesses because I was under impression that these witnesses were under police custody earlier. It did not happen that no witness gave answer to any question at all. I cannot state without seeing the record as to whether answer of any question remained to be written. I am not able to state without seeing the record as to whether when the statement was read over after recording the same, I had noticed that answer to some question remained to be written. It is true that if I had noticed at the time of reading over the statement that answer of question is remaining to be written, I would have asked the answer and recorded the same. It is not true that I have recorded the confession statement and statement of witness without paying attention to the precautionary steps, which ought to be done before recording the confession of the accused and statement of the witness under section 164

6 Along with the above testimony, deposition of **Dr. Juber Mahammad Yusuf Mamji PW180**, reads as under:

[1] I have been residing with my family at my residence situated on the Maulana Azad Road in Godhra City for the last 10 years. I have been discharging my duty as Professor in Gujarat Homeopathic Medical College at Savli since 2007. I had been practising as Medical Practitioner running hospital in the name of "Madni Shifa Clinic" at my residence situated on the Maulana Azad Road in Godhra in 2003 and prior to it.

[2] **Generally, timing of my hospital was from 10 o'clock. I had been residing above the hospital at that time. One patient, namely Jabir, came for the treatment at about 9.30 am on 27/02/2002. On examining him, C.L.W. was found on his forehead. I gave treatment to him and took three stitches on injury. The patient informed that he sustained injury due to falling from shelf. I gave necessary medicines to the patient and charged him Rs. 50/- towards fee. Thereafter, the aforesaid patient did not approach me for further**

treatment of the said injury again. The aforesaid patient came to my clinic for the first time. I am shown mark 28/260. Having seen the same, I state that it is the certificate prepared by me in my own handwriting on 29/01/2003 in connection with aforesaid matter. It bears my signature, and facts written therein are correct, and I handed over the aforesaid certificate to the police.

Note:- *With regard to assigning exhibit no. to mark 28/260 after admitting the same in evidence, learned advocate Mr. A.D. Shah for Defence has drawn attention of the court and stated that as certificate addressed to police was prepared on 29/01/2003 after statement of witness was recorded on 24/01/2003, and as certificate bears signature of the witness, it can be considered to be statement u/s 161 of Cr.P.C. Therefore, as per provisions of section 162 of Cr.P.C., the same cannot be admitted in evidence. After hearing both parties in this regard, the case was adjourned for decision.*

[3] The injury sustained by the patient can be caused if blow of any hard and blunt substance is inflicted. The police recorded my statement in connection with aforesaid fact on 24/01/2003. I did not know the patient. I have been residing in Godhra since birth. It is not so that I knew the said person as I had been residing in Godhra since birth. If patient examined by me is present in the court today, I can try to identify him.

Oath administered again,

Note:- *The witness went very close to the accused persons, who are sitting in the court, keeping Court Shirestadar Mr. Patel with him and after examining for about three minutes, he could not identify any person out of accused persons as patient examined by him.*

Cross examination : - for accused persons
- by learned advocate Mr. A.D. Shah
(for Accused no. 4, 6, 10, 13, 38, 42, 51, 52, 54, 58, 59, 61, 69, 75, 78, 79, 81, 82, 84, 85, 86 to 89, 91 to 99)

[4] It has not happened that police might have written a letter to me seeking some information after recording my statement on 24/01/2003. The police did not visit my clinic again after recording my statement on 24/01/2003. I did not prepare any case papers in respect of treatment given to the person, who approached me for treatment on 27/02/2002 as

was stated in the examination-in-chief. I had been maintaining register in respect of treatment given to the patient in the clinic at that time. It is true that entry is made in the said register in respect of name of patient, age, history of injury. It is true that when police came to record my statement on 24/01/2003, police did not ask for register of my clinic of that time or I did not show the same on my own.

[5] It is true that I never saw this patient before 27/02/2002. It is not true that I have never seen this patient even after 27/02/2002. The witness states that he saw him in the police headquarter. I saw him on the same day my statement was recorded. It is true that identification parade in respect of the patient has not been conducted before Executive Magistrate in my presence.

Cross examination :- for accused persons
- by learned advocate Mr. A.A. Hasan
(Accused no. 1 to 3, 5, 18, 22, 24, 31, 37, 41, 43, 47, 53, 63, 65, 67, 74, 77, 90, 100, 101)

[6] It is true that police chowki no.3 is situated adjacent to 'Madni Shifa clinic". It is true that Godhra railway station is at walking distance of five minutes from my clinic. It is true that there is not any Police Head quarter in Godhra Railway Police station. It is true that Mr. Noel Parmar, Deputy Superintendent of Police, Western Railway, Vadodara called me. It is true that my statement dated 24/01/2003 was recorded at Kothi office, Kubernagar, Vadodara. It is true that I was compelled to come personally at Kothi office, Kubernagar, Vadodara to get my statement recorded. It is true that I requested at that time to record my statement at Godhra. It is true that I was called with my letter pad at Vadodara on 29/1/2003.

[7] I am aware about the fact that when any correspondence is made in Medico legal case, it is necessary to enter Inward and Outward Number therein. It is true that any reference number or outward number has not been made in certificate of Mark-28-260. It is true that I was told to issue certificate addressing Sub Divisional Police officer, Western Railway, Vadodara. It is true that the aforesaid certificate was prepared in Vadodara office as per instruction of the said police officer. It is true that it has not been mentioned anywhere in the record maintained by Medical Practitioner in connection with

the aforesaid certificate.

6.1 That the above testimony of **PW-180** is very relevant circumstance of the case even though evidentiary value of confessional statement of Jabir Binyamin Behra and statements of Ranjitbhai Jodhabhai Patel, PW-224, Prabhatsinh Gulabsinh Patel PW-231 and Sikandar Mohammad Shaikh PW-237 are considered independently.

6.2 **In cross-examination this PW-246, Shri R.K.Parmarl learned CJM, Godhra, however, admits that he was not aware of the procedure laid down in para 34 of Criminal Manual, at the same time he makes it clear that procedure which was required to be followed for recording confessional statement of accused and statements of witnesses under Section 164 and under Section 281 of the Code, 1973 was imperative and same was followed. No complaint was made by either accused or witnesses about any physical torture by police and they were found healthy and having understanding of the decision. The above PW replies to a suggestion about presence of any police personnel, it was stated that all police personnel were removed outside the court room, but in the lobby of the court premises if police personnel were present for maintaining law and order and bandobast, he was not aware about it. Though initially this PW was instructed by learned Additional Sessions Judge on 26.02.2003 to record statement of witnesses within period of 7 days, it was extended up to 07.03.2003. In further cross-examination, this PW himself states that yadi was given to S.B.Patel, PSI by him so as to forward the same to Vadodara Central Jail authority and he had no idea about any direct or indirect involvement of S.B.Patel, PSI, in the investigation of the crime. That regarding necessity of judicial custody of accused, this PW is aware, but from record it appears that**

accused Jabir Binyamin was taken from court of learned CJM, Godhra to Vadodara on 04.02.2003 and handed over to jail authority and then was brought back on 05.02.2003 before the court hours, to that extent viz. during journey hours the accused remained in police custody at Godhra. This PW is aware about availability of Sub-Jail at Godhra for keeping under-trial prisoners. That this PW clearly stated that he was aware of the fact that other accused was in judicial custody, jail authority was to bring him before the court with separate police japta and this work was handed over to S.B.Patel, PSI because offence had taken place within the jurisdiction of Railways, Godhra and that conduct of Dy. S.P. was not up to the mark in the court. S.B.Patel, PSI was handed over Yadi. According to this PW main purpose of sending accused to judicial custody and giving 24 hours time for reflection before recording confessional statement so that he may remain free from the effect of police custody and may reconsider his decision to confess the crime. That for better appreciation of evidence, we have produced relevant testimonies before the court in earlier part of the judgment. Thus, what emerges on record is as under:

[1] He was unaware of procedure form qua paras 33 and 34 as laid down in Criminal Manual, but was quite well versed with basic requirements under Section 164 read with Section 281 of the Code, 1973 to be followed in such a case.

[2] That in the Yadi he asked to handover the custody to PSI Shri S.B. Patel. On 29.01.2003 Noel Parmar was accompanied by other Police Officials, the Magistrate on sensing unusual behavior of Noel Parmar, inquired for such other names and came to know that S.B. Patel one of the Police Officers

accompanied Noel Parmar.

[3] On 04.02.2003 PSI S.B. Patel produced the accused before this witness and yadi was also given to Shri S.B.Patel along with the accused to be handed over to Central Jail Authority, Vadodara and a copy to Deputy Commissioner of Police.

[4] That in the Court Room only one police person accompanied the accused for the purpose of security on that day.

[5] That he did not note on production of accused on 04.02.2003 that he was Chief Judicial Magistrate, Godhra in the confessional statement (the witness volunteered that he has stated that he was Chief Judicial Magistrate, Godhra, Shri R.K. Parmar).

[6] Though this witness had not inquired into details about police custody of accused prior to 04.02.2003 and no verification was made about accused confessing before the police for recording of a videograph during interrogation, which was not mandatory but all basic and relevant questions were asked about willingness and volition on the part of the accused that his decision to confess the crime was not due to any threat, undue pressure, enticement, temptation for any gain and even consequences of such confessional statement were also explained.

[7] That this witness knew about the availability of Sub-Jail

at Godhra, but the accused was brought from Central Jail, Vadodara and considering the magnitude of crime and safety of accused proper course of action was to sent back the accused to Central Jail, Vadodara even considering law and order situation.

[8] He handed over the custody on 04.02.2003 to PSI Shri S.B. Patel for being submitted to Central Jail, Vadodara.

[9] In his cross-examination by Mr. A.A.Hasan, learned advocate for the accused Nos.1 to 3 and other accused, it was made clear that when he recorded the statement of accused in the court room, the lobby of the court room, outer part of the window situated to other side and the court room was full of advocates and there were common people in addition to the advocates. This witness stated that he had instructed the personnel of police to go out and denies that it is not true that during the procedure of recording the statement there was movement of advocates and common people in the court room even constable on duty in the court was instructed to take care that movement is not made.

[10] He was confronted with un-initialed correction to the name, surname "Panval" "Bala" and the addition in the last line of the word "pump" and the replacement of the word "standing" with "coming" on page No.7.

[11] The statement was recorded in presence of the advocates.

[12] Identification of thumb impression of accused, without

signature was done by Court Clerk.

[13] No carbon copy of the statement was taken simultaneously neither photocopy was obtained.

[14] Procedure as prescribed in Second Part of Clause 7 and 9 of Form No.35 in the Criminal Manual has not been noted in the confessional statement of the accused recorded on 05.02.2003, but substantial compliance was made for statutory procedure under Section 164 read with Section 281 of the Code, 1973.

[15] That in the order dated 29.01.2003 passed by Railway Magistrate it could be noticed that remand of the accused was granted for a period between 22.01.2003 to 30.01.2003 and he was in judicial custody when he was produced before this witness.

[16] He was aware of the fact that the accused had confessed to the police while in police custody.

[17] He was unaware of the nature of the treatment given to the accused while in judicial custody on 04.02.2003 and 05.02.2003, but ensured physical and metal health of the accused and that whether he was able to understand and answer the questions to be put to him.

[18] That in the end of the confessional statement of Jabir, there is no endorsement that the statement was read by or read over to the accused and the contents thereof are true.

[19] This witness did not make any effort to ensure production of the accused directly from the judicial custody by jail authorities.

7 Thus, on this aspect of police custody during transit, legal flaw / infirmities appears about police custody of accused Jabir Binyamin for taking him to Central Jail, Vadodara on 04.02.2003 but again when accused was produced on 05.02.2003, this PW followed the detailed statutory procedure as required under Section 164 and Section 281 of the Code, 1973. That the procedure contained in paras 33 and 34 of Criminal Manual is informative and has genesis in Section 164 of the Code, 1973 and though unaware this PW has in fact followed such procedure in essence while recording confessional statement of the accused and statements of other three witnesses and, therefore, to that extent the confessional statement of the accused is voluntary, trustworthy as willingness was ascertained and consequence of the confession resulting into conviction and sentence of the crime confessed was also explained. That thumb impression on every page of the statement so certified by PW and physical and mental condition of the accused was ascertained and was found in order. Looking to the sensitive nature of the case, providing heavy police bandobast either to bring the accused to the court or in the court premises by itself cannot be said that the accused had given confessional statement and witnesses have given statements under Section 164 of the Code, 1973 out of fear and the same are not voluntary and true. Besides this PW after studying legal provisions and without being influenced by instructions passed by learned Additional Sessions Judge, Panchmahals, Godhra, recorded confessional statement of accused and other statements of witnesses PW-231 and PW-224. That as confessional statement of Jabir Binyamin

Behra is voluntary and truthful, and therefore believable, but at the same time cannot be used against co-accused unless cogent and convincing corroborating evidence is available.

That confessional statement of Jabir Binyamin Behra recorded under section 164 of the Code, 1973 satisfies twin objects viz. Voluntariness and truthfulness and therefore, trustworthy as held by the Apex Court in the case of Aloke Nath Dutta [supra]. In the very judgment in para 116, a reference is made to the decision in the case of Balbir Singh [supra]. According to the Apex Court one rule is almost certain that no judgment of conviction shall be passed on a non-corroborated retracted confession. The court shall consider the material on record objectively in regard to the reasons for retraction. It must arrive at a finding that the confiscation was truthful and voluntary. Keeping in mind the above, we find that plenty of corroborative evidence available to believe the confessional statement of Jabir Binyamin Behra and that is borne out from the statement of witnesses PW-224, PW-231, PW236 and PW-237, respectively not in their statements recorded under Section 164 of the Code, 1973, but also in their testimonies before the court. That FSL and scientific evidence also emerge on record corroborate the confessional statement of Jabir Binyamin Behra. We are convinced that confessional statement of Jabir Binyamin Behra is voluntary, truthful and, therefore, trustworthy and is believed. See, decisions of the Apex Court in Volume-II of the judgment in the case of Rabinderpal Alias Dara Singh [supra], Baijnath Saha v. State of Bihar [supra] and Yakub Memon [supra]

7.1 The above three statements of witnesses viz. Sikandar Mohammad Sidik Shaikh, Exh.237 and Ranjit Jodhabhai Patel, PW-224 and one confessional statement of accused Jabir Binyamin Behra

recorded under Section 164 of the Code, are very important for deciding the cases on hand. This evidence is relied on to establish conspiracy, gathering of violent mob forming unlawful assembly, pelting of stones, assault by weapons and setting S6 coach on fire and damage to other coaches and also topography at and around scene of offence.

7.2 Submission of learned Special Public Prosecutor regarding obtaining certified copy dated 05.02.2003 of confessional statement recorded by PW-246, learned CJM, by Investigating Officer PW-244 viz. Exh.1469 vis-a-vis testimonies of PW-246 that no copy of the confessional statement was made available, it appears in the evidence on oath by PW-246 of the then CJM, Godhra that no xerox copy or any other copy of the above statement was prepared by him. At this stage of appeal, the certified copy of the confessional statement dated 05.02.2003 of Jabir Binyamin Behra, accused, is produced which reveals that certified copy was applied and obtained by Investigating Officer PW-244, and the documentary evidence assumes significance. But, we restrict our appreciation of the evidentiary value of such confessional statement based on various case laws to which reference is already made in Volume-II of the judgment in which principles and parameters are laid down for requirement of ascertaining truthfulness and voluntariness of such statement under section 164 of the Code, 1973. In view of the reasons already assigned by us earlier, deposition of PW-246 about non-availability of a copy of the confessional statement dated 05.02.2003 of Jabir Binyamin Behra, accused, and obtaining certified copy on the same day by the Investigating Officer PW-244 needs no further deliberation at this stage since statutory requirement under Section 164 of the Code, 1973 was followed by PW-246 while recording such statement.

8 That testimonies of **Bhikhabhai Harmanbhai Bariya, PW-**

206 and Ranjitsinh Jodhabhai Patel, PW-224 before the trial court at Page 1060 and 1139 respectively corroborate statements under Section 164 of the Code of PW-224, 236 and 237 qua part of the conspiracy. This witness was selling beedies and cigarettes at Godhra Railway station and was working with Muslim employer and was present at the time and date of the incident i.e. 27.02.2002. In his cross-examination in chief arrival of the Sabarmati express train according to him was around 7:30 to 7:45 am and karsevaks uttering slogans of Jay Shriram and it was over-crowded and further a quarrel took place between Karsevaks and hawkers for payment of money with Mehboob Latika, who ran towards signal Falia and members of Muslim community started pelting stones. After the train was started it stopped at a distance, as the chain pulling was done and thereafter again train started and Salim Panwala had shouted that, "stop the train", and thereafter Anwar Bhopo, Kadir Pataliya and Saukat Bhana climbed on the train. Kadir Pataliya went between two couplings and he had turned the cock, and the train was stopped after going ahead. In para 3 of his deposition, it is stated as under:

> "**3. The stone pelting on the 'A' Cabin was continued when I went, the public was pelting stones. The mob had set on fire. There, Anwar Bhobha was standing down near Gida, and I was standing behind the 'A' Cabin at that time. There were Hasan Lalu, Saukat Lalu, Mohammed Lalu, Kadir Pataliya, Babu Pataliya, Soeb Kalandar, Yunus Ghadiyal, Mehboob Popa, Salim Panwala, Saukat Bibino, Saukat Bhana, Salim Panwala, Ramzani Bibino.** Then the coach of train was set on fire and the stampede took place and I had gone at home. The police had taken my statement related to the incident on 25.07.2002. If the hawkers who were present on the platform on the day of the incident and those hawkers who got on the running train and those persons who were present near 'A' – Cabin at the time when the attack was done on the train, are present in the Court, I can identify them.

Note : *Among the accused persons, the witness has identified total – 6 persons during the period of about seven minutes after going very close to the accused persons where they are sitting in the Court Room by keeping the Court Shirastedar – Mr. Patel with him. The names of these 6 persons as per the say of the witness are as below.*

[1] Saukat Bhana
[2] Hasan Lalu
[3] Saukat Bibina
[4] Mehboob Latika
[5] Irfan
[6] Mehboob Popa

On asking the names by the Court to the aforesaid 6 accused persons, they have stated their names as below respectively.

[1] Saukat Farook Pataliya
[accused no. 5 - S.C. no.75/2009]

[2] Hasan Ahmed Lalu 11
[accused no.4 - S.C. no. 71/2009]

[3] Mohammed Saukat Yusuf Mohan
[accused no. 1 - S.C. no. 85/2009]

[4] Farook (Mehboob) Ahmed Yusuf Hasan
[accused no. 1 - S.C. no. 84 /2009]

[5] Irfan Abdul Majid Kalandar
[accused no. 2 - S.C. no. 81/2009]

[6] Mehbood Yakub Mitha
[accused no. 2 – S.C. no. 71/2009]

Note : *The names of the persons whom the witness mentioned in the Examination-in-Chief – i.e. Saukat Lalu, Mohammed Lalu, Hasan Lalu, Kadir Pataliya, Babu Pataliya, Soheb Kalandar, Yunas Ghadiyal, Salim Panwala, Ramjan Bibino are not present now in the Court as accused persons. Among the accused persons, there is no any accused namely Yunus Ghadiyal but Yunus Abdulhak Samel is present. There is no any accused with the name Ramjani Bibino. The accused namely Ramjani Binyamin Behara is present in the Court. Among the names which are stated by the*

witness in the Examination-in-Chief, Sohed Kalandar is present in the Court room".

8.1 In para 23, the above witness confirms to have made statement before the police about involvement of the accused, which reads as under:

"**23. It is not true that I have not dictated in my police statement that, "all started shouting. It is not true that I have not dictated in my police statement that, "The mobs came and started stone pelting on the station." The witness states that I have dictated in my statement that, "Muslim Ghanchi came running and started stone pelting on the train." It is not true that I have not dictated in my police statement that, "Salim Panwala shouted at this time." The witness states that I dictated in my statement that, "Salim Haji shouted." It is not true that I have not dictated in my police statement that, "Kadir Patadiya boarded in the last coach and other two persons boarded in the front coaches. Kadar Patadiya went between two coupling and he turned the bolt." The witness states that I have dictated such in my police statement that, "I have seen Kadir Patadiya turning the disc of chain pulling." It is not true that I have dictated such in my police statement that, "Stopped near cabin 'A'." It is not true that when the the coach was burning and the people were causing stampede, the names of the persons that I have stated in examination in chief may have come there running. It is true that I have dictated such in my police statement that, "And other hawkers, Mohmad Ahmad Lalu, Sokat Ahmad Lalu, Hasan Ahmad Lalu, Mahebub Popo, Kadir Patadiya, Babu Patadiya, Irphan Bhobho, Shuakat Bibno, Soyeb Kalandar, Yunus Ghadiyali, Imran Sheru, Ramzan Bibino, his nephew Shukat and Salim Panwala and other hawkers ran." It is true that the hawkers came running from towards Railway station**".

9 **Ranjitsinh Jodhabhai Patel, Exh.224**, who was working at petrol pump of Kalabhai along with another employee Prabhatsinh Gulabsinh Patel, PW-231 and narrates the incident of previous day viz.

26.02.2002 and around 22:00, the owner of Aman Guest House, Rajak Kurkur came and another person named Siraj Bala following him in bottle green coloured tempo and Salim Panwala was sitting with him on the driver's seat. There were total three persons viz. Binyamin Bahera, Saukat Lalu, Salim Jarda sitting at the back side of tempo and purchased 140 liters of petrol by paying money to Prabhatsinh. 7 carboys having capacity of 20 liters each were filled in and thereafter they went back.

9.1 Total four persons were identified and facts about identification read as under:

> *"Note : The witness has kept the Court Shirastedar Mr Patel with him and he goes close to them who are sitting in the Court room. During the time of about five minutes with the accused persons, they made two persons to stand. Meanwhile, the Special Assistant Public Prosecutor Mr Prajapati submitted before the Court to make two accused persons stand in a queue, it was instructed from the Court to make the accused persons stand in a queue. Therefore, they stood in a queue. During the course of time of fifteen minutes, the witness has identified total four persons. As per averment of the witness, the name of person standing first is Jabin Binyamin Bahera, second is Siraj Bala, third is Rajak Kurkur and forth is Salim Jarda. On being asked by the Court the names of all three persons, they have respectively stated their names as follows.*
>
> (1) Jabir Binyami Bahera
> (Accused no : 2, S. C. No: 72/09)
> (2) Hasan Ahmed Lalu
> (Accused no : 4, S.C.No: 71 / 09)
> (3) Yusuf Allu Baksh Kazi
> (Accused No : 16, S.C.No: 69/09)
> (4) Taiyab Abdulla Shaikh
> (Accused no : 28, S.C.No: 69/09)
>
> The witness states during examination in chief that the said accused persons namely Rajak Kurkur, Salim Jarda and Siraj Bala are present in the Court. Whereas, Salim Panwala and Saukat Lalu are present in this Court".

9.2 The above witness explains about going to the police station on 10.04.2002 and denial of any knowledge about incident of his interview with TV reporter on TV channel. He further narrates about offering money by TV report under the guise that the reporter was writing the book and to make a TV serial. Further he confirms about his statement before the learned CJM and police protection provided to him and co-employee Prabhatbhai. In his further cross-examination dated 08.03.2010 by learned advocate Mr. A.A.Hasan for the defence in para 17 the above witness deposed as under:

> "17 On 04/11/2008, the Police had recorded my statement. I do not know the fact that the officer who noted down the statement on that day was Mr J.R. Mathaliya, District Superintendent of Police, Panchmahal. I have heard the name of Mr J. R. Mathaliya. When I dictated the statement dated 04/11/2008, I had heard his name. Now I am saying that, when you asked me about the aforesaid question regarding the statement dated 04/11/2008, I have heard his name. As per my say, when you said the name of Mr J. R. Mothaliya, I have heard the name. It is not true that I was such informed that many questions shall be asked to me by Advocate in the name of Mr J.R. Mothaliya. The police with me had informed me to dictate the statement at Gandhinagar. It is true that the police was at my home only for the bandobast. It is true that I asked for neither summons nor write from the police and the police did not give me. It is not true that when I went to dictate the statement at Gandhinagar, the police officer who recorded my statement had apprised me that his name is **Mr J.R. Mothaliya and he is a District Superintendent of Police, member of SIT and he is investigating this said case. It is true that at that time the video recording was done. It is true that at that time, my earlier statements dated 10/04/2002 and 23/02/2003 were read over to me. It is true that I was asked such as to whether my statement dated 10/04/2002 is true or false. It is true that I had admitted such on that day that my statement dated 10/04/2002 is true and appropriate. It is**

not true that while recording the statement on 04/11/2008, I did not dictate any fact regarding the person from Delhi who took my interview and the interview which the persons of "TV Nine" had taken. It is true that the video recording was done during statement dated 04/11/2008. It is true that the fact which I was dictating during the said statement was noted down by the Police employee. I can not say today also as to how much time it took exactly for recording the said statement. It is true that the statement of mine which was recorded on that day was read over to me. It is true that I had also ascertained at that time regarding note of the statement. I do not have idea of the fact as to whether my statement which is recorded was in two papers or not. If you say, it may be in two papers. I do not have idea of the fact as to whether my signature has been taken below the said statement or not. On being asked to me for reading my statement dated 04/11/2008, I state after reading the same that there is neither any mention regarding interview by the person from Delhi nor from TV nine. It is true that in my statement dated 04/11/2008, I have dictated farming as my occupation. My statements dated 10/04/2002 and 23/02/2003 are shown to me. I state after looking to it that my occupation therein has been written service. It is true that the fact of service noted therein is false. It is true that regarding the said false note of the service, I have not taken objection till date at any place. The Chief Judicial Magistrate asked me as to whether I am doing farming or not and I denied for the same. It is not true that in order that the said fact may not come on record that I am running the business of grocery by the help of Shri Noel Parmar, I have intentionally concealed the said fact during statements before the Police".

9.3 Further, in para 20 of the cross-examination, the above witness deposed as under:

"20 I do not have idea of the fact that my statement dated 10/04/2002 was recorded in presence of the Deputy Superintendent of Police. I do not say that the fact which I have dictated during the statement dated 10/04/2002 was false. As per my say, the fact which I stated during statement dated 10/04/2002 was false. It is not true that after ten days of the incident, Ajagaribhai was not my owner. **It is true that**

after 28/02/2002, I did not serve at the petrol pump sealed earlier till it was re-opened. I can not surely say as to in which month the petrol pump was opened. The witness willingly states that it had opened after about four-five-six months. I was not inquiring as to whether the said petrol pump open in between that period or not. Between the said period, neither I was called anytime nor was I given any salary. It is true that I have dictated such during my statement dated 10/04/2002 that "Thereafter, I read news paper on the next day and I came to know that at the place near 'A' cabin of Godhara railway station, Muslim persons of Singal Faliya stopped Sabarmati express train yesterday and made stone pelting and set one coach on fire. Due to the same, some passengers in the said coach died by burning. In the said train, Karsevaks were returning from Ayodhya. It was known that due to the dispute with some Muslim persons selling tea, the said incident occurred." It is true that I have also dictated such during the said statement before the Police that "On the day the said incident occurred, we have not sold petrol from our petrol pump to any person in loose in a Can and from our petrol pump, no loose petrol or diesel is sold in Can." The witness states that it was dictated at the instance of the owner. It is true that it has not been written in my statement dated 10/04/2002 that, I have dictated the same at the instance of our owner. It is true that in my statement dated 10/04/2002, the fact regarding loose sale of petrol, diesel has been dictated false. I felt such before 23/02/2003 that I have dictated certain facts false in my statement dated 10/04/2002. It is not true that around the time of 10/04/2002, I had left the service of petrol pump and therefore, I did not have any fear of my owner. I do not have idea of the fact as to whether the said petrol pump was opened in the month of August / 'Shravan' month of 2002 or not. After about eight months of the incident, I had served at the petrol pump for about ten days. It is true that during the service of ten days, no body assaulted on me or beat me. It is true that after leaving the service, I joined my farming work. During the said time, it happened for me to read news paper. I did not feel such after leaving service that I should state true fact to the police about which I stated false earlier in the reply at the instance of my owner. It is true that before 23/02/2003, I have myself not gone to Kuber bhavan or Godhara Railway Police station. I do not have idea of the fact that before 23/02/2003, the investigation of the said case was carried out in Godhara

Railway Police station and Vadodara Kuber Bhavan. Before 23/02/2003, the case was filed before Ld. Court and I did not have information as to whether the deposition of the accused was done or not. I had read in the paper that, the deposition of the accused has been done in the Court. I do not remember as to on which date I had read. I can not say as to before how many days prior to my statement dated 23/02/2003 I read the said news. I can also not say as to in which news paper I had read the said news. I had read the said news in the school of our village Sampa. I do not have idea as to how many persons together read the said news. I do not have idea of the fact as to whether only two news papers 'Gujarat Samachar' and 'Sandesh' are delivered in the said school or not. There was no any photograph of the accused in the said news paper. I do not have idea of the fact that there was no photograph of the accused in the said news paper. I do not have idea of the fact as to whether the said news was on first page in detail and in large fonts or not. It is not true as to whether it was published in the said news as to who, in which container, how and in which vehicle took petrol. In the said news paper, I had read the news regarding petrol. It did not happen that the news which I read was in one line only. **It is not true that on the basis of the said news, I dictated the statements dated 10/04/2002 and 23/02/2003. I had read the news regarding the fact that Jabir Binyamin Bahera had purchased petrol from petrol pump. I do not have idea of the fact as to whether the news was published in connection with the statement of mine recorded in the Court. It is not true that as stated in the examination in chief, no any person had arrived at our petrol pump to purchase petrol and I have not filled up any petrol but as Mr Noel Parmar has given me the economical help, I have been fabricated witness at his instance and I am stating this fact absolutely false**".

10 **SALIENT FEATURES OF THE EVIDENCE OF RANJITSINH JODHABHAI PATEL [P.W.224 EXH.1139] ARE:-**

[1] Rajak Kurkur is the owner of Aman Guest House approached Kalabhai Petrol Pump at M-80 after 6:00 p.m. on 26.02.2002 when the witness was sitting in the office of Kalabhai Petrol Pump, with parrot colour tempi given by Siraj

Bala accompanied by Salim Panwala on the driver seat and occupied by Jabir Bin Yamin Behra, Saukat Lalu, Salim Jarda in the rear. Salim Panwala went to Prabhatsinh chamber and gave money for purchasing of petrol to him. Prabatsinh, Salim Panwala and Rajak Kurkur all three came out. Prabhatsinh instructed him to fill 140 litres of petrol. Seven carboys each of 20 litres were filled with petrol, the lead was closed by Salim Jarda, Jabir Bin Yamin Behra, Saukat Lalu and Siraj Bhala and then Rajak Kurkur rode M-80 followed by Siraj Bala with tempi accompanied by Salim Panwala on the driver side and occupied by Saukat Lalu, Salim Jarda, Jabir Bin Yamin Behra in the rear and it was driven to Aman Guest House.

[2] Claims acquaintance with Rajak Kurkur as owner of Aman Guest House and frequent visitor to the petrol pump.

[3] Claims acquaintance with Salim Panwala as a leader and frequent visitor to the petrol pump.

[4] Claims acquaintance with Jabir Bin Yamin Behra as famous person of single falia and a criminal involved in various thefts.

[5] Claims acquaintance with Salim Jarda, Saukat Lalu and Siraj Bala as rickshaw drivers and frequent visitors to the petrol pump.

[6] His two statements were recorded on 10.04.2002 and 23.02.2003.

[7] Identifies Jabir Bin Yamin Behra, Hasan Ahmed Lalu, Yusuf Alabax Kazi, Taiyab Abdullah but does not identify Rajak Kurkur, Salim Jarda and Siraj Bala though present in the court. Salim Panwala and Saukat Lalu were not arrayed as an accused.

[8] His statement under Section 164 was recorded on 11.03.2003 and was called for T.I.Parade of Salim Jarda on 17.06.2004 in Mamlatdar's office and on 15.10.2004 for Siraj Bala.

[9] Went voluntary to the police on 10.04.2002 as his employer had called him.

[10] States that he stated before SIT that before about one year of 2008 a person chanting Jay Shree Ram came from Delhi and asked him various questions regarding the extent of land possessed by him, family history and gave him Rs.2,000/- and told him that more money will be given, he is planning to write a book and make T.V. serial, and that if I would say what he wanted, more money will be given and then he told me to state that Noel Parmar paid him Rs.50,000/- and therefore he stated that.

[11] Admits that he was confronted with his interview given to the Delhi man by T.V.9, that Noel Parmar paid him Rs.50,000/- and showed some photographs to be identified as accused persons and was asked to state whether those facts were correct or not and the witness stated that the facts were not correct.

[12] Admits that the Magistrate informed him that his statement was recorded as applied for by him but disputes having made in the application for the purpose of recording such statement. However it appears that initially the Magistrate had refused to record the statement but subsequently under the orders of the Additional Sessions Judge, his statement was recorded along with that of Prabhatsinh on different dates.

[13] Admits that he constructed a house and a provision store with pacca construction and covering roof of galvanized sheet in 2003 after termination of his job.

[14] Earlier his income was Rs.1,250/- per month and a daughter to be maintained.

[15] Admits that he is now the owner of motor-cycle GJ-01-CN-6199.

10.1 **He clarified that in his previous police statement dated 10.04.2002 it was stated that no petrol / diesel was sold from his petrol pump as he was asked by the police about the day of incident; however he volunteers that the statement was given as instructed by his employer. During the identification in the court, in the first round admittedly he could identify only one person though made an attempt to identify them from a close distance and other three were wrongly identified by him. The explanation given by him was that because of long time gap and change in physiognomy of the accused and their appearance, the mistake was committed. However, he did**

not express the difficulty faced by him in the identification of the accused in the open court during the cross-examination and he identified the accused with confidence that they were the same persons as identified by him.

10.2 **His statement was recorded on 23.02.2003 by the police and 11.03.2003 by the Magistrate.**

10.3 **In none of the statements the witness has given an explanation that the statement qua "no sale of petrol was given by him at the instance of his employer".**

19.4 **Admittedly he felt the need of giving statement dated 23.02.2003 after publication of the details of the statement given by Jabir Bin Yamin Behra in the newspaper; however only after more than 10 days of statement of Jabir Bin Yamin Behra.**

10.5 **In none of the police statements he mentions the registration number of tempi.**

10.6 **He disputes the omission that Salim Panwala disembarked the tempi and went into the cabin and gave money for buying petrol to Prabhatsinh and then Prabhatsinh, Salim Panwala and Rajak Kurkur all three came out and Prabhatsinh instructed me to fill 140 litres petrol.**

10.7 **He disputes the omission that Rajak Kurkur is the owner of Aman Guest House and frequently comes to the petrol-pump and seats with my employer and therefore I know him.**

10.8 **He also disputes the omission "sometimes when there was an occasion for his employer to go out, irrespective of the persons of my employer he used to give tickets to our cashier".**

10.9 **He also disputes the omission that "because he was indulging in theft and robbery, I know him.**

10.10 **He also disputes the omission that "Salim Jarda, Siraj Bala and Saukat Lalu who were auto-rickshaw drivers ….. ".**

10.11 **He disputes the omission in his statement dated 23.03.2002 that Salim Jarda fixed the lead on carboys and that Siraj Bala drove the tempi to Aman Guest House and the omission in the statement before the Magistrate regarding the person who fixed the lead on the carboys.**

P.W.221 hostile.

P.W.220 panch of contents of coach (Exh.86).

P.W.219 Surjibhai Chhanabhai Baranda - (Deputy Suptd. of Police, Vadodara Zone, Western Railway).

P.W.218 Ramsinh Kodarbhai Patel (PSI Western Railway, Bharuch)

P.W.217 Ambalal Chhotalal Patel (P.I., CID Crime, Gandhinagar).

P.W.215 Rameshbhai Raisinh Solanki (hostile).

P.W.213 Roopsinh Amarsinh Navi (Godhra Control Police Incharge).

P.W.211 Bhikabhai Ranchhodbhai Machchi (P.S.I., Nadiad Railway Station). He recorded statements of Veenaben Mafatbhai Patel-PW-83, Sumitraben Bhupendrabhai Patel on 05.03.2003 and Satishkumar Ravidutt Mishra – P.W.96 on 06.03.2002. No material contradictions or omissions.

P.W.210 Umarkhan Kalaji Malek (Second P.SI Valsad Police Station) recorded statement of Virpal Chaidilal Patel - P.W.82 and Shila Pal. No material omissions or contradictions.

P.W. 209 Pravinsinh Modhbhai Gadhvi (PSI, LCB Western Railway, Vadodara) recorded statements of Satishkumar Mishra and his daughter Archana on 18.03.2002 recovered logbook Exh.194 and panchnama Exh.195 drawn on 19.07.2002 from Uday Chandrakant Katiyar P.W.116 (Junior Engineer) in presence of panchas and in that connection he recorded his statement.

P.W.199 Prabhatbhai Punabhai Bhoi (Unarmed Police Constable) who was deployed for bandobast on the railway station since 26.02.2002 and who in addition to the testimony given by other witnesses deposed Siddiq Baqar and Siraj Rickshawala having complained to him against beating by karsevaks. Siddiq Baqar and Siraj Rickshawala admittedly showed him the injuries caused to them including an injury on the right eye of Siddiq Baqar. He deposed that the assailants

were determined not to budge despite firing of teargas cell. He and constable Karansinh rounded-off three persons namely Nasirkhan Sultankhan Pathan, Sadiqkhan Sultankhan Pathan and Alauddin Alimuddin Ansari with iron rod, iron pipe and iron rod respectively and submitted to the police who cordoned them alongwith the other at A-Cabin.

10.12 Other four persons namely Yusuf Sabir Ismail with handle-less axe, Yar-Mohammed Rafi Mohammed with stick, Ahmed Abdul Rahim with iron rod, Azgar Ali with handle-less axe were seen by him in the mob.

10.13 His statement was recorded on 01.03.2002 and 24.12.2002.

10.14 Mentions about firing by police etc.

10.15 Identifies after 15 or 17 minutes of look at the accused in 4 to 5 rounds. Eight accused namely Yusuf Sabir (Accused No.17 Sessions Case No.69/09), Alauddin Alimuddin Ansari (Accused No.15 Sessions Case No.69/09), Azgar Ali Kamruddin Vohra (Accused No.26 Sessions Case No.69/09), Sadiqkhan Sultankhan Pathan (Abdul Sattar Ismail Ghitali) (Accused No.13 Sessions Case No.69/09), Siddiq Baqar (Siddiq Abdul Rahim Bakar) (Accused No.1 Sessions Case No.80/09), Ya Mohammed Rafi Mohammed (Inayat Abdul Sattar Jujera) (Accused No.10 Sessions Case No.69/09). The names of other two persons were not known to the witness, who, on verification, stated that they were respectively Kamal Badshah (Accused No.27 Sessions Case No.69/09) and Soeb Yusuf Kalandar (Accused No.01 Sessions Case No.75/09). The persons referred to by the witness in his

testimony were present in the court.

CROSS:

10.16 **He identified the accused with great difficulty for Sadikkhan Sultankhan Pathan, he identified Abdul Sattar Ismail Ghetali.**

10.17 **Admittedly, never before the incident, Abdul Sattar, Nasirkhan Sultankhan Pathan, Sadiqkhan Sultankhan Pathan, Kamal Badshah, Inayat Jujela were known to him by name and address. Neither any description of their was given in his police station.**

10.18 **Omissions regarding his deployment at Platform No.1 for bandobast and his reporting the completion of bandobast duty in the train upto Dahod to Jhalasab who noted the same in his case diary and his being present on duty along with others and the omission as regards 50 to 60 persons pelting stones on the train at parcel office and the omission as regards many people possessing deadly weapons and attacking the train as also the omission regarding exhortation to kill the atheist Kafir and the mob being violent and aggressive and his submitting three persons to the police man who had already caught others at A-Cabin and rounded them off and his involvement in the relief operation. It is noticed in his cross-examination.**

10.19 **Admittedly he did not disclose the names of the persons caught and interrogated by him before his statement dated 01.03.2002. No arrest memo was drawn by him.**

11 Even in cross-examination by other learned counsels

appearing for the defence the above witness has stood by his version and no major contradictions or omissions appeared on record.

12 **Sikandar Mohammad Sidiq Shaikh, PW-237**, an eye witness to the incident, who was selling pouches of drinking water at Godhra Railway Station has seen accused persons on the previous day around 9:00 or 9:30 hours while he was returning from railway station via Signal Falia to his home found Jabir Behra and Soyeb Qalandar nearby Posti ni Hotel. The above witness, **in para 4 of examination-in-chief stated as under**:

> "4 On the next day at about 7-45 or 8-00 hours, my family-members woke me up. They told me that there is an uproar outside and there is shouting. I got up and after washing my face, went to pond via rough road. I saw a parrot-coloured small tempo standing there on the rough road. I saw from near the pond that one train was there near "A" Cabin and many people were throwing stones on it and they were causing damage. Hence, I ran and went towards the train from there. There is a narrow lane behind "A" Cabin, I jumped over it and went upon the train. I climbed on a pile of stones and saw that people were causing sabotage on the train. Rajaq Kurkur, Bilal Badam, Hani Badam, Sidiq Badam, Aiyub Pataliya, Qadir Pataliya, Yakub Pataliya, Irfan Pataliya, Rauk Kamli and Faruq – brother-in-law of Rajaq Kurkur were among those who were causing damage to the train with bars. Thereafter, Rajaq Kurkur climbed on the steps of the coach no. S/6 and he was pouring petrol-like liquid with carboy from open window located near door and Salim Paanwala was lifting the said carboy from the lower part. At that time, Mahebub Latiqa split the partition between two coaches with a knife. Before that, Mahebub Latiqa had made holes in the carboy kept below. He had done so with an equipment like knife. After the partition was split, Mahebub Latiqa went to the inner section and thereafter, Jabir Behra also went inside. At that time, Saukat Lalu gave carboys to both of them, one for each. Thereafter, Saukat Lalu also went inside. At that time, Saukat Lalu was given a carboy by Rafiq Bhatuk. All the three of them went inside and thereafter, the door of coach no. S/6 facing

Godhra opened. Thereafter, Rafiq Bhatuk, Irfan Bhobha and Imran Sheru, all of these entered the coach from that door. They had gone inside with three carboys. Others were standing below. The persons standing below were sprinkling petrol in the broken window from carboys. Irfan Pataliya, Ramjani and Hasan Lalu were among them. Bilal Haji and Bhana had also arrived. Meanwhile, Hasan Lalu ignited a torn and worn cloth and lifted it with a stick and threw it into the coach. Hence, the coach caught fire and it started burning. Hence, the passengers in the coach began shouting. I was seeing all this even at this time by standing on the pile of stones".

12.1 In the court, the above witness made an attempt to identify total 10 persons standing in the line and the fact about such identification appears as under:

"Note : As the witness requested the accused persons sitting in a Court to stand in a line, the accused are standing in a line in the Court accordingly. During the time from 11-55 to 12.05 hours, the witness has identified total 10 persons out of those standing in the line. Their names as stated by the witness are as below respectively.

[1] Hani Badam
[2] Sidiq Badam
[3] Jabin Bahera
[4] Irfan Bhobha
[5] Rauq Kamli
[6] Irfan Pataliya
[7] Mahebub Latika
[8] Aiyub Pataliya
[9] Maulavi
[10] Bilal Badam

Thereafter, the witness has identified one more person out of those sitting during the time from 12-05 to 12-20 hours. His name is Hasan Lalu as stated by the witness. As names were asked to the aforesaid 11 persons by the Court, they have stated their names as below respectively.

[1] Mohammad Hanif Abdullah Badam

(accused no. 4, S.C. No. 82/09)

[2] Sidiq Abdullah Badam
(accused no. 1, S.C. No. 71/09)

[3] Jabir Binyamin Bahera
(accused no. 2, S.C. No. 72/09)

[4] Sikandar Abdulmajid Qalandar
(accused no. 2, S.C. No. 81/09)
(Irfan Abdulmajid Qalandar)

[5] Abdul Rauf Abdulmajid Dhesali
(accused no. 1, S.C. No. 78/09)

[6] Irfan Mohammadhanif Pataliya
(accused no. 1, S.C. No. 82/09)

[7] Faruq Ahmed Yusuf Hasan
(accused no. 1, S.C. No. 84/09)
(Mahebub Ahmed Yusuf Hasan)

[8] Aiyub Abdulgani Pataliya
(accused no. 2, S.C. No. 82/09)

[9] Maulavi Hussain Umarji
(accused no. 1, S.C. No. 74/09)

[10] Bilal Abdullah Badam
(accused no. 3, S.C. No. 79/09)

[11] Hasan Ahmed Lalu
(accused no. 4, S.C. No. 71/09)

Lastly, the witness has identified one person as Ramjani at the stage of registering of the names of the accused persons. On asking name to that person, he has stated it as Rajamani Binyamin Bahera.

The following accused persons are not present in the Court-room at present out of those whose names were stated by the witness in the examination-in-chief.

[1] Qadir Pataliya,

[2] Yakub Pataliya,
[3] Faruq,
[4] Saukat Lalu,
[5] Rafiq Batuk,
[6] Bhana,
[7] Imran Sheru.

The following accused persons are present in the Court-room whose names have been mentioned by the witness in the examination-in-chief.

[1] Rajaq Kurkur
[2] Bilal Haji
[3] Soyeb Qalandar".

12.2 The above witness further narrates about identification parade which took place before Mamlatdar qua Mehboob Latika and that he had no occasion to speak to Maulavi Hussain Umarji before the incident. However, after the incident he requested Maulvi to help him to provide grains, water, etc. He was living in chawl of 25 to 30 houses which were opposite to Mosque. **The above witness confirms to have made statement before learned Magistrate under Section 164 of the Code. In para 21 of his cross-examination the above witness stated as under:**

"21 The persons damaging the coach were doing so by going near the coach. It is true that they were damaging the windows by going near the windows of the coach. The persons pouring liquid on the coach were standing below the coach and they were sprinkling it from the carboy by splashing. It is true that I have seen the carboys well. I have never used carboys of this type. I had not seen the lids of these carboys. I have not taken in hand any carboys of this type. It is true that I have mentioned carboys in my statement. It is not true that I have dictated the detail of carboy in the examination-in-chief for the reason that it is written in my statement. I cannot state the fact as to at what height the windows were from the ground. I cannot state about my height also. My height was the same even before

eight years from now. The physique was also of the same kind at that time. It is not true that I was a child during the period of the incident.

22 In coach no. 6, three windows were broken from the door of the side of Godhra and two were broken from the side of Vadodara. I do not know how many windows are generally there in both the sides in a coach. I have had occasions of going inside coaches of train.

Question : Do you know that there are A.C. Sleeper and general coaches in the passenger-trains coming from Delhi and Bombay?

Answer : In some trains, there are special coaches and local coaches and in some trains, there is a coach with glass.

I do not know the fact as to which coach is known as 'A. C. Coach'. I know which coach is called a sleeper - coach. I have travelled in train. I used to go up to Derol and Piplod for hawking.

23 When the door of coach no. S/6 facing Godhra was opened, I had not seen anything else in the internal side. The witness states that the opposite (off-side) door was closed. At that time, I had not seen anything in the passage between the opposite door which was closed and this open door. I had not seen passengers or goods, children or women in this passage. It is true that iron-rods are fitted horizontally on the external part of the windows of the coaches. The rods fitted on the external side of the Windows which I state to have broken were not completely broken. The rods of the window opposite to me were not broken. As per my say, attempt had been made to break these roads but they were not broken. I cannot state the fact as to whether such things as pieces of glass of the windows, aluminum-strips of the windows or rubber-frame were lying on the ground at the place of the incident or not.

12.3 Further, he states that before his statement was recorded at Surat on 21.09.2003 he had not told to any person though he was an

eye witness of the incident. This witness also denies about providing job in Udhna, Surat by Noel Parmar, I.O. In paras 43, 44 and 45, the above witness who was standing on pile of stones stated stated about the incident and that the door was open after 3 persons had gone inside the coach and they were Rafiq Bhatuk, Irfan Bhobha and Imran Sheru and these 3 persons were named before the learned Magistrate in the statement recorded under Section 164 of the Code. The above witness in paras 43, 44 and 45 stated as under:

> "**43. I do not know Karim Paanwala. It has not so happened that Rajaq Kurkur and Karim Paanwala might have climbed upon the coach. It has not so happened that Rajaq Kurkur and Salim Paanwala might have supported from behind. It is true that I have dictated in my statement before the Magistrate that "the owner of Aman Guest House named Rajaq Kurkur and Salim Paanwala were there, there was something like petrol in the black carboy, Rajaq Kurkur and Karim Paanwala climbed on the coach no. 6 and Rajaq Kurkur and Salim Paanwala were supporting from behind." The petrol poured by Rajaq Kurkur and Salim Paanwala about which I state had been poured in the first window of the compartment near the door. It is not true that in my statements before the police or before the Magistrate, I had not dictated that thereafter, Rajaq Kurkur stepped on the stairs of the coach no. S/6 and he was pouring petrol-like liquid from carboy from the open window from near the door, and Salim Paanwala was lifting that carboy from the lower part.**
>
> **44. Petrol, diesel and kerosene smell differently. The liquid being poured which I saw was petrol as per my say. It is not true that in my statements of 21-9-2003 and 22-9-2003, I have dictated that "near the steps of the coach no. S/6, they were throwing a petrol-like liquid into the coach from a black burnt carboy." It is not true that there is no facility of opening the doors of coaches in a train from outside. As per my say, the doors have handles outside. It is true that these doors have a lock inside, on the upper part. It is true that the door cannot be opened from outside if any of the two locks located inside has been fastened. It is true**

that when I had reached on the opposite side of the coach, the door of the coach opposite to me was closed. It is not true that I do not know as to how this door was opened. The witness states that the said door was opened after the three persons had gone inside. It so happened that Rafiq Bhatuk, Irfan Bhobha and Imran Sheru went into the coach by opening the door. The witness states that it was somewhat open and they pushed it and went inside. It is not true that I have not dictated in my statements given before the police or before the Magistrate that the three persons who had gone inside opened the door of the coach and Rafiq Bhatuk, Irfan Bhobha and Imran Sheru pushed the door which was half-open and they went inside. It is true that I have dictated in my statement before the Magistrate that "meanwhile, the door was opened from inside."

45 As per my say, there were total ten carboys at that time. When the persons as stated by me were sprinkling petrol in the coach from below, some petrol fell on the ground also. I have not seen as to whether any amount of petrol poured into the coach had fallen on the ground from the coach or not. I had not seen that the petrol which got spilled on the ground might have caused any flow. The witness states that the soil got wet. I had seen passengers of the coach no. S/6 going towards the side of Vadodara, from the window where I was standing. The pile of stones upon which I was standing was on the opposite side of the door of the coach no. S/6 facing Godhra. It is not true that while standing on the pile in this way, I cannot see any part of this coach no. S/6 except this door. The off-side-door of the coach no. S/6 facing Godhra was closed. No passengers had got down from the coach no. S/6 on the side where I was standing. It is true that I have not dictated in any of my statements given before the police or the Magistrate that "before that, Mahebub Latika made holes in the carboy kept below. He did so with a knife-like equipment."

Salient features of testimony of P.W.237 Sikander Mohd.Siddiq Shaikh are:

[1] He saw the parrot colour tempi on kachcha road near

Talavdi.

[2] He saw stone pelting on the train at A-Cabin from there.

[3] Runs to the train.

[4] Climbs on the hip of the stone and saw Rajak Kurkur, Bilal Badam, Hanif Badam, Siddiq Badam, Aiyub Patadiya, Kadir Patadiya, Yakub Patadiya, Irfan Patadiya, Rauf Kamli and brother-in-law of Rajak Kurkur, Farukh breaking the train by iron-rods.

[5] He saw Rajak Kurkur climbing on the stair of S-6 near the door and from the open window therefrom the petrol like inflammable from carboy was poured by Rajak Kurkur and Salim Panwala was providing a support to the carboy from below.

[6] Mehboob Latika teared open the vestibule situated between two coaches, by means of knife.

[7] Before that Mehboob Latika pierced holes in carboys by weapon like knife.

[8] During the opening created by tearing of vestibule, Mehboob Latika followed by Jabir Behra obtained the entry inside and at that point of time Saukat Lalu gave one carboy each to them.

[9] Then Saukat Lala also entered into the coach and Rafik Batuk gave carboys to him.

[10] All the three entered into S-6 and opened the godhra side door.

[11] Then Rafik Batuk, Irfan Bhoba and Imran entered into the coach through the door with one carboy each.

[12] Other persons standing on the platform were sprinkling petrol on the coach; they were Irfan Patadiya, Ramjani and Hasan Lalu.

[13] Bilal Haji and Bhana were also present there.

[14] Then Hasan Lalu burnt the rack and through it with the help of stick into the coach through the broken window and thus the coach was set on fire.

[15] All the activities were noticed by him by standing on the hip of the stone.

[16] Thereafter on arrival of the train, the people started running away and he also ran away.

[17] Learns that Umarji Molvi was helping the ghanchi people who had assaulted the coach and were caught.

[18] He and his family shifted to Surat and were residing the land provided by the government in the river bed.

[19] Police contacted him and asked him to give the statement to the officer at Baroda.

[20] To ensure that he withstand the statement, he was sent to the Magistrate Court with the officer who recorded his statement for his statement under Section 164 of Cr.P.C. (Exh,1253).

[21] He was called for T.I.Parade for three to four times in August 2005 and identified Aiyub Patadiya and in September 2005 he identified Hanif Badam and in 2006 he identified Mehboob Latika.

[22] In the court he identified Hanif Badam, Siddiq Badam, Jabir Behra, Irfan Bhoba, Rauf Kamli, Irfan Patadiya, Mehboob Latika, Aiyub Patadiya, Molvisab and Bilal Badam and at the last Hasan Lalu.

[23] On verification by the court it was found that for Irfan Bhoba he identified Sikander Abdul Majid Kalander and for Rauf Kamli he identified Abdul Rauf Abdul Majid

Deshli and for Mehboob Latika he identified Faruk Ahmed Yusuf Hasan.

[24] He also identified Ramjani bin Yamin Behra.

[25] Amongst the persons named by him in his evidence, Kadir Patadiya, Yakub Patadiya, Faruk, Saukat Lalu,Rafiq Bhatuk,Imran Sehru were not present in the court whereas Rajak Kurkur, Bilal Haji and Soeb Kalander were present.

CROSS:

[1] He was 35 years of age at the time of recording of his statement.

[2] Disputes that he reveals his age as 19 years at the time of police statement.

[3] The age of his brother Salim was 15 years and sister Rehana was 12 years at the time of his statement.

[4] His father was selling taviz and rings.

[5] His father left them after 4 or 5 years stayed in Godhra.

[6] His statement was recorded after one and half month of the incident in question though for six months after incident he was hawking in water pouches and was free and available.

[7] He is unaware as to whether he knows Ajaykumar Kanubhai Bariya.

[8] He was taken for his T.I.Parade in 2004 in Mamlatdar's office at Godhra where one person had come for his identification.

[9] He disputes that in the statement recorded on 21.09.2003 he stated that afraid of being caught by police he obtained a rented house of brother-in-law in single falia and went to reside there.

[10] He also disputes that he stated in that statement that for five or six months he stayed there, hiding from the police.

[11] He disputes having stated in his statement on 21.09.2003 that his father was beggar and was weak at sight and was almost blind.

[12] He also disputed in his statement dated dated 22.09.2003 he stated that his father was a beggar in Indore and was weak at sight and was almost blind.

[13] He also disputes having stated in his statement dated 2.09.2003 that his sister-in-law had burn marks on her face, did not have one eye and was seeing through one eye only and his mother was unable to do the labour work.

[14] That when he was seeing the activities from the metal hip, no stone pelting was being done and other people were also there on the metal hip which was at a distance of 15 to 20 feet from the train.

[15] The people were sprinkling petrol from carboys while standing near the coach.

[16] In para 23 states that when Godhra side door was opened, off-side door was closed (so he added clear vision of two doors while the passengers says that the coach was full of passengers and luggages. The passengers also says that the off-side door was opened and they escaped therefrom).

[17] Admits having stated in his statement dated 21.09.2003 and 22.09.2003 that he is acquainted with the voice of Moulana Yakub Punjabi.

[18] He also admits having stated in his statement dated 21.09.2003 and 22.09.2003 that he is acquainted with the voice of Moulana Yakub Punjabi.

[19] He also admits having stated in his statement dated 21.09.2003 that from Ali Majid there was exhortation that Islam is in danger, Masjid is set ablaze etc., and that voice was that of Yakub Punjabi; he however explains that he had stated that the voice was like that of Yakub Punjabi.

[20] He also admits having stated in his statement dated 21.09.2003 that at the very moment he saw Molvi Yakub Punjabi on the terrace of Ali Masjid.

[21] Admittedly he stated in his statement dated 22.09.2003 that the person making exhortation as above was in the voice of

Yakub Punjabi; explains that he stated that the voice was similar to that of Yakub Punjabi.

[22] Admittedly he stated in his statement under Section 164 that there was exhortation from Ali Masjid and voice was that of Yakub Punjabi Molvi; explains that he stated that the voice was similar to that of Yakub Punjabi Molvi.

[23] Admittedly he stated in his statement under Section 164 that he saw Yakub Punjabi Molvi and others on the terrace; explains that he stated that he saw a person similar to Yakub Punjabi Molvi.

[24] Admittedly he accepted all his three statements as true before SIT.

[25] Admittedly accepted the statement recorded by the Magistrate as true.

[26] Voluntary to state that he saw from the window that the people were rushing from godhra side platform part of coach to vadodara side.

[27] Disputes that he did not state in his police statement or the statement before the Magistrate that the three persons who went inside opened the door and Rafik Batuk, Irfan Bhoba and Imran Sehru opened half open door by a push.

13 **Now we appreciate testimony of Ajaykumar Kanubhai Baria, PW-236**, in his statement recorded by PW-207 **under Section 164**

of the Code, Exh.1233, stated as under:

"I do hereby on solemn affirmation state that -

My name is	:	Ajaykumar
Fathers Name	:	Kanubhai Baria
Religion	:	
Age about	:	17 / 18
Occupation	:	Unemployed
Residence	:	Rameshwar Society, Behind Railway Ground, Godhra
District	:	Godhra.

Examination-in-Chief

– he himself gives the statement on oath as per section 164 of Cr.P.C.

I came to Signal Faliya in Godhra after coming out from my house at 07:00 o' clock in the morning on 27-02-2002. From there, I left to go towards the railway station after taking tea kettle from the place of my boss Mehboob Popa. After five to seven minutes of my reaching to the railway station the "Deluxe" train arrived and I was selling the tea in this train. This "Deluxe" train was going from Delhi to Vadodara. The other hawkers were also there on Railway Station other than me. Among them, there were (1) Yakub Patariya (2) Kadir Patariya (3) Irfan Patariya (4) Babu Patariya (5) Mehbood Chanda (6) Mehboob Popa (7) Shoeb Kalandar (8) Yunus Ghadiyali (8) Hasan Lalu (9) Mehboob Latika - we all persons were hawking.

The "Deluxe" train departed. Thereafter, Sabarmati train arrived within seven to eight minutes and stopped. At that time we started vending at the station. At this time, the Karsevaks got down from the train, and started to shout "Jay Shree Ram – Jay Shree Ram". During that time, Mehboob Popa came near the engine running from the back side of the train and Mehboob Latika also came behind him. I had asked to Mehbood Latika that, "why are you running", then he replied to me that, "the Karsevakas are beating Siddiq Bakkar over there at the back side". Meanwhile, about six to seven Karsevakas came near "S-3" coach where we were standing and started to ask me that, "whether you are a Hindu or

Muslim". I told that, "I am a Hindu". Then they asked me to speak "Jay Shree Ram", so I spoke "Jay Shree Ram". Thereafter, the Karsevaks also asked Mehboob Latika that, "whether you are a Hindu or Muslim", but Mehboob Latika did not reply. So the Karsevaks started to beat him. Hence, Memboob Latika escaped from there and started shouting after going on the hillock (mound) near engine that, "they are beating over here". I had also said that, you all run away from here, all are assaulting over here. Thereafter, Sabarmati Express started and while it had just moved about one coach from its standing point, the train was stopped as the chain of the train was pulled and immediately the stone pelting started on the train from Signal Faliya. These stones were thrown by the peoples of "Ghanchi" community. I have seen these stones. I have seen (1) Mehboob Latika (2) Irfan Popa (3) Anwar Kalandar (4) Yunus Ghadiyali (5) Irfan Patariya (6) Yakub Patariya (7) Ibrahim Bhana (8) Shaukat Bibina (9) Shoeb Kalandar (10) Hussain Lalu (11) Mustak (12) Raji Bhuriya (13) Mehboob Popo (14) Mehboob Chandana - throwing stones. That time I went to the shop of Rashid Raji which is located in Signal Faliya and stood over there. During that time, 12 to 13 rickshaws came from Station Road, Godhra. 4 to 5 persons were there in each rickshaw. I do not know them but after getting down from the rickshaw, all of them were pelting stones at the train. **Meanwhile – Shaukat Lalu, Irfan Popa, Rafik Bhatuk, Jabir Sheru, Ramjani, Hasan Lalu, Irfan Pataliya, Mehboob Latika – all of them went to the backside of the house of Razak Kurkur and Shaukat Lalu also told me that, "you also come with us"**. I did not know as to where they were going, hence I went with them and stood outside the house of Razak Kurkur and among all of the others, Shaukat Lalu and Rafik Bhatuk went into the house and the remaining were also standing outside. After some time, I saw that Rafik Bhatuk came with a carboy and gave to Irfan Bhopa and he told me that, "keep this carboy in the rickshaw". Due to fear I kept this carboy in the rickshaw. It was smelling like kerosene from this carboy. They came out after some time and the carboys were there in the hands of all and all these carboys were kept in rickshaw. I do not know the number of rickshaw, but its color was like "bottle guard". This rickshaw was like a Carriage Tempo. There was a Mosque like sign at the lower part of the front side glass of this small tempo rickshaw and small grill was there at the back side and it was parked in a manner that the front part was facing towards the road.

Ramjani came and sat on the driving seat of this Tempo Rickshaw and Mehboob Latika sat on the left side. Saukat Lalu sat on the right side. Among these persons, a long knife (dagger) was there in the hand of Mehboob Latika and pipe were there in the hand of Saukat Lalu. Jabir, Hasan Lalu, Sheru, Irfan Bhopa and Rafik Bhatuk were sitting at the backside of rickshaw and they also made me to sit in rickshaw by giving me threat. I did not know as to where this rickshaw was going. Meanwhile when the rickshaw came out from the street on the road Sabarmati Express had departed at the time and the last coach of the rear side was at the end of the platform and all the Ghanchi people standing over there were running here and there. During that time, the rickshaw reached near culvert and the Sabarmati Express train was stopped. These people had taken this rickshaw of ours near "A" Cabin Ali Hussein Mosque, and stopped the rickshaw over there. During that time, Saukat Lalu got down and ran with a carboy and all sitting in the rickshaw got down after him and those persons also ran with the carboys. Shaukat Lalu told me that, "you also come with us" and I also went with them due to fear. All these people started to go towards coach no. S-2 from the engine side. Meanwhile – Mehboob Chanda, Mehboob Popa, Irfan Patariya, Kadir Patariya, Shoeb Kalandar, Anwar Bala, Anwar Kalandar, Yunus Ghadiyali, Mustak, Bhriyo Raji, Shaukat Bibina, Kadir Patariya, Babu Katariya – these people were throwing stones on the train and were breaking the windows of coach no. S-2. **At that time Mehboob Chanda took the carboy which was with me and gave the carboy of Hasan Lalu to Irfan Bhopa and the carboy of Mehboob Latika was given to Saukat Lalu.** They were coming towards these coaches from the engine side by crossing between the S-2 and S-3. **During that time, Mehboob Chanda ignited something like cloth and threw it in the coach from the broken window of coach no. S-2 and this burning cloth was thrown out by the passengers who were sitting inside**. Thereafter, these persons turned towards coach no. S-6. Stone pelting was going on over there and at that place **Sheru was trying to break the windows of any of the coaches from S-2 to S-6 by giving blows with pipe. All these people reached near coach no. S-6 and cut open the curtain [vestibule]**, which was between wagon no. S-6 and S-7, with a knife. **These persons climbed up and Jabir had also climbed up and they were trying to break the door of coach no. S-6. Holes were made on the upper side of carboy with a knife. Mehboob**

Latika gave one carboy to Jabir and Saukat Lalu also climbed up the coach. In the meantime, Saukat Lalu entered from the canvas [vestibule] way and opened the main door facing towards "cabin no. A" of coach no. S-6 and Rafik Bhatook gave a carboy after making holes. Rafik Bhaook climbed up the coach after him, from the door. Sheru and Irfan Bhobha also climbed up with them. At this time, I was standing in front of coach no. S-6. I came near the door and watched as to what these people are doing. At that time, these persons were pouring the kerosene into the coach and Hasan Lalu and Ramzani were pouring the kerosene into the coach from outside. During that time, Mehboob Popa, Yunus Kalandar and Yakub Patariya – these persons were breaking the doors and windows of S-6. Meanwhile, Hasan Lalu ignited a cloth and threw the same into the coach from a broken window and smoke started to come out after sometime. Much outcry had taken place over there. I do not know as to when and at which place did the people, who were inside the coach, got down. This coach started burning slowly. During that time, I started running towards "A – Cabin" Signal Faliya road and when I looked back after reaching at the culvert, a fire extinguisher had arrived and Rafik Bhatook and other persons had blocked the way of the fire engine and they were also pelting stones at it. Thereafter, I fled to my house and after reaching there, I saw that, "Ghanchi" people had come to burn our houses. The Ghanchi people of our surrounding area did not allow them to burn our house. We had gone away to the house of my uncle in Rameshwarnagar Society due to fear. Thereafter, curfew was imposed in Godhra City.

These persons had threatened me that 'if you inform anyone or the police about burning of this coach, we will kill you and your family members'. Despite that, I am stating this fact before you voluntarily with open heart. Such is my fact.

Godhra / camp Anand.
Dt. 09-07-2002

Before Me.
Sd/-illegible dt. 9-7-2002
Time – 15:00 hrs.
J.M.F.C. (Rly).
Godhra.

Sd/- Ajaykumar Kanubhai Bariya

The witness had willingly stated the aforementioned statement on oath before me in clean and healthy condition which I had written.

The statement is read over to the witness
and he admits the same to be true".

14 **Ambalal Ranchodlal Patel, Railway Judicial Magistrate, Godhra PW-207 admits to have of followed statutory requirement under Section 164 of the Code, 1973.**

In cross-examination, Ajaykumar Kanubhai Baria, PW-236, a star witness of the prosecution in para 75 to 79, deposed as under:

"75 When all came near the house of Rajak Kurkur, I was standing near the bicycle shop. At that time, three persons entered the house of Kurkur. At that time, out of them, one Irfan Bhobha gave a carboy (small container) and I put it in the rickshaw. I do not know as to whether carboy given to me by Irfan Bhobha was given to Irfan Bhobha by Rafik Bhatuk or not. At present, I do not remember that I dictated in my statement before the Magistrate that, "When I saw, Rafik Bhatuk came with a carboy and give it to Irfan Bhobha." It did so occur that Rafik Bhatuk gave me a carboy. It did not so occur that I dictated in my statement of 04/07/2002 that Rafik Bhatuk gave me a carboy and I put it in the rickshaw. It did not so occur that not three persons, but all went into the house of Rajak Kurkur together.

76 The capacity of carboys was 20 litres. There were eight or nine carboys. Whether a tempo was as big as a passenger rickshaw or not. In my opinion, it was a little larger than passenger rickshaw. I cannot state as to how long its rear body was. Out of carboys, one or two carboys were also having capacity of five or ten litres. It was not such that all the carboys were having capacity of 20 litres only. Seven persons were standing in the rear part of this tempo. It did not so occur that eleven carboys were put in the rear part of this tempo. It is not true that I dictated in my statement of 04/07/2002 that, "11 persons were sitting

with carboys in the tempo." It is not true that I cannot state as to whether there was petrol or kerosene in this carboy. The witness states that it was petrol. I state on the basis of smell that there was petrol in the carboy. It is true that smell of petrol and kerosene is different. It is not true that I dictated in my statement before the Magistrate that there was kerosene in the carboy. It is true that when we were going by tempo nearby Ali Masjid via Singal faliya and under-bridge, mobs were running away on the way. It is true that I did not know as long as tempo reached Ali Masjid as to where and why we are to go. When tempo reached Ali Masjid, I did not have any particular reason to see towards Sabarmati Express train. The witness states that it was standing there, therefore, I saw it. It is not true that one could see train where it was standing from signal faliya. When we left with tempo, I saw train first of all after coming out of street. The witness states that at that time, last coach was at the end of platform. When we reached near Ali Masjid, train was standing near 'A' cabin. The train stopped near 'A' cabin for three minutes. I cannot state as to whether tempo was taken ahead through the persons of mob on the way or not. I do not know as to whether open chawk is near Ali Masjid or not. I do not know as to whether there is a well near Ali Masjid or not. If one looks facing track at the place where tempo was parked, Ali Masjid was towards left hand. A street of fakir is situated between Ali Masjid and railway track. We went to railway track via street of fakirs. When we went to track, each one of us was armed with carboys. The rickshaw was parked a little ahead of street of fakir, and we went to track from there on foot. There were no wild babool trees between Ali Masjid and track during that period. 'A' cabin is 500-600 feet far from Ali Masjid. This cabin is situated towards Godhra side from Masjid. It so occurred that we went to track via foot track situated behind 'A' cabin. We went towards engine after reaching the track. At that time, engine was about ten coaches far from 'A' cabin. When I reached there, stone pelting was underway. It did not so occur that stone pelting may have occurred after we reached there. Stone pelting was being made on coach no. S-2 at that time. We went near S-2 taking carboys. In my opinion, the cloth thrown into coach no. S-2 was soaked by spilling liquid over it from the carboy which I had given to Mahebub Chanda. I do not know as to whether the said cloth was completely soaked into liquid or not. When Mahebub

Chanda soaked cloth, he put cloth down. When the said cloth was soaked, liquid from the carboy was also spilled over ground. The said cloth was lit and thrown into coach through window, and the same burning cloth was thrown back outside the window. I do not know as to whether this cloth was put out or not after it was thrown outside window.

77 When we went near coach no. S-6, mattress and cloth were set on fire. I do not know as to who brought mattress. The mattress and cloth were put on the ground, liquid from carboy was poured over them, they were set on fire and thereafter thrown into coach. At that time, liquid from the carboy spilled over ground. The stopper of door, belonging to coach no. S-6 and situated between coach no. S-6 and S-7, was broken kicking the door. I do not know as to whether the said stopper was at the upper part or lower part of the door. I have not clearly dictated in my statement before the Magistrate the name of Mahebub Latika or any other person, who cut curtain between coach no. S-6 and S-7. At that time, 6 persons entered the coach. I have not seen as to whether they sprinkled liquid in the coach or not. The witness states that I saw that remaining three persons were sprinkling liquid from outside. Three persons were sprinkling liquid on the coach by splashing from carboys held in both hands. The splash of liquid from the carboy was entering into window at that time. It is true that liquid from the carboy was falling down at that time. I cannot state as to whether similarly these three persons sprinkled all the liquid from these three carboys or not. At present, I do not remember as to how many windows of coach no. S-6 were broken at that time. More than one window were broken. The burning mattress and cloth were thrown into the coach through window. At that time, I cannot state as to whether six persons, who went inside, were in the coach only or not. It is not true that stone pelting over coach no. S-6, act of breaking windows and act of sprinkling liquid were being committed simultaneously. It is not true that holes were made in the carboys by remaining between coach no. S-2 and S-6. The witness states that we were making holes in the carboys remaining between coach no. S-6 and S-7.

78 When coach was set on fire, police did not come. I ran away back towards 'A' cabin from the place of

occurrence. I do not know as to who was with me while running away. I cannot state as to whether anyone, out of persons who set coach on fire, was with me or not while running away. At present, I do not remember as to whether I dictated in the statement before the police the names of persons, who were with me when I ran away from the place of occurrence. At present, I do not remember that any familiar person was with me at the time of running away. In my opinion, the reason for forgetting the same is that incident has occurred many years ago. I dictated details, dates, etc. in the examination-in chief as per my memory. When I was running away towards 'A' cabin, a lot of people were running away after me. They were running away to save their lives. I have not seen as to whether anyone, out of absconding persons, had empty or full carboys or not. I do not know as to whether anyone, out of them, was equipped with weapons or not. I have not seen as to whether any empty or full carboy, out of eight-nine carboys, was thrown away near coach no. S-6 or not. It is not true that when we went towards place of occurrence from tempo, we went with eight or nine carboys and two carboys were left in the tempo. The witness states that there were only eight or nine carboys in the tempo.

79 When I ran away from 'A' cabin and reached near culvert, I saw a fire brigade. It did not so occur that I may have also seen police personnel there at that time. It did not so occur that when chain pulling was made first time, stone pelting may have been made from road of signal faliya. It is true that I have dictated in my police statement of 04/07/2002 that Irfan Pataliyo, Yakub Pataliyo, Mahebub Popa, Soeb Kalandar, Iliyas, Mahebub Chanda, Babu Pataliya, Mustak, Haji Bhuriya, Rahif Bhatuk, etc. were making stone pelting on the train from signal faliya road at that time. It is true that at that time, ten to twelve rickshaws came there and there were four to five persons in each rickshaw. It did not so occur that at that time, not ten to twelve rickshaws, but ten to twelve persons may have come there by rickshaw. It is true that I have dictated in my police statement of 04/07/2002 that, "Meanwhile when I saw, Ghanchi people came by ten to twelve passenger rickshaws from station road side." It is true that I have not dictated in my police statement of 04/07/2002 and 05/07/2002 and in the statement of 09/07/2002 before the Magistrate that, "At

that time, Hasan Lalu and Mahebub Latiko also reached near S-6 and stone pelting was also underway there." I do not remember that I did not dictate in my statement before the Magistrate that, "Therefore, a mob of Ghanchi people gathered from Singal faliya." It is not true that I have dictated in my statement before the Magistrate that, "Therefore, Mahebub Latiko ran away from there and I also spoke after reaching hillock ahead of engine that, "Run away from here. All are beating here." Thereafter, Sabarmati Express departed." I dictated such fact in my police statement of 04/07/2002. It is true that I have not dictated in my statement before Magistrate that, "Meanwhile, I was standing on the pile of metal." I have stated in my earlier deposition regarding efforts being made to break door. The same was stated regarding corridor between coach no. S-6 and S-7. It is not true that I was not present at the time of incident or I have not eye-witnessed incident, but I give a false deposition at the instance of police".

15 Further, analysis of evidence of **PW-236 Ajaykumar Kanubhai Baria** is as under:

Why Ajaykumar Kanubhai Bariya's evidence should be believed.

Is it spontaneous ?

15.1 Mentions about having seen a tall and fair man at 3:30 and also in evening (with Rajjak Kurkur) on 24.02.2002, while going Aman Guest House. This fact is not connected with the offence yet. He has mentioned that he went to Village Kerol to attend a marriage party on 26.02.2002 and returned at 8:00 p.m. At that time, he sees Rauf Kamli, Yakub Patadiya, Ayub Patadiya, Kadir Patadiya, Mehboob Popa, Mehboob Chanda, Babu Patadiya, Irfan Patadiya and Irfan Bhana near Aman Guest House, but does not attribute any criminal act to them.

15.2 On 27.02.2002, in the routine course of his business, he

collects 50 cups of tea in a tea kettle and goes to Platform No.1. Here also he does not refer to any conspiracy.

15.3 Sees Yakub Latiko, Hasan Lalu, Saukat Lalu, Anvar Kalandar, Soheb Kalandar, Anvar Bala, Mutak, etc. on the platform selling tea, when Deluxe Train came from Dahod. At that time, Sabarmati Express arrives, hears chants of 'Jay Shri Ram' 'Jay Shri Ram' uttered by Karsevaks (this version is supported by many witnesses). He was near S/3 compartment.

15.4 At that time, sees Mehboob Popo followed by Mehboob Latika running towards engine side – asked them what has happened, Mehboob Latika replies Siddiq Bakkar had quarreled with Karsevaks (the factum of this quarrel is not disputed either by the prosecution or defence) – mention what was seen by him – does not attribute any criminal act to Mehboob Latika and Siddiq Bakkar.

15.5 Narrates that the Karsevak asked him to identify him whether he was Hindu or Muslim, the Karsevak asks him to utter and he utters 'Jay Shri Ram' 'Jay Shri Ram', but when they asked Mehboob Latika to utter those words, he was silent whereupon Mehboob Latika was beaten by mob, who, then after getting himself released runs towards engine, climbs the hill and calls for the help. Ajay Bariya also joins him and thereupon the people entered through hole in wall and started pelting stone which was defended by Karsevaks by throwing stones (pertinently in this part of his testimony). He mentions incidents as they occurred without attributing anything to the accused persons, however, refers to the stone pelting at that point of time. Whether this fact of stone pelting is supported by other witness is required to be verified. However, the defence story is that at that time, many of the

witnesses ran for safety in the train with an apprehension that there was stone pelting.

15.6 According to this part of the testimony of the witness, this first incident occurred pretentiously on account of Siddiq Bakkar and thereafter Mehbooob Latika beaten by Karsevak and during that time, many of the accused were seen by him selling refreshments on Platform No.1. Thus, he does not involve them in any offence at that point of time.

15.7 Another thing which is required to be noted from this part of the testimony of this witness is that after the quarrel, afore-stated persons were running towards engine (none of the railway police officials mention that Siddiq Bakkar – Mahebub Latika complained to him of they having been beaten and the officer having advised him to lodge complaint).

15.8 It appears from the testimony of this witness so far that everything was cool and calm before the said persons were beaten. The movement of the persons named in Para-4 was not found to be suspicious by this witness.

15.9 He corroborates the fact stated by almost all the witnesses that the train restarted after one or two minutes and stopped because of chain pulling after hardly leaving by one or two coaches.

15.20 He goes to his place of business at `Chanu Khoku tea chop' and notices stone pelting from the Bakora , the fact that there were stone pelting after the train stopped on chain pulling (there is diverse version about the reason of chain pulling, but some of the witnesses

accept the fact that as some of the Karsevaks were left behind, and the train started), the chain had to be pulled from four coaches to enable the Karsevak to board the train is corroborated by almost all the witnesses. He notices various accused viz. Yakub Patadiya, Iliyas Mulla, Mehboob Popa, Haji Bhuriyo, Rafik Bhatuk, Mustak pelting stone on the train. Reaction of the persons, who were beaten, though not justified, would be the same as the mob indulged into stone pelting to exhibit their anger.

15.21 The witness refers to the metal heap near S/6. He further does not refer to as to how the train moved to A-Cabin and how it halted there but refers to the incident near A-Cabin.

15.22 In the cross-examination in Para-73, he mentions that at the time of first stone pelting, he was near Bakora [hole].

15.23 No doubt, minor discrepancies are are noticed in his statement about Jabir, who is said to be one of the conspirators, in his confessional statement under Section 164 of the Code of Criminal Procedure, 1973 (for short "Cr.P.C.") than what is stated by Bariya in his statement.

15.24 Admittedly, on 03.07.2002, he was called in the Police Station but no statement was recorded.

15.25 Cutting of vestibule is corroborated by scientific evidence and knocking of the door is corroborated by many witnesses.

15.26 In his statement before police mentions use of petrol, but in the statement under Section 164 of the Cr.P.C. mentions use of

kerosene. (Para-6) Names 10 persons running with carboys with petrol, no other eye-witnesses, who were on the platform and near A-Cabin corroborate this statement. But the fact remains that the coach was burnt by inflammable liquid containing hydro carbon as per FSL report.

15.27 Goes to the Magistrate for recording of the statement under Section 164 of the Cr.P.C. without knowing as to what such a statement is and does not explain as to why he had to go all the way to Anand, on 09.07.2002 for recording the statement under Section 164 of Cr.P.C. though on other days, the Magistrate was available in Godhra.

15.28 However, it is not denied that carboys were filled with inflammable material.

15.29 This witness is no doubt not in a position to say that how he came to know about Magistrate holding the court in Anand, but the fact remains that he being a tea vendor at railway station, Godhra and familiar with court of railway magistrate to be at a safer side and to protect his identity approaching the learned Magistrate at Anand holding the Court at Anand by itself is no ground to disbelieve this witness. The following circumstances will reveal that a semi-illiterate boy, aged about 17 to 18 years having witnesses the crime of this magnitude would be petrified and reluctant to disclose correct and full facts initially. Certain queries put forth by the Investigating Officers and inability on his part to reply them immediately based on memory and after mustering the courage, names of accused were given and though insignificant discrepancies, minor contradictions in statement recorded under Section 164 of the Cr.P.C. or in his testimonies before the trial court substantially remain corroborated about setting S/6 coach on fire pursuant to conspiracy hatched. However, Sikandar Mohammad Shaikh,

hawker at Godhra Railway Station PW-237 and Bhikhabhai Harman Baria, hawker at Godhra Railway Station PW-206 also confirm that coach S/6 was set on fire.

15.30 Admittedly, he was called in the Police Station on 03.07.2002 on which date, his statement was not recorded, but he was under fear.

15.31 Admittedly, his age was between 17 and 18 years.

15.32 He did not have as much courage he had at the time of his deposition i.e. 01.04.2010. At the time of recording of the witness and therefore, prone to pressure and influence. He was afraid of police.

15.33 Admittedly, after 04.07.2002, when his first statement was recorded, he was under constant fear.

15.34 Admittedly, he was afraid when he went to Police Station before two days i.e. 04.07.2002 and therefore, police could not record his statement.

15.35 Admittedly, on 02nd and 03rd July, 2002, he was interrogated by Noel Parmar without recording of his statement, in presence of Rakesh Asthana and J.K. Bhatt.

15.36 Admittedly, he was afraid of revealing the names of the accused.

15.37 Admittedly, he wanted to give his statement on 02.07.2002.

15.38 Admittedly, he replied to the queries of the police on 02.07.2002, but the police was not satisfied.

15.39 Admittedly, on 03.07.2002, he was fetched by the police personnel from his house.

15.40 Admittedly, the witness had taken time to reply question in the cross-examination.

15.41 Admittedly, on 03.07.2002, the statement of the witness was being recorded and was read over to him (but not made a part of the proceedings).

15.42 Admittedly, he was confident after recording of the statement on 04.07.2002 that he would not be arraigned as accused and he was also assured that there would not be further harassment from the police.

15.43 No witness corroborates the fact that Mehboob Latika was piercing the holes in the carboys on the land between S/6 and S/7.

15.44 Story deposed by other witness is that all the doors and windows were closed during the incident and windows were broken and therefrom offending material landed inside the coach window was full of passenger (about 150 or 200) and also luggage and even the passage near the latrine was occupied by the persons and the luggage which made it impossible for anyone to enter into the coach foreseeable. The accused in the examination in chief fails to recollect their names in the cross-examination (Para-78). However, knocking of the door scratches, bent stoppers, FLS report get corroboration from FSL report and other

PWs.

16 In Para-79, assigns incriminating roles to Hasan Lalu and Mehboob Ratika for the first time in the Court, no such statement was made by him in his statements dated 04.07.2002, 05.07.2002 and 09.07.2002. Half names of the accused given in the statement dated 04.07.2002 full names in the statement dated 05.07.2002 again half names in the statement under Section 164 of the Cr.P.C. That the above aspect of initially giving half names of the accused and then full names by itself is not material contradiction since identity of the accused stands established.

17 It appears that the presence of the witness at the scene of the offence i.e. Platform No.1 and A-Cabin cannot be doubted inasmuch as he was the tea vendor employed with some of the accused and therefore, his presence at the railway station was natural. Initial part of the incident i.e. the quarrel, running of two persons Mehboob Latika and Mehboob Popa, beating of Siddiq, seeking help of other persons and rushing of mob through Bakora and stone pelting, halting and movement of the train at several points i.e. on the platform and A-Cabin. Pelting stones and throwing of the inflammable from outside of the train are all facts corroborated by other witness and therefore, to that extent, the witness appears to be reliable.

18 **Before we deal with event-wise comparative chart of different events of PW-236 and PW-237 and confessional statement of Jabir Binyamin Behra under Section 164 of the Code, 1973 and testimonies of witnesses before the court, we find following minor, insignificant contradictions, omissions and improvements in the statement of evidence of Ajay Kanu Baria, PW-236, a star witness of**

the prosecution which do not touch the core of the case of the prosecution.

19 In the first instance of stone pelting, Yakub Patadiya, Imran Musa, Haji Bhuriyo, Rafik Batuk and Mustak named in the testimony whereas in statement under Section 164 of CR.PC., Yakub Patadiya and Mehbub Popa.

20 No material contradictions in naming the persons who going to or going behind the Aman Guest House. The persons named are (01) Shaukat Lalu, (02) Mehbub Latiko, (03) Ramjani, (04) Rafik Batuk, (04) Irfan Bhopa, (05) Irfan Patadiya, (06) Hasan Lalu and (08) Jabir. Statement under Section 164 of the Cr.PC., People going inside the house of Rajak Kurkur, Shaukat Lalu, Rafik Batuk and evidence before the Court Shaukat Balu, Imran Sheikh and Rafif Batuka.

21 Insofar as number of carbos are concerned, Shaukat Lalu, Irfan Bhopa, Rafik Batuk, Hasan Lalu and Latika are the persons named in 164 statement, who want to Aman Guest House. Though the witness is not clear, as to how each of these persons were having carbos smelling kerosene states that all of them were holding carbos and all carbos were loaded in the rickshaw. (Paragraph No.76 in the cross-examination, replies that one or two carbos were of the capacity of five or ten liters and it was not as if 11 carbos were loaded in the tempy? He also discloses the statement in question made under Section 161 made on 04/07/2002 that “people were keeping the tempy and each one of them were holding carbos). He also states that all the aforesaid persons boarded rickshaw with Carbos and at ‘A’ cabin, Shaukat Lalu and all others dis embarrassed the rickshaw with carbos. He was holding one of the carbos. However, it is not state as to how all of 08 or 09 carbos were

used in the statement under Section 164 of Cr.PC. In the testimony explains how and who used the carbos. In the statement, reference to kerosene like smell from carbos whereas in the testimony refers to petrol.

22 Eight persons boarding rickshaw as per statement under Section 164 in the version before the Court, 09 persons boarded rickshaw. Addition is Irfan Patadiya occupying backside otherwise, all the persons are come exactly and their place of sitting in the rickshaw also shown exactly the same in both the statements.

23 In 164 statement, out of the persons sitting in the front side of the tampy, Mohmmed Latika had a long knife and Shaukat Lala had a pipe; whereas in the version before the Court Shaukat Lala and Irfan are shown with one pipe each and Mohmmed Latika and Jabir are shown to have one long knife each. Benefit of passage of time between the statement dated 08/07/2002 recorded in the year 2010 can be given for such minor contradiction ? Is it that such improvements is made to achieve consistency in the confessional statement dated 05/02/2003 of Jabir?

24 Accused-Jabir is said to have given his statement under Section 164 of the Code, admitting conspiracy. According to his version, Irfan Patadiya, Yakub Patadiya, Lalu and Yunus Ghadiyali were the persons involved in the 1st stone pelting. He is alleged to be active member in the conspiracy, but does not name.

25 **Even nature of contradictions as above, along with some contradictions, omissions and improvements in the statement of evidence of Ajay Kanu Baria, we now deal with the submissions of**

Mr. I.H.Syed, learned counsel for the defence, as under:

26 That **comparative chart submitted by Mr. I.H.Syed,** learned counsel for the defence of versions given by Ajaykumar Kanubhai Baria, PW-236; Jabir Binyamin Behra, an accused and Sikandar Mohammad Sidak Shaikh, PW-237, in their statements recorded under Section 164 of the Code, 1973 and the testimonies of Ajaykumar Kanubhai Baria, PW-236 and Sikandar Mohammad Sidak Shaikh, PW-237 in the court about different events, if closely examined, it is about members of unlawful assembly came into rickshaw by Jabir Binyamin Behra, in his confessional statement naming or not naming assailants, addition or improvement about member and names of such assailants, and also about pelting of stones from Signal Falia, people going towards and inside the house of Razak Kurkur and number of carboys coming out Razak Kurkur's house, etc.

27 **First six events.** In the statement under Section 164 of the Code, 1973 and testimonies by PW-236 have common names and on the contrary PW-236 in his statement under Section 164 of Code, 1973 recorded on 09.07.2002 is consistent in his statement before the court about event No.4, people going towards / inside the house of Razak Kurkur. Out of all these names, 5 names of the accused are also given by Jabir Binyamin Behra in addition to presence of PW-236 in his confessional statement under Section 164 of Code, 1973 recorded on 05.02.2003. It is not relevant whether accused had 3 carboys, 5 carboys, 7 carboys or 9 carboys, so stated by Ranjitbhai Jodhabhai Patel, PW-224, Prabhatsinh Gulabsinh Patel PW-231, PW-236 and that confessional statement of Jabir Binyamin Behra, but the fact remains that carboys were filled in with inflammable material loaded into rickshaw which was taken to coach S/6 of the train. About discrepancy of tempi, again

minute analysis made reveal that the tempi was having space to accommodate accused and carboys. The colour of tempi was parrot green or light green like bottle-gourd is again creating no doubt about usage of tempi in commission of crime. Even identity of inflammable liquid in the carboys where it was having smell of kerosene or petrol and identification of such inflammable liquid by this PW-236, ultimately was confirmed that it was petrol by FSL. The description of assailants having knife and pipe which could be carried easily in the tempi and it is also very natural that PW-236 was not having any idea about hatching of conspiracy. About event No.9 pertaining to Travelling and stoppage of tempi with carboys and persons, confirms that Signal Falia and Ali Masjid, Fakir ni Chawl, etc. were located in the same area from where tempi had travelled and minor discrepancy in describing the travel route by PW-236 cannot be said to be any improvement or to corroborate testimony of PW-237 and of map of scene of offence and topography around scene of offence nearby A Cabin also confirms version of PW-236 and PW-237. Even about event Nos.10 and 11 pertaining to Number of carboys unloaded from the tempi near “A Cabin” and Attack on S2 coach by assailants, whether a particular accused was sitting on backside or front side of the tempi and that PW-236 is consistent in his statement about attack on S2 coach and participation of 12 accused for this event of attack on coach S2, 7 assailants, who were named in earlier statement under Section 164 of Code, 1973 dated 09.07.2002 are also named in his testimony before the court. That not naming about presence of PW-236 by PW-237 in his statement under Section 164 of the Code, 1973 or in the testimonies before the court amidst commotion, confusion and continuous stone pelting and circumstances prevailing then do not affect the core of case of prosecution. Likewise, other events about exchange of carboys between accused persons and throwing of articles inside S2 coach and movement towards S6 coach, description of assailants and

their role in hitting windows with iron pipes, trying to break the hose pipe have common features about damaging the train with iron rods and even in the confessional statement of Jabir Binyamin Behra and statement under Section 164 of PW-237 and the testimonies in the court. Event No.15 about Role attributed to Razak Kurkur, one of the accused near S6, PW-236, though had not stated anything in his statement under Section 164 of Code, 1973, but his version in the court is on par with version of PW-237 in the statement under Section 164 of Code, 1973 and in the court and also about role of other accused. For the next event No.16 about cutting of vestibule cover, climbing and entering coach S6, statement of PW-236 and PW-237 under Section 164 of Code, 1973 recorded on 09.07.2002 and 22.09.2003 respectively and in their testimonies in the court contain striking similarities about role of accused, which is reproduced herein below:

28 Version of Ajay Kanu Baria PW-236 in statement under Section 164 of Code, 1973 is as under:

> **"1. Reached near S6 and cut the curtain between the S6 and S7 with knife and they climbed and Jabir also climbed and was trying to break door of S6 and made holes on the top of the carboy with knife.**
>
> **2. Mehboob Latika gave one carboy to Jabir and Shaukat Lalu also climbed the coach and at that time Shaukat Lalu opened the main door of S6 towards "A cabin" and Rafik Bhatuk gave carboy after making holes and Rafik Bhatuk climbed and went into the door and Sheru and Irfan Bhobha also climbed and went inside".**

Version of Ajay Kanu Baria PW-236 in statement recorded in court, is as under:

> **"1. After reaching S6, Mehboob Latika made holes in the**

carboy with his knife and cut the cloth curtain between S6 and S7 with knife and Mehboob Latika entered and after him Jabir also went inside. Both of them kicked the vestibule door and broken the stopper and opened the door. At that time Shaukat Lalu gave one carboy to Mehboob Latika and one carboy to Jabir and from the same route Shaukat also went inside and Rafit Bhatuk gave Shaukat one carboy.

2. After going inside Shaukat Lalu opened the Godhra side main door and from there Rafik Bhatuk, Irfan Bhobha and Imran Sheru entered with one carboy each."

29 Version of Sikandar Siddiq Shaikh PW-237 in statement under Section 164 of Code, 1973 is as under:

"Maheboob Latika cut the curtain between two coaches with knife and thereafter, Maheboob Latika, Jabir Behra and Shaukat Lalu carrying a carboy each entered into the coach.

At that time Rafiq Bhatuk, Irfan Bhopa, Imran Sheru, Hasan Lalu, Rauf Kamli, Irfan Patadiya, Ayub Patadiya were standing on the ground near the coach and in the meantime the door was opened from inside then Rafik Bhatuk, Irfan Bhopa, Imran Sheru carrying one carboy each entered the coach from the open door. Faruq Bhana and Bilal Haji also came".

30 Version of Sikandar Siddiq Shaikh PW-237 in statement recorded in court, is as under:

"At that time Mehboob Latika had cut the curtain between two coaches by a knife. Before that, Mehboob Latika had made holes with knife like tool in the carboy which was kept on ground. After tearing the curtain Mehboob Latika entered the coach and then Jabir Bahera had also gone inside.

At that time Shaukat Lalu had supplied one carboy each to both of them.

Thereafter, Shaukat Lalu also went inside. At that time Rafiq Batuk gave one carboy to Shaukat Lalu and thereafter, Rafiq Bhatuk, Irfan Bhobha and Imran Sheru went inside the S6 coach and the S6 Godhra side door was opened and from there Rafiq Bhatuk, Irfan Bhobha and Imran Sheru entered the coach with a carboy each".

31 That both the above versions of above PW-236 and PW-237 have minor discrepancies about either putting a carboy on the ground for handing over such carboy to one accused by another accused and how entry was made by cutting the vestibule but it clearly emerges on record that all conspirators, who hatched the conspiracy were present at the scene of offence to execute the conspiracy and witnessed by PW-236 and PW-237. Not only that but confessional statement of Jabir Binyamin Behra under Section 164 dated 05.02.2003 substantially support statements and testimonies of both the above PW-236 and PW-237. Even event No.17 about throwing of the burning rags and S6 setting on fire, we reproduce the relevant testimonies of PW-236 and PW-237, which read as under:

32 Version of Ajay Kanu Baria PW-236 in statement under Section 164 of Code, 1973 is as under:

"1. At that time Hasan lalu had thrown a burning rag from a broking window and after some time there was smoke and there was lot of commotion/chaos.

2. He doesn't knew how and when the persons of S6 coach got down and the coach had started catching fire slowly and slowly".

33 Version of Ajay Kanu Baria PW-236 in statement recorded in court, is as under:

"1. At that time Hasan Lalu, Irfan Pataliya and Ramzani were sprinkling petrol from outside from broken window inside the coach and Hasan Lalu burnt a rag and threw inside the S6 coach from the broken window. Immediately there was a "????" and there were shouts in the coach".

34 Version of Sikandar Siddiq Shaikh PW-237 in statement under Section 164 of Code, 1973 is as under:

"When Sikandar was standing on the stone heap at that time Faruq Bhana and Bilal Haji reached there. At that time Hasan lalu, Ramzani and Irfan Patadiya were pouring petrol like substance on the broken window of the coach.

He saw Hasan Lalu throwing burning cloth inside the coach from the broken window.

35 Version of Sikandar Siddiq Shaikh PW-237 in statement recorded in court, is as under:

"Hasan Lalu, Ramzani and Irfan Patadiya were pouring petrol like substance in the broken window".

Event No.18 Incident of fire in S/6. For the sake of convenience, we reproduce statements and testimonies of PW-236 and Bhikhabhai Harmanbhai Baria PW-206:

36 Version of Ajay Kanu Baria PW-236 in statement under Section 164 of Code, 1973 is as under:

"1. At that time Ajay was standing in front of S6 and he came to the door to see what they are doing? He saw that, these people were sprinkling kerosene in the coach from carboy and Hasan Lalu and Ramzani were sprinkling

kerosene from outside the coach.

2. At that time Anwar Popa, Yunus Kalandar and Yakub Pataliya were breaking windows and doors of S6".

37 Version of Ajay Kanu Baria PW-236 in statement recorded in court, is as under:

"1. At that time Ajay was standing on the metal heap. With a view to see that what these persons are doing inside, went to the open door of S6 but nobody was seen. Neither the persons who went inside nor the passengers were seen but he saw the petrol which was sprinkled.

8. The second event of breaking window is not in the deposition".

38 Testimony of Bhikhabhai Harmanbhai Bariya PW-206 in the court stated as under:

"At the time when he was standing near "A cabin" he had seen the mob set the coach on fire. Following persons were near the coach. Hasan Lalu, Shaukat Lalu, Mahommad Lalu, Kadir Pataliya, Babu Pataliya, Soeb Kalandar, Yunus Ghadiyali, Maheboob Popa, Salim Panwala, Shaukat Bibino, Shaukat Bhano, Salim Panwala and Ramzan Bibino. (no specific role assigned to anybody though the witness claims to know the accused)"

39 On similarity of versions of PW-236 and PW-237 for the event of throwing of burning rags and setting on fire, it cannot be said that only in order to be consistent with the prosecution version of PW-236 and Jabir Binyamin Behra, in his confessional statement, some improvement is introduced by naming Irfan Patalia and Ramzani along with Hasan Lalu while throwing burning rags. The incident of fire revealed PW-236 stating about Hasan Lalu and Ramzani, who were

sprinkling an inflammable liquid while he was standing on the metal heap, which was also found as per map of scene of offence and in testimonies of other PWs including passengers who were injured eye witnesses, and therefor,e we find no major discrepancies, material contradictions, vital omissions or any major improvements or striking dissimilarities in this comparative statement and testimonies of witnesses viz. PW-236 and PW-237 either under Section 164 or before the court and a confessional statement of Jabir Binyamin Behra, an accused and Bhikhabhai Harmanbhai Bariya PW-206 in the testimonies before the court touching the core of the case of the prosecution, but on the conspiracy supports the case of prosecution.

Thus, testimonies of PW-236 though suffer from insignificant discrepancies, minor contradictions and inconsequential improvements get sufficient corroboration from PW-224, PW-231, PW-237 and PW-206 and further do not affect core of the case of the prosecution, duly corroborated by evidence of passengers, Railway employees, Police, Fire Brigade and other scientific evidence, for which detailed reference is made earlier in this volume of the judgment and about FSL, TI Parade, ID before the court, panchnamas, etc., which is referred in later part of the judgment.

40 In all these cases, behvioural pattern of witnesses Pws224, 231, 236, 237 that emerge on record while making statement before the police or the Magistrate or both and testimonies before the court is to be appreciated and analyzed in the backdrop of gruesome crime like the case on hand witnessed by them. Initially, not informing or approaching or disclosing events of the unfortunate incident at different stages, involvement of the accused, their precise role, name of the accused, possession and usage of weapons or other articles of crime resulting into

discrepancies, omissions, contradictions improvements, etc of insignificant in nature which either do not make any dent or affect substratum or core of the case of the prosecution but in fact reveal natural conduct and reflection of mindset of a person fossilized in different layers of fear psychosis, including that of consequences which may follow during the course of investigation and trial. Therefore, witnesses are initially reluctant to perform their duty to disclose or inform the police about crime so as to avoid possible harassment and even false implication in the crime.

Thus, the conduct of all these witnesses is natural, free from any influence or tutoring, trustworthy and inspiring confidence and therefore reliable and to be believed.

41 **That relevant paragraphs of testimonies of all the witnesses in Part XII of the judgment highlighted and emphasized by us establish that these witnesses have remained unshaken in cross-examination though impeached by learned counsel for the defence and the quality of their evidence meet with requirement of Section 134 of law of evidence that the quality and not the number of witnesses supporting case of the prosecution is important, they have undergone rigmarole of Sections 137, 139, 145, 153, 154, 155, 156 and 157 of the Indian Evidence Act, 1872. The decisions to which we have made reference and relied on in Volume-II of this judgment on the subject, for example; Maslati [supra], Vinod Kumar [supra], Suvarnamma [supra], Gulam Sarbar [supra], Thoti Manohar [supra] and Mano Dutt [supra] are relevant. That testimonies of all the witnesses, as above, establish the case of the prosecution qua sections 302, 120B & 149 of murder, conspiracy and unlawful assembly respectively and common object believed by us and as per**

principles laid down by the Apex Court in the cases of Om Prakash [supra], Gurmail Singh [supra] and Sheo Prasad Bhor Alias Sri Prasad [supra], and no doubt para 125 of the case of Yakub Memon [Bombay Blast Case][supra] which refer to para 583 of Nalini [supra] in which principles qua conspiracy in the context of Section 120A and 120B of the IPC are enumerated.

PART XII-G

FSL EVIDENCE

1 That below mentioned three expert witnesses are equally important vis-a-vis testimonies of eye witnesses and injured eye witnesses along other documentary evidence.

[1] **Satischandra Ganpatram Khandelwal, Deputy Director, FSL, PW-226**, during the period July, 2002 onwards for Exh.1159 i.e. report No.4/2002 dated 20.07.2002 and 15 photographs Exh.796 by FSL photographer PW-145. The above documents are proved.

[2] **Dipakkumar Bhagvatlal Talati, Assistant Director, FSL, PW-227,** 01.04.2002 onwards. This PW is concerned with Exh.1162 to Exh.1186 and particularly Exh.1168, dispatch note containing 32 articles, Exh.1169 dispatch containing 2 articles, Exh.1170 muddamal receipt and another Exh.1171 also of muddamal receipt received by FSL of the above articles along with forwarding letter Exh.1172 and analysis report dated 20.03.2002 Exh.1173 of all these 36 articles, which were collected immediately on the day and thereafter of the incident. In addition to the above, 11 articles vide Exh.1174 about dispatch note of 11

articles and receipt thereof by FSL vide Exh.1175 and analysis report of the above 11 articles being Exh.1177 and further dispatch note of 18 articles vide Exh.1178 and analysis report by FSL of 10 articles during the period of 3 months of incident reveal that the investigation has made all possible efforts to detect the crime by undertaking the exercise, as above.

[3] **Mohindarsing Jageram Dahiya, Director, FSL, PW-240** having studied up to M.Sc. and Ph. D. in Forensic Science and experience of about 30 years with FSL and authored a book on Crime Scene Management and published more than 50 research papers in Scientific Journal and Conference and had also given training to Police Officers, Forensic Officers and Officers, Judges of Trial Court, etc.

2 **Satishchandra Ganpatram Khandelwal, PW-226**, visited Godhra Railway Police Station on 11.07.2002 and thereafter along with Mr. Noel Parmar, I.O. and Mr. Dahiya, PW-240 went to the Yard of Railway Station, where, 2 coaches were stationed on the track. That inspection was carried out and Mr. Parmar showed sliding door, which was stuck at back part of northern latrine there and scratch marks were found upon inspecting both the slide doors of SC & S5 and a visitation report was submitted. Mark 28/2007 and finally exhibited as Exh.1159. Even opinion was rendered based on first photo Exh.796 and in para 3 it is stated as under:

> "3 I am shown first photo out of exhibit no. 796. On looking at the same, I state that stoppers are fitted in the holes of sliding doors therein. The aforesaid sliding door was fitted towards north and the hole, in which stopper is fitted, is a hole

on the southern sliding. On looking at the photograph no. 2, I state that a close up picture of photograph no. 1 is seen in photograph no. 2. There is a hole towards the north of toilet in which sliding door is fitted. Photograph no. 3 shows friction mark extending from the said hole to south direction. In this photograph, northern side hole is nearer to floor of latrine and condition of aforesaid hole has been disturbed. I am shown photograph no. 4 and it is a close up photograph of photograph no. 3. I am shown photograph no. 5 wherein stopper appears to have been a little bent. On looking at photograph no. 6, I state that there is a rectangle at the upper corner of sliding door therein stopper like hook can be fitted. On looking at the photograph no. 8, I state that it is a close up photograph of photograph no. 6. On looking at photograph no. 7, I state that sliding door is tightly fitted in the toilet wherein there is a long scratch mark extending from north direction to south direction, and there is a hole towards north, and rust particles and burnt carbon particles appear to have stuck on this hole and scratch mark.

Question:- Photograph no. 3 and 4 are shown to you wherein any carbon particles are seen?
Answer:- Photographs were taken to decide as to whether carbon particles and rust particles appear on the said scratch mark or not".

2.1 Likewise, other photograph Nos.9 to 15 were seen which reveal status of burnt coach from inside and outside. The above witness has worked in Physics during the period from 1977 to 2008 and had an occasion of taking about 100 to 150 samples for examination in connection with fire, occurred during this period. However, in para 6 this witness states that fire can broke out due to many factors, but he has no knowledge as such what kind of pattern may be found in the cases of fire break out due to short circuit and / or explosions and also due to petrol, diesel, kerosene or such other inflammable material. In para 8 it is stated that no mention was made about burning pattern of sliding door in the report of examination dated 11.07.2002. However,

he states that sliding door was fitted in the toilet and it was situated towards S7 coach, was open and fitted. The sliding door of S6 coach and even S5 were made of iron sheets. In his further cross-examination in para 13 it is stated that the said sliding door was moving on the strong steel strip and during his investigation he inspected as to whether ther are marks on the stopper of sliding door or not. In para 14 the witness admits to have received fax message on 10.07.2002 for inspection and on the spot inspection was carried out on 11.07.2002 and that report was forwarded on 20.07.2002. Para 15 of the cross-examination reveals blending of the sliding door of S6 was caused by force and it was found that force was used on the outside handle of sliding door of S6 coach situated towards S7 and in case if force is used by hammer on the inside stopped of the sliding door, the stopper could open in such manner. Para 15 of this witness reads as under:

> "15 It is true that bending of stopper on the sliding door of coach no. S/6 as stated by me was caused by force. It is necessary to know that use of said force was made from inside or outside the coach. It is true that if force is applied on the sliding door, stopper can bend. It is not true that inspection of entire sliding door shall have to be made to know this. It is true that it is necessary to know marks on the sliding door. It is true that if sliding door is closed, inspection of parts on both sides of it may become possible and it can be seen as to whether there are any marks on both sides or not. It was found that force was used on the outside handle of sliding door of coach no. S/6 situated towards S/7. It is true that if force is used by hammer on the inside stopper of this sliding door, stopper can bend in this manner. It is true that rust was found on the hole of stopper. It is true that Mr. Noel Parmar showed scratch mark on the sliding door. It is true that there were no other scratch marks on the sliding door apart from it. It is true that Mr. Noel Parmar stated that report is to be submitted after inspecting this".

2.2 Further in para 18 of the cross-examination this witness

denies to have not made any note with regard to length of scratches in the rough note produced by him. Para 18 of this witness reads as under:

> "18 It is not true that I have not noted length of scratches in the rough note produced by me. The measurement noted at the upper portion of rough note is the measurement of scratch only found on the metal wall. It is true that I have not made any note in the report regarding shape of those scratches. It is true that no scratch was found at the time of inspection apart from this one scratch. It is not true that there is no note in my rough note in connection with any hole of stopper. The witness states that such is noted that one hole has become a little distorted. Nothing has been noted except it. It is true that I have not noted any more details regarding distortion. I noted all the distortion and change found in the concerned place during the inspection, and I have prepared a report based on it. It is not true that in the rough note, there is no reference of scratches, which have been shown in my report. It is true that such has not been noted in the rough note that scratches were found on the outside handle of sliding door. It is true that I have not noted in the rough note as to why scratch mark and hole were caused. It is true that I have not measured depth of scratches.

2.3 That report dated 20.07.2002 of S.G.Khandelwal, PW-227, reads as under:

> **"Forensic Science Laboratory**
> **Gujarat State**
> **New Mental Corner, Ahmedabad-16**
>
> Date: 20/07/2002
>
> **Spot Visit Report No. 4/2002, in reference to**
> **Godhara Railway Police Station C.R.No. 9/2002**
>
> In accordance with the Fax message No. N. W.P/101/Inquiry/Camp Godhara, dated: 10/07/2002 of the Assistant Police Commissioner, Control Room, Vadodara and Investigating Officer, Camp, Godhara, on 11/07/2002, the

Forensic Expert Team visited Godhra during 11:15 hours in the morning to 13:15 hours in the noon wherein alongwith the undersigned, Dr. M. S. Dahiya, Assistant Director, Ahmedabad, Mr. M. N. Joshi, Scientific Officer, Ahmedabad, Mr. J. C. Patel, Photographer, Ahmedabad were present. They inspected S-6 coach of the Sabarmati Express burnt at the time of incident and S-5 coach with it. Both the said coaches were lying in Godhara Railway Yard.

Observations:

(1) The sliding door of the burnt S-6 coach having direction towards S-7 coach (Eastern side) was sliding towards the internal wall of the Northern toilet and it was open and it was fixed inside the toilet.

(2) Down the said sliding door, two holes of the coach were found at about 53.0 cm height from the floor. The distance between these two holes was about 62 cm. (Both these holes were towards Northern to Southern in the coach). The diameter of the northern side hole was about 1.5 cm. and the hole of southern side was quite distorted. The stopper wedge of both the holes could be fit. A scratch mark of about 62.0 cm. was seen between both these holes. The stopper wedge was bent inside which shows that, the stopper was in the closed condition at the relevant time.

(3) There was a long rectangular hole on the upper side of the door of the said sliding door wherein the stopper above the passage could be fit. No scratch marks or utilization of any force were found in the said upper door hole or around.

(4) Looking to the condition of the upper stopper hole of the said sliding door, the upper stopper-lever was found in open condition.

(5) Below the said sliding door and towards the stopper portion and on the stopper(Rod tip of the stopper), marks of utilization of force were found wherein the metal of the door was found slightly bent and damaged.

(6) At the portion of the outer side handle of the said sliding door also, little scratch marks i.e. marks of utilization of force were found.

(7) In the toilet of the burnt S-6 coach having direction towards passage of S-5 coach (western side of the coach), no marks were found as mentioned in the above observations.

(8) Necessary photography regarding the incident was carried out.

S. G. Khandelval,
Assistant Commissioner,
Forensic Science Laboratory cum
Assistant Chemical Analyse,
Gujarat State,
Ahmedabad."

3 **Dipakkumar Bhagvatlal Talati, Assistant Director, FSL, PW-227** received two plastic carboys on 02.03.2002 and the above two muddamal containers were examined by following standard physical chemical method wherein the presence of Hydrochloric Acid was found in the sample mark-1 and blue coloured hydro carbons of kerosene were found in the sample mark-2. That receiving of muddamal, forwarding letters and analysis report dated 20.03.2002 with signature and seal with designation are confirmed. Further, receiving 36 parcels including 2 sealed parcels on 04.03.2002 dispatched by the Deputy Police Officer, Western Railway, Ahmedabad vide letter dated 02.03.2002 is admitted and these samples were examined and report was submitted on 20.03.2002. Again, 11 parcels were dispatched by the very police officer vide dispatch note dated 11.04.2002 and receipt was issued by office of FSL on 12.04.2002 and after analysis of samples out of aforesaid 11 parcels report dated 26.0-4.2002 was submitted along with forwarding letter dated 30.04.2002. Thereafter, 10 sealed parcels containing 9 sealed jute sacks and one sealed plastic carboy were received by the Investigating Officer vide letter dated 04.05.2002 on which examination was carried out and report dated 17.05.2002 was prepared. That receipts receiving samples vide Exhs. 1, 1168, 1169, 1170 and 1171 and

receipts Exh.1174 and 1175 and report thereon Exhs. 1176 and 1177 and subsequent reports Exh.1178, 1179, 1180 and 1181 and last 2 samples received in sealed conditions vide dispatch letter dated 09.02.2002 and examination of report dated 17.05.2002, which are given Exhs. 1182, 1183, 1184, 1185 and clarification report dated 15.06.2002 Exh.1186, all stood confirmed. **This witness fairly concedes about no experience of conducting analysis of any muddamal article in the case of fire broke out in any residential house, etc. and that he did not know anything in respect of flash over. However, in para 10, it is stated that analysis of samples was conducted through standard physical chemical method. Paras 11 and 12 of this witness read as under**:

> "11 It is true that this IS number is such number as is decided by Bureau of Indian Standard in accordance with rules and regulations. Other IS showing rules and regulations in respect of petroleum products are in existence. As mentioned in the aforesaid report, I obtained flash point and pro point of aforesaid chemicals at the stage of analysis. I am shown IS-1448 (P-10). On looking at the same, I state that cloud point and pro point method have been mentioned therein. It is true that in this report, analysis of first sample conducted was in relation to kerosene. It is true that samples mark 1, 2 and 3 have been shown in para 1 of analysis on the page no. 3 of aforesaid report. It is true that as noted in the said report, its flash point should be minimum 35 centigrade as per standard. It is true that more flash point and smoke point than minimum standard shown in Indian Standard were found in the sample no. 1, 2 and 3. It is true that mark A, B, E, F and G in the said report were pertaining to diesel and the note in that regard has been mentioned vide sample mark A, B, E, F, G in result-2 of analysis on the page no. 3. It is true that I have not stated in my report that kerosene and diesel have been purchased from any one place only. It is true that Investigating Officer sought opinion in respect of petrol as to whether petrol has been procured from the same source or not, and I stated in my aforesaid report that it is not possible to give clear opinion in respect of the fact that petrol of these samples is of same kind

and has been procured from the same source.

12 I have not performed any experiment as to how long petrol is retained. It is true that if quantity of petrol has fallen on any substance in large proportion, the said substance can absorb petrol. The witness states that it is necessary to have such surface of substance as can absorb it. It is true that retention of petrol is dependent on many circumstances. It is true that hydrocarbons are present in the petrol, diesel and kerosene. It is true that different tests are to be conducted for analysis of hydrocarbons. It is true that hydrocarbons are also of different types. It is not true that different method will have to be adopted for analysis of different hydrocarbons. It is not possible to know exact temperature by direct test for knowing hydrocarbons in petrol, diesel and kerosene. The remains of hydrocarbons can be tested in the burning and non-burning situation. It is true that presence of remains of hydrocarbons can be found with chromatography method. It is true that as per report no. 2002/C/287 dated 20.03.2002, remains of hydrocarbons of diesel or kerosene were not found in any sample. The remains of hydrocarbons of petrol have been found in the piece of lungi of sample mark 1/6 in the aforesaid report. The piece of aforesaid lungi was not in the burnt condition. I cannot state as to whether remains of petrol found in the aforesaid sample were of burnt petrol or not. The different analysis method was adopted regarding different kind of hydrocarbons for this analysis. I did not adopt pyrolysis method in this method. In my opinion, thin layer chromatography and gas chromatography method were adopted".

4 **Mohindarsing Jageram Dahiya, Director, FSL, PW-240** deposed about inspection of coach S6 on 01.05.2002, the experiment performed by pouring water in a coach on 03.05.2002 and thereafter two visits on 02.07.2002 and 11.07.2002. IN para 11 of his cross-examination he denies that he had no occasion to inspect any coach of the train in connection with fire after 11.07.2002. This witness had an occasion of inspecting one coach of Shanti Express, Gandhinagar, two coaches on different dates at Kalupur Railway Station, Avadh Express,

Karjan and Railway engine in Bharuch. In para 13, the above witness admits to have collected samples of

seat material of this coach and the seats were made up of foam and raxin. Para 13 of the deposition of this witness read as under:

> "13 During my visit on 1/5/2002, the samples which I collected from this coach include samples of seat material of this coach. These seats were made up of foam and raxin. It is true that there are various types of foam for seats. We have not analysed in connection with the foam which was used in the seat of the coach of the incident. I can not state as to whether the foam which was used in the seat of the coach of the incident was 'Lakes'(sic) or not. It is true that the foam for the seat are made by using chemicals. It is true that this foam for the seat is made up from synthetic polymer namely stairin. It is true that polyurethane used in this type of seat can catch fire very easily. It is not true that there is toxic substance in this type of foam. It is true that when polyurethane foam burns at the heat of 800 degree, the gas produced from therein include hydrogen synod, carbon monoxide etc. It is true that if anyone inhales both these gases, oxygen carboxy hemoglobin burns and oxygen covering capacity of red blood carbon (RTB) decreases. It is true that in such condition, there is possibility that a human being suffers from dizziness, headache, weakness of limbs, tightness in the chest and lack of consciousness and due to this reason, human being loses life in some cases.

4.1 Para 15 of this witness mention about the density of the coach was 5000 cubic ft. taking into consideration the length, width and height of the coach. In para 16 this witness deposed as under:

> "16 It is true that Investigating police officer had got the photographer to snap other photographs during 9-30 hours to 10-00 hours in the morning and he did not send me the said photographs alongwith the letter dated 25/8/2004. It is true that I am being shown photographs from Exhibit-1048 to 1059. Viewing the same, I state that Investigating officer did not send any photographs out of those photographs alongwith

the letter dated 25/8/2004. It is true that the investigating officer did not provide the information regarding the flames of fire and the colour of flames at the stage of fire caught in this coach. It is not true that from the colour of the fire flames, the substance / liquid used to torch the fire and temperature of fire at the relevant time can be known. It is true that from the burning of one substance and the colour of smoke, it can be known as to which type of substance has been burnt. I do not know the fact that if the colour of fire flame is of orange colour, the temperature can be about 1000 to 1200 degree centigrade at the relevant time and if the colour of fire flame is of bright yellow colour, the temperature can be about 1200 to 1400 degree centigrade. The witness states that merely on the basis of the colour of flames, the temperature of the relevant time can not be stated. I do not consider the book 'Forensic Science in Criminal Investigation and Trial' as standard book with respect of the incident of present case. I agree with the analysis regarding flames of fire which has been noted in chapter no.15 'Character of Fire' on page no. 967 of the last edition of this book. The witness states that this note is with reference to small quantity flames and this reference can not be considered sufficient for the fire investigation case. According to me, (1) Practical Fire and Arson Investigation, Author : Devid J. Redshikar and O.Polonel (2) Scientific Protocol for Fire and Explosion Investigation, Guidelines for Fire and Explosion Investigation by the Technical Kimit of National Fire Protection Association -9/21 etc can be considered standard books.

4.2 In para 30 this witness has noted the damage caused to the floor part of the coach. Para 30 reads as under:

30 I noted the damage caused to the flooring part of the coach. The crust of the flooring part of the coach were peeled off. During my inspection, I did not collect any sample of the flooring part. The witness states that they were priorly collected. I have no idea as to who collected it and when. I can not state exactly as to whether samples of flooring were collected by FSL officers or not. It is true that all the seats of the coach were burnt. The witness states that some seats towards Vadodara were burnt up to some extent. All the above

seats of the whole coach were burnt completely. All the above seats of the whole coach were burnt completely and some seats towards Vadodara were burnt up to some extent, but its reason may not be such that the fire broke out from above part. If any inflammable liquid may have spilled in the above part of a rack and any passenger may have lighted a bidi for smoking, but it is not possible that the fire may have broken out due to the same. If liquid has been spilled in the middle part of Eastern side and fire has been torched, the fire may affect the part towards East-North direction. According to me, the door of North-East direction was also burnt. The said door was also burnt up to much extent".

4.3 That after constitution of Special Investigating Team by the Apex Court, officers were given the questionnaire forwarded by Shri Mothaliya, to which reference is made earlier in this judgment.

Exh.1353

"ANSWERS TO YOUR QUERIES RELATED WITH GODHRA RLY. PSTN. 1 CR.NO.09/2002

Query-1 What is the opinion on the allegation that the S-6 was put on fire after pouring petrol?

Ans:- On the day of incident, 38 samples were drawn i.e. on 27/2/2002 for the presence of any inflammable material.

1 As per FSL report No. 2002/C/287 dt. 21/3/2002, the presence of residual petroleum hydrocarbons were detected in 27 samples.

2 Petrol was detected in 2 samples.

3 In some samples. orange dye used in petrol was detected. In one sample, presence of blue coloured hydrocarbon was detected.

4 The crime scene report No.2 dt. 17/5/2002, issued by FSL para-3 indicates the use of high inflammable material to burn the coach.

Query-2 Whether the pouches filled with inflammable were thrown into inside the coach?

Ans:- No, pouches of inflammable material were not thrown in to the coach because as per FSL crime scene report dt. 01/05/2002, frames of windows were closed at the time of fire. Secondly, each window was having grill with 3" gap between bars of the grill. Hence, it was not possible to throw pouches inside the coach from outside. Also, had pouches been thrown in to the coach, maximum would have been recovered at the time of first panchnama. such things were not recovered.

Query-3 Whether the inflammable articles had been thrown through the windows by the mob?

Ans:- No, Answer is as above (Query-2).

Query-4 If some passengers/persons while cooking on kerosene stove (Primus) and exploded it. Whether is it possible to occur/happen such serious incident?

Ans:- No, it is not possible to occur such serious incident of burning 59 passengers within short period.

The fire pattern would have been different.

The recovery of the (primus) would have been made at the time of panchnama.

In such case FSL would not have detected residual petroleum hydrocarbon of petrol.

Query-5 Whether is it possible to catch fire from the match sticks or bidi or cigarette and result in such serious incident?

Ans:- No, because such incidental fire takes hours to spread from one end to other end of coach.

Logically such small fires are not allowed to develop by the passengers to such extent and that also in a stationery train.

The material used in making the railway coach conforms to

the requirements of UIC code 564-2 and I S specifications for flammability and fore retardant properties. These materials do not burn without application of sufficient fire source.

The fire properties of different furnishing materials mentioned above indicate that the fire on samples of sizes laid down in specification will extinguish itself within the time period mentioned against each material after removal of the fire source. These materials do not burn of its own without application of the fire source.

The above mentioned furnishing materials are of general nature and does not emit toxic gases due to which human being can face sudden death. (Copy of letter from Govt. of India, Ministry of Railways, Research Designs and Standards Organization, Lucknow is attached).

Query-6 Whether the incident of fire in coach was happened due to short circuit?

Ans:- No, FSL team examined this reason very thoroughly but there was no evidence of short circuit. Secondly, the train was stationery at the time of fire and when the train is stationery, it remains on battery only.

Query-7 Whether it is possible to broke out the fire in the coach by pouring petrol or any inflammable article by flash fire?

Ans:- No, this fire was not broken out by flash fire because flash fire is a fire that spreads rapidly through a diffuse fuel, such as dust, gas, or vapors of an ignitable liquid, without the production of damaging pressure. If cause of burning is flash fire then ignitable material is must to initiate the initial fire. Since it was an open chamber, a lot of ignitable material is required to initiate such a large fire in a very short period in the area of about 5000 cubic feet. FSL also revealed the fire spread was natural in this case.

Query-8 Is it possible to burnt the coach by flash over or is it possible to flash over in the coach?

Ans:- No, it is not possible to burn the coach in question nor

flash over phenomenon will occur in this coach. Flash-over **can be explained in a practical and understandable manner as a stage in the development of a contained fire in which all exposed surfaces reach ignition temperature, more or less simultaneously**. During free burning phase of fire, the rate and intensity of open burning increases geometrically and fire doubles with each 10o C rise in the temperature. Heat rapidly evolving from the origin point of fire, is convected and collected in the upper most area of the structures. Additional heat is transferred through conduction and radiation. The convected (super heated) gases themselves become a source of radiated heat, radiating heat energy downward into all surface areas directly below them. This heat is absorbed by conduction into the mass of those items whose surface are struck, causing surface pyrolysis (backed effect). **When the temperature reaches the ignition temperature of the items, a flashover occurs, flames instantly flashover the entire area and all similar structures burn equally (e.g. wooden wracks etc.) through out the compartment. Here, almost 20% of the compartment on west side has only heat effect and rest it totally burnt**.

Sometimes, the different items in the room, having different ignition temperature, start burning at different time intervals. It has been seen that because of vide variations in ignition temperatures of the items, some are burnt while others do not burn giving a false look of multiple origins of fire. **Larger the volume area and free flow of air delays in the build-up of temperature as well as time to flashover**.

The time of flashover has vide variations of may never occur depending upon the factors like confinement, length of the time of fire, size of the fire, location of the fire in the structure, volume area, aeration position of the burning point, quality of the combustible material in the structure etc. Looking to the above, a train compartment with so many outlets for the leakage of hot gases is not an ideal structure for flashover phenomenon.

Query-9 On the direction of the officials of FSL during the inspection of S-6 coach, the IO had collected remains of burnt articles in 9 sealed bags sent to FSL for examination. The FSL was sent a report on 17-05-2002

stating that there is no presence of any inflammable in the remains of burnt articles. What may be the reason for this?

Ans:- Traces of hydrocarbons and carboys were not detected may be because these samples were drawn basically for the detection of petroleum hydrocarbons but for other relevant information required for the investigative (evident from the accompanied forwarding note.) But the traces of carboys which were not detected may be because plastic carboys would have melted and evaporated at such a high temperature.

Secondly, this material was collected after two months of the incident. Hence, might have been decomposed. **However, samples immediately after the incident, 27 samples have shown the presence of residual petroleum hydrocarbon.**

Thirdly, it was a total sweep of the compartment. Hence, residual hydrocarbon might have been diluted below the detection limit.

Query-10 In your report of 17-05-2002 has stated that there is no presence of remains of plastic containers in the remains of burnt articles, What may be reason for this?

Ans:- With regards to "Black Carboys" it is submitted that-
Plastic carboys of being plastic might have melted and evaporated at such a high temperature say about 500 to 600 degree Centigrade.

Secondly, carboys might have been taken back by the culprits after emptying into compartment.

Query-11 The condition of windows and doors of the Coach at the time of attack on the coach at Signal Faliya, Godhra.

Ans:- **Plastic and glass shutters of windows on Godhra side of S-6 were closed at the time of fire. But were found broken with stone pelting**.

Three doors of the coach were open and one door towards the front facing signal Faliya was closed at the time of fire.

Query-12 Whether is it possible to spread the fire to inside the coach if the fire put on the bottom side rubber of Vestibule of the coach and is it possible to spread the fire as it happened in this incident?

Ans:- No, It is clarified that the vestibule of coach S-6 is made of special type of rubber which is self extinguishing and does not catch fire. The rubber vestibules of coach S-6 had no burning sign on the lower end but shown the surface pyrolysis on upper side because of the continuous exposure to flames coming out through the upper portion of the vestibule door. (Photograph of the vestibule of S-6 coach is attached). This is also evident from the photograph of the coach S-6 published on the cover page of "The Week" magazine of July 7 2002; where the canvas vestibule of coach S-7 is burning while the rubber vestibule of S-6 are not burning.

Hence, there is no question of burning of the vestibule of coach S-6 and initiating/spreading of fire from this portion. However, had it been a case, the coach S-7 would have burnt because of the canvas vestibule of the coach had caught fire which did not happen. Secondly, the vestibules are outside the coach; hence, the fire of the burning vestibule will go upwards. The metallic sheet of the coach prevents the spreading of fire towards coach.

Query-13 The pattern of the fire outside the coach noticed in this case is the pattern of fire caught from outside or inside?

Ans:- Looking to the pattern of fire outside the coach, fire started from inside the coach, the coming out through windows burnt the coach on outside.

Query-14 If huge quantity of petrol poured inside the coach and put on fire whether explosion is possible or not?

Ans:- No, in a non confined structure, the explosion will

not take place because of the immediate leakage of expended gases.

Query-15 The burn injuries caused to the passengers of this coach was on their upper side bodies, the reasons for the same?

Ans:- **A flame has natural tendency to rise upwards. When ceiling obstructs this upward progression, it starts flowing horizontally and escapes through the upper open portions of doors and windows of the structure. The persons coming out of the doors along with the flames might get burning or scorching on the upper half of the body**. Secondly, the persons standing in non burning areas nearby may get scorched on exposed parts by heat radiations.

Query-16 Is there any case in your knowledge that if fire broke out accidentally in a still train and running train in which this much casualties caused? If yes, details may please be provided.

Ans:- Yes, I have seen many cases on TV as well as personally attended some cases of accidental fires in running and still trains. But I have never heard or experienced/seen any causality in such fires. The best example of this type of fire is cited below:

Avadh Express No. 9038 was going in full speed from Baroda to Bombay. Near Palej Railway Station, fire was observed in one of the compartment in between two toilets. The train was stopped by pulling the chain, which took some time and covered some distance to halt completely. In this fire, five bogies of the train were completely burnt. **But not a single passenger was hurt seriously or died**. For details, please go through the paper cutting attached here with.

Query-17 If the fire broke out accidentally, whether it is possible to cause huge casualties like this?

Ans:- No, if the fire breakout accidentally, such casualties are not possible. **This type of casualties is only possible if passengers are suddenly trapped in a very big fire**.

Query-18 On which evidence it has been finalized/decided that the persons of mob/accused came inside by breaking the Vestibule?

Ans:- FSL, report date 20/7/2002 pertaining to the examination of sliding door of S-6, a connecting vestibule between S-6 and S-7 indicates that: **Signs of force were visible where the door metal was some what bent and damaged.**

Some scratch marks were visible on the outside handle of the sliding door indicating the use of force to open it.

A longish scratch mark was visible between the stopper knob and the hole meant for its fitting. This indicated that it was opened forcibly from outside.

Query-19 What is the reason that initially smoke came out and then was the fire?

Ans:- **When fire starts, it generates an environment which has three zones i.e. the lower is a combustion zone (flame) where fuel burns. The middle is called as plum (column of hot air). Upper one is smoke zone or smoke and sludge layer. In a fire environment, smoke is a fuel the fire will eventually consume**. Inside, plumes generate a dense layer of smoke that will ultimately fill a closed space from top to bottom. The hotter is the upper layer of gas, the greater is the degradation of other materials in the room. Smoke represents the material that did not burn completely the first time. This environment is full of char, solid matter in very particulate from, as well as liquids in as aerosol form. **This by-product of the fire is produced by pyrolysis of the first fuels partially consumed by the fire**. When aerosolized liquids that are formed in smoke strike a glass surface, the smoke re-condenses and a brown sludge is created. Sludge, like smoke, represents fuel for later stages of the fire's development if there is enough thermal momentum to ignite it. Smoke and sludge collect on internal surfaces in structure fires. Conversely, if the thermal momentum of the fire reaches its maximum, the layer of soot can become fuel for the later stage for fire (500 to 600o C). At this point, the entire compartment

simultaneously bursts into flames. **Hence, at initial stage of big fires in a compartment/room, the visibility of smoke is too much which subsides the visibility of fire because of sudden lowering of the thermal layer from ceiling accompanied by the sudden lowering of thick smoke layer**.

The best examples of the above are:

1 Tons of petrol was thrown in to WTC by striking aeroplanes, caught fire initially only smoke was visible and after some fire appeared.

2 Bombay train which caught fire, initially there was appearance of smoke only and visibility of fire was at later stage.

Query-20 Whether the fire broke out after the halt or halted due to the fire on moving train?

Ans:- To the best of my understanding, the fire broke out after the halt of train. The operation done to torch the compartment is not possible in a moving train i.e. cutting the vestibule [Sanjeev: Where's the evidence of cutting?], breaking the connection vestibule door and pouring of petrol and coming down then from the train. However, this can be better known by the eyewitnesses. [Sanjeev: THERE IS NO EYEWITNESS]

Query-21 Whether the presence of petrol or inflammable materials have been noticed on the railway track sand/metal on the bottom of the coach at the place of incident?

Ans:- No, it was not noticed on the track, near the track or on the bottom of the coach. **The pattern of burning itself indicates that fire developed from inside the coach and not from railway track or bottom of the coach**.

Query-22 (Verbal) What type of chain pulling system was there in compartment? Was there any violence on the compartment before fire ?

Answer: The chain pulling system was alarm chain pulling

system (ACP) and train can be stopped from out side the compartment by using this system.

There were marks of heavy stone pelting on the compartment on Godhra side (Signal Faliya). The stones are shown in the photograph."

5 Even applying method of chromatography by a forensic expert is also a recognized method of analysis of fire inflammable material used in fire and it cannot be said that such method is unscientific. We are in agreement with the judgment relied on by learned Mr. J.M.Panchal, learned Special Public Prosecutor about failure on the part of learned counsel for the defence in raising certain questions / suggestions about special features of theories of fire and they were not cross-examined and to that extent submissions made by learned counsel for the defence are rejected. In Volume-II of the judgment we have referred to the judgments relied on by Mr. J.M.Panchal, learned Public Prosecutor and learned counsel for the defence, but common thread which runs through all these judgments is requirement of recognized scientific method and analysis of the material by experts and that is available on the record of this case.

FIRE THEORY

6 We have already held that when trustworthy, truthful and reliable ocular evidence is available, and an expert was not confronted in cross-examination in spite of availability of opportunities, and no recourse was taken to Section 311 of the Code, 1973, at the stage of appeal, the material placed on record by learned counsel for the defence relying on certain books viz. [1] Fire Debris Analysis authored by Eric Stauffer, Julia A. Dolan and Reta Newman; [2] Practical Fire and Arson

Investigation authored by David R. Redsicker and John J. O'Connor; and [3] Scientific Protocols for Fire Investigation authored by John J. Lentini, about requirement of following such procedure for which various opinions are given by the authors do not require any deliberation. In the facts of the case, it has come on record that Dipakkumar Bhagwandas Talati, Assistant Director FSL, PW-227 has followed recognized and established method of chromatograph while analyzing fire debris and materials sent for. Further, pyrolysis which is a process by which a solid [or a liquid] undergoes thermal degradation into smaller volatile molecules, without interacting with oxygen or any other oxidants and it is necessary process for the combustion of most solid fuels. Pyrolysis of a given material can produce many different thermal degradation products, called pyrolysis products and it significantly contributes to the chemicals recovered from fire debris samples during the laboratory analysis. The above process is explained by Mohinder Dahiya, Deputy Director, FSL, Gandhinagar, PW-240 and it cannot be said that he was not in knowledge of the basic requirement to undertake the fire debris analysis by his colleagues. That examples given in the book about flash-over particularly that with the fire growing, the hot gas layer eventually reaches the critical temperature of approximately 600 degrees C and at this point, the hot gas layer ignites, thus significantly increasing the radiant heat transferred to the floor level ignite. The example given is about close room and it cannot have any universal applicability and this aspect is also explained by PW-240 in a reply to query raised by the SIT. That in para 8.2 Chromatographic Theory is explained in which it is clearly stated that the techniques of Chromatographic are still used for the separation of coloured components in a mixture.

6.1 Chapter 5 of Scientific Protocols for Fire Investigation authored by John J. Lentini about Analysis of Ignitable Liquid Residues

and Chapter 7 about Thirty Fire Scene Scenarios, suffice to say that Chapter 7 begins with sentence by Jack Handy that `**In theory, there is no difference between theory and practice, but in practice, there is**'. Para 7.11 under the heading of Conclusion it is again mentioned that the physical evidence and eyewitness accounts often allow an investigator to make such determinations and additional data, not directly related to the fire, often must be considered to evaluate whether the investigator's hypotheses make sense in the real world. The individual, who acts as the principal investigator is charged with putting all the evidence together into a coherent story. Applying the scientific method to questions of responsibility is as important and often more difficult than applying to origin and cause determinations.

6.2 Reliance is also placed on The book `Practical Fire and Arson Investigation' authored by David R. Redsicker, more particularly, behaviour of fire, classification of fire, phases of fire, incipient, emergent smoldering, free burning, oxygen-regulated smoldering, fuel load, fire spread, direction and rate of spread of fire, etc. again remained for the examples which cannot be compared with the facts of the present case for the reasons stated in earlier paragraphs. We have ruled out theory of smoldering in view of versions of eye witnesses, including injured and evidence of FSL experts of fire and, therefore, this aspect of smoldering will also not help the defence.

6.3 The paper and article pertaining to `Upholstered Furniture Transition from Smoldering to Flaming', in conclusion taken into consideration a theory which exists for smoldering combustion based on work carried out by T.J.Ohlemiller at Princeton University, which were summarized in the hand-book – SFPE. That the theory which indicates the importance of different porous item density, air flow rate and

direction, etc., at the present time, however, the theory cannot be used to protect whether an upholstered furniture item will smolder or not. It further comments that predictability was equally impossible and the theoretical basis was even sketchier. The conclusions of the analysis is that out of a total 102 items subjected to smoldering ignition in laboratory tests, 32% burned up partially or completely without erupting in flaming while 64% did go to framing and time taken for such framing, but it was finally concluded that the existing data do not permit firm conclusions regarding the fabric and padding materials which are the most prone to transit to flaming.

6.4 Further, testimonies of Mr. Dipakkumar Bhagwandas Talati, PW-227, Mr. Satishchandra Ganpatram Khandelwal PW-226, and Mohinder Dahiya PW-240 corroborate with ocular evidence and rule out theory of smoldering, short-circuit or any other cause of accidental fire. That all the above experts have answered the queries even put forth by SIT and during cross-examination about emergence, pattern, nature, ignition, colour of flames and temperature in centigrade along with smoke and fire in Coach S/6 of ill-fated train persuade us to reject theories canvassed by learned counsel for the defence about fire in the coach was due to unknown cause other than the conspiracy for which proper method of investigation in the cases of arson was not followed.

PART XII-H

INVESTIGATION AND OTHER EVIDENCE, INCLUDING T.I.PARADE, I.D. BEFORE THE COURT

1 Learned counsel for the defence highlighted irregularities in

the investigation, suppression of vital material, approach of the investigating officer, which was unfair, nontransparent and biased and even non-examination of witnesses in Part V-D of this judgment.

2 On perusal of the nature of irregularities and/or lacunae, we find that some minor lapses appear but non-production of yadi of seizure of tempi, non-disclosure of the fact about letter addressed by PW-244 to PW-218 about disclosure made by Jabir Binyamin Behra before the police and breach of Section 27 of the Evidence Act,, fax message addressed to Investigating Officer to FSL on various dates viz. 28.04.2002, 01.07.2002 and 10.07.2002 again will have no significance since sufficient material is available about exchange of communication between the Investigating Officer and FSL at various stages from day one of sending seizure muddamal items to final queries raised by SIT and, therefore, it cannot be said to be irregularities of material in nature. Further, some wireless messages given on walkie talkie, etc by the guard to the Deputy Station Superintendent has no relevance in view of testimonies of PW-228 about unlawful assembly assaulting train. Likewise, non-production of other record of Carriage and Wagon Department of Ahmedabad and non-examination of certain witnesses, who were present at Railway Station, Godhra will not have fatal to the case of the prosecution. That various details about figure of vacuum drop at the stage of chain pulling or preparation of map and topography of scene of offence though relied by the Investigating agency was not brought on the record, would not again be damaging the caw of the prosecution in view of the testimonies of Railway employees and what is stated by PW-132 and PW-162 about damage to the coaches including S/6 and S/7 and Exh.778 and Exh.1008 and extract of Guard Book and a communication dated 19.09.2005 of Senior Superintendent Engineer, Railway to Dy.S.P., Western Railway, about mechanism of chain pulling,

ICV and shaft. We have produced testimonies of Railway employees, who were examined confirm about first and second chain pulling and also the place of offence, violent attach on the train and setting coaches on fire by mob consisting of 500 to 1500 persons belonging to a minor community.

3 So far as improvements made by the witness to suit the prosecution version during the trial is concerned, it is again an attempt made on testimonies of Town Police personnel and kerosene replaced by petrol to which we have already given our findings. The trial court has also not believed the version of VHP workers and we have given our own reasons to believe some of them for certain events, which took place while the train stopped near `A' cabin upon second chain pulling. As held by the Apex Court in the case of Mohd. Ajmal Kasab vs. State of Maharashtra [AIR 2012 SC 3565] if the confessional statement confirms the findings of investigation that should go to the credit of investigation and it cannot be said that the confessional statement was recorded to confirm the police investigation.

4 Thus, submissions made by learned counsel for the defence about irregularities and illegalities in the investigation and improvements of witnesses have no substance and are hereby rejected.

5 As held in Dayal Singh [supra] and and Rabhindra Kumar Pal Alias Dara Singh [supra], minor lapses of defects in investigation cannot be termed as defective. Another decision on this line is Madan Singh [supra] which referred to earlier decision in the case of Chikkarange Gowda [supra].

6 In absence of any clue, the investigating agency may

undertake investigation based on many theories which may or may not lead to detection of crime and criminals. Even during the course of investigation it may come across altogether a different facet of crime not assumable or thought of. Co-incidence does happen and various events which have taken place during the course of investigation resulting into recording of statements of witnesses from time to time cannot be said to be contrary to lawful procedure of investigation in view of nature of magnitude of crime but even minor lapses and discrepancies of insignificant in nature in the investigation which do not touch substratum of the case of the prosecution are to be discarded.

ABOUT OTHER EVIDENCE AND T.I.P AND I.D.

7 In the first part of this judgment, we have reproduced list of evidences along with description for which such evidence was produced, including admitted documents to which as such there is no dispute except Exh.1008 i.e. report given by Senior Section Engineer, Ahmedabad giving the coach numbers and two drawings of coach wherein ACP systems were installed. All the above documents were exhibited as Exh.28 in Sessions Case No.69 of 2009 to Sessions Case No.86 of 2009 and Sessions Case No.204 of 2009.

8 Medical Officers PW-27 to PW-59 and PW-62, who had performed postmortem and respective postmortem notes are again established and proved by the prosecution. Likewise, Medical Officers PW-62 to PW-73 and PW-176 and PW-180, who had given treatment to the injured and two accused are established and proved by the prosecution. We have referred to testimonies of PW-180 in earlier part of thew judgment, who had given treatment to accused No.2 of Sessions Case No.72 of 2009, Jabir Binyamin Behra immediately after the train

was set on fire for the injury he received.

9 PW-207, learned JMFC, Railway Exh.1063 in his testimonies admits to have recorded statements of PW-236 Exh.1214, PW-234 Exh.1233 and PW-232 Exh.1221 under section 164 of the Code, 1973. Out of these three witnesses, PW-234 and PW-232 were declared hostile.

10 PW-246 learned CJM has recorded confessional statement of Jabir Binyamin Behra Accused No.2 of Sessions Case No.72 of 2009 Exh.1469 and statements of three other witnesses PW-224, PW-231, PW-237 Exh-1470, Exh.1471 and Exh.1253 and admitted accordingly in his testimonies by following procedure under Section 164 of the Code, 1973 to which detailed reference and reasoning is already given by us.

11 PW-41 Executive Magistrate carried out Test Identification Parade for A/5 of Sessions Case No.71 of 2009; A/3 of Sessions Case No.70 of 2009; A/2 of Sessions Case No.72 of 2009; A/1 of Sessions Case No.73 of 2009; A/3, A/4 and A/2 of Sessions Case No.75 of 2009 and identified by PW-149, PW-236, PW-170 and PW-208 respectively.

12 PW-42 has also carried out Test Identification Parade of A/1 and A/2 of Sessions Case No.76 of 2009, A/1 of Sessions Case No.77 of 2009; A/1 and A/2 of Sessions Case No.78 of 2009 and identified by PW-149, PW-208, PW-231, PW-224, PW-208, PW-237 and PW-236, respectively.

13 Executive Magistrates who have undertaken Test Identification Parade – PW-42 & PW-212 of accused Nos.A/4 & A/5 of Sessions Case No.78 of 2009 identified by PW-172 and PW-236, A/1 and

A/4 of Sessions Case No.79 of 2009 identified by PW-231, PW-224 and PW-236 and accused No.1 of Sessions Case No.80 of 2009 by PW-236 and PW-163 are established and proved.

14 PW-42 has also carried out Test Identification Parade of A/1 and A/2 of Sessions Case No.81 of 2009; A/2 and A/4 of Sessions Case No.82 of 2009 and A/1 of Sessions Case Nos.84 and 85 of 2009 and also of A/1 of Sessions Case No.204 of 2009.

15 We have exclusively considered testimonies of passengers, injured eye witnesses and other eye witnesses in earlier part of this judgment and such witnesses have also identified respective accused. Likewise, other Government servants viz. Railway Employees, RPF, GRPF, GTP and Fire Brigade personnel have also identified the accused.

16 Evidence of scientific and expert from FSL have confirmed at relevant Exhibits to which we have made reference earlier and they are PW-227 Dipakkumar Bhagwandas Talati, Assistant Director FSL, PW-240 Mohinder Dahiya, Deputy Director, FSL, Gandhinagar, and PW.226 Satishchandra Ganpatram Khandelwal,Deputy Director, FSL.

17 We are in agreement with reasonings and findings of learned trial Judge with regard to appreciation of evidence of various testimonies of various panch witnesses of discovery / recovery of weapon / articles, panch witnesses of arrest of accused and panchnama drawn and exhibited on the record of the case.

18 Police personnel, who have recorded statement of wittinesses / prepared panchnama of inquest and arrest of accused have deposed to and they are PW-230, PW-241, PW-244 at Exh.1196,

Exh.1366 and Exh.1406 and also PW-245 at Exh.1457, Deputy Superintendent of Police of Special Investigation Team.

19 Following eye witnesses, including injured / passengers or travellers have identified various accused persons of different Sessions Cases and they are as under:

Name of PW	**Identified Accused persons -ID In Court**
PW-109 Mukesh Ramanlal Makwana	A/6, SC No.7109, Mizfar Usman Hayat A/28/09, SC No.69/09 Taiyab Abdul Haq Khoda
PW-110 Bhupatbhai Maniram Dave	A/13, SC No.69/09 Abdul Sattar Ismail Gitali
PW-118 Ashwin Govindbhai Patel	A/1, SC No.82/09 Irfan Mohmmad Hanif Abdul Gani Pataliya
PW-122 Babubhai Somdas Patel	A/2, SC No.78/09 Yunus Abdulhaq Samol @Ghadiyali
PW-124 Dilipkumar Jayantilal Patel	A/1, SC No.70/09 Sabbir @Bhupatno Bhuriyo Abdul Rahim Badam A/13, SC No.69/09 Abdul Sattar Ismail Giteli [Acquittal Appeal No.743/22 is filed against him]
PW-150 Jayantibhai Umeddas Patel	A/1, SC No.81/09 Rayeesh Hussain Ismail Mitha @Bhaina Ghanchi – Musalman A/2, SC No.78/09 Yunus Abdulhaq Samol @Ghadiyali A/5, SC No.75/09 Saukat @Bhano Farook Abdul Pataliya A/53, SC No.69/09 Mohmmad Syed Abduyl Salam Shaikh
PW-160 Hirabhai Umeddas Patel	A/1, SC No.70/09 Sabbir @Bhupatno Bhuriyo Abdul Rahim Badam A/14, SC No.69/09 Yasin Habid Malek
PW-168 Mandakiniben N. Bhatiya	A/4, SC No.78/09 Usmangani Mahmmad Ibrahim Kofiwala A/1, SC No.86/09 Siddik Ibrahim Hathila A/52 SC No.69/09 Abdul Razak Yakub Ismailwala

	@Moto Bando Shaikh
PW-170 Pravinkumar Amthalal Patel	A/2, SC No.72/09 Jabir Binyamin Behra [ID in TIP] A/1, SC No.85/09 Saukat Yusuf Ismail Mohan @Bibino [ID in TIP] A/22, SC No.69/09 Ahmed Abdul Rahim Hathi A/2, SC No.72/09 Jabir Binyamin Behra A/1, SC No.86/09 Siddik Ibrahim Hathila
PW-175 Gayatriben H. Panchal	A/2, SC No.75/09 Habib @Badshah Binyamin Behra A/31, SC No.69/09 Habidbhai Karimbhai Shaikh A/24, SC No.69/09 Idrish Abdullah Umarji Shaikh A/44, SC No.69/09 Mahmmad Jabir Abdullah Kalam Musalman A/2, SC No.72/09 Jabir Binyamin Behra A/5, SC No.78/09 Ibrahim Abdul Razak Abdul Sattar Samol @Bhano A/12, SC No.69/09 Saddikkhan Sultankhan Pathan

Part No. 38 P.W.No. 236 Exh: 1231	Page No. 12743 to 13128 Pg. 12782 to 844 Ajay Kanubhai Bariya Being Tea Vendor, he knows the accuses who were also work as Vendor on Godhra Rly Station/Platform.

ID In TIP

S.C. No.	Accused No.	Name of Accused
75/09	1	Soheb Yusuf Ahmed Kalandar (Dt. 7.7.2003) (Exh: 315)
78/09	2	Yunus Abdulhaq Samol @ Ghadiyali (Dt. 16.08.2004) (Exh: 335)
78/09	5	Ibrahim Abdul Razak Abdul Sattar Samol @ Bhano (Dt. 01.09.2004) (Exh: 339)
79/09	4	Farook @ Haji Bhuriya Abdul Sattar Ibrahim Musalman-Gaji (Dt. 19.11.2004) (Exh: 345)
80/09	1	Siddik Abdul Rahim Abdul Sattar Bakkar Musalman (Dt. 24.12.2004) (Exh: 347)

81/09	2	Irfan Abdul Majid Ghanchi Kalandar @ Irfan Bhobho (Dt. 03.07.2005) (Exh: 353)
82/09	2	Ayub Abdul Gani Ismail Pataliya (Dt. 01.08.2005) (Exh: 354)
84/09	1	Mehbub Ahmed Yusuf Hasan @ Latiko (Dt. 20.02.2006) (Exh: 360)
		Anvar Kalandar (Dt: 31.07.2004)

(C) Identified in the Court:

Part No. 38 P.W.No. 236 Exh: 1231	Page No. 12743 to 13128 Pg. 12782 to 844 Ajay Kanubhai Bariya Being Tea Vendor, he knows the accuses who were also work as Vendor on Godhra Rly Station/Platform.

ID In the COURT

S.C. No.	Accused No.	Name of Accused
78/09	5	Ibrahim Abdul Razak Abdul Sattar Samol @ Bhano
72/09	2	Jabir Binyamin Behra
79/09	4	Farook @ Haji Bhuriyo Abdul Sattar Ibrahim Musalman-Gaji
78/09	2	Yunus Abdulhaq Samol @ Ghadiyali
71/09	3	Ramjani Binyamin Behra
75/09	5	Saukat @ Bhano Farook Abdul Sattar Pataliya
84/09	1	Mehbub Ahmed Yusuf Hasan @ Latiko (Please see at P/38-12849, Line:2 (A/1 of S.C.No. 84/09)
80/09	1	Siddik Abdul Rahim Abdul Sattar Bakkar Musalman Shaikh
82/09	2	Ayub Abdul Gani Ismail Pataliya
71/09	4	Hasan Ahmed Charkha @ Lalu
82/09	1	Irfan Mohammad Hanif Abdul Gani Pataliya
81/09	2	Irfan Abdul Majid Ghanchi Kalandar @ Irfan Bhobho
71/09	2	Mehboob Yakub Mitha @ Popa
73/09	1	Mehboob Khalid Chanda
69/09	51	Anwar Mohammad Mehda @ Lala Shaikh

70/09	2	Abdul Razak Mohmmad Kurkur
69/09	40	Abdul Rehman Abdul Majid Dhantiya @ Kankatto @ Jamburo

(2)

Part No. 38 P.W. No. 237 Exh: 1252	Page No. 12743 to 13128 Pg. 12845 to 875 Sikandar M. Shaikh Being Vendor for selling of Water Pouch, he knows the accused who were also work as Vendor on Godhra Rly Station/Platform.

(A) **Exh: 1253 STATEMENT U/S 164 OF CRI. IPC**

(B) IDENTIFIED IN THE T.I.P.

Part No. 38 P.W. No. 237 Exh: 1252	Page No. 12743 to 13128 Pg. 12845 to 875 Sikandar M. Shaikh Being Vendor for selling of Water Pouch, he knows the accused who were also work as Vendor on Godhra Rly Station/Platform.

ID 4 ACCUSES IN TIP

S.C. No.	Accused No.	Name of Accused
78/09	1	Abdul Rauf S/o Abdul Majid Isa Dhesli @ Kamli (Dt. 12.08.2004) (Exh: 332)
82/09	2	Ayub Abdul Gani Ismail Pataliya (Dt. 01.08.2005) (Exh: 354)

EYE WITNESS SOLITARY WITNESS

Part No. 38 P.W. No. 237 Exh: 1252	Page No. 12743 to 13128 Pg. 12845 to 875 Sikandar M. Shaikh Being Vendor for selling of Water Pouch, he knows the accuses who were also work as Vendor on Godhra Rly Station/Platform.

	Exh: 1253- Statement U/s 164 of Cr.P.C.	
82/09	4	Mohammad Hanif @ Hani Abdullah Maulvi Ismail Badam (Dt. 06.09.2005) (Exh: 357)
84/09	2	Mehbub Ahmed Yusuf Hasan @ Latiko (Dt. 20.02.2006) (Exh: 360)

(C) **IDENTIFIED IN THE COURT**:

Part No. 38 P.W. No. 237 Exh: 1252	Page No. 12743 to 13128 Pg. 12845 to 875 Sikandar M. Shaikh Being Vendor for selling of Water Pouch, he knows the accuses who were also work as Vendor on Godhra Rly Station/Platform. Exh: 1253- Statement U/s 164 of Cr.P.C. ID 3 Accuses in TIP ID 12 Accuses in the Court

ID in the COURT		
S.C. No.	**Accused No.**	**Name of Accused**
82/09	4	Mohammad Hanif @ Hani Abdullah Maulvi Ismail Badam
71/09	1	Siddik @ Matunga Abdulla Badam -Shaikh
72/09	2	Jabir Binyamin Behra
81/09	2	Irfan Abdul Majid Ghanchi Kalandar @ Irfan Bhobho
78/09	1	Abdul Rauf Abdul Majid Isa @ Dhesli @ Kamli
82/09	1	Irfan Mohammad Hanif Abdul Gani Pataliya
84/09	1	**Mehbub Ahmed Yusuf Hasan @ Latiko**

EYE WITNESS / SOLITARY WITNESS

Part No. 38	Page No. 12743 to 13128

P.W. No. 237 Exh: 1252	Pg. 12845 to 875 Sikandar M. Shaikh

ID in the COURT		
S.C. No.	**Accused No.**	**Name of Accused**
82/09	2	Ayub jAbdul Gani Ismail Pataliya
74/09	1	Maulvi Hussain Haji Ibrahim Umarji
79/09	3	Bilal Abdullah Ismail Badam Ghanchi
71/09	4	Hasan Ahmed Charkha @ Lalu
71/09	3	Ramjani Biyamin Behra

IDENTIFIED IN THE COURT:

Part No. 36 P.W. No. 206 Exh: 1060	Page No. 12092 to 12140 Pg. 12308 to 322 Bhikha Harman Bariya 2-3 years before incident-**Hawker**-**Witness of ACP at "A" Cabin** **Named and ID in Court 6 Accuses**

Named and ID in Court 6 Accuses		
S.C. No.	**Accused No.**	**Name of Accused**
75/09	5	Saukat @ Bhano Farook Abdul Sattar Pataliya
71/09	4	Hasan Ahmed Charkha @ Lalu
85/09	1	Saukat Yusuf Ismail Mohan @ Bibino
84/09	1	Mehbub Ahmed Yusuf Hasan @ Latiko
81/09	2	Irfan Abdul Majid Ganchi Kalandar @ Irfan Bhobho
71/09	2	Mehboob Yakub Mitha @ Popa

WITNESSES – EMPLOYEE OF KALABHAI PETROL PUMP

Part No. 37 P.W. No. 206 Exh: 1060	Page No. 12411 to 12742 Pg. 12488 to 518 Ranjitsinh Jodhabhai Patel Employee of Kalabhbai [Hakimiya] Petrol Pump Delivery Man

ID in T.I.P		
S.C. No.	**Accused No.**	**Name of Accused**
77/09	1	Salim @Salm an Yusuf Sattar Zarda [Dt. 17.6.2004][Exh.329]
79/09	1	Siraj Mohmmad Abdul Raheman Meda @Bala Shaikh [Dt. 15.10.2004][Exh.342]

[B] IDENTIFIED IN THE COURT

Part No. 37 P.W. No. 224 Exh: 1139	Page No. 12411 to 12742 Pg. 12488 to 518 Ranjitsinh Jodhabhai Patel Employee of Kalabhbai [Hakimiya] Petrol Pump Delivery Man

ID in the Court		
S.C. No.	**Accused No.**	**Name of Accused**
72/09	2	Jabir Binyamin Behra

[C] <u>Exh.1470, STATEMENT U/S.164 OF CODE, 1973</u>
[2][A] <u>IDENTIFIED IN THE T.I.P</u>

Part No. 37 P.W. No. 231 Exh: 1206	Page No. 12411 to 12742 Pg. 12684 to 708 Prabhatsinh G. Patel Employee of Kalabhbai [Hakimiya] Petrol Pump Cashier

ID in the Court		
S.C. No.	**Accused No.**	**Name of Accused**
77/09	1	Salim @Salm an Yusuf Sattar Zarda [Dt. 17.6.2004][Exh.329]
79/09	1	Siraj Mohmmad Abdul Raheman Meda @Bala Shaikh [Dt. 15.10.2004][Exh.342]

[B] <u>IDENTIFIED IN THE COURT</u>

Part No. 37 P.W. No. 231 Exh: 1206	Page No. 12411 to 12742 Pg. 12684 to 708 Prabhatsinh G. Patel Employee of Kalabhbai [Hakimiya] Petrol Pump Cashier

ID in the Court		
S.C. No.	**Accused No.**	**Name of Accused**
72/09	2	Jabir Binyamin Behra
77/09	1	Salim @Salman Yusuf Sattar Zarda
79/09	1	Siraj Mohmmad Meda

20 That additional clarification and submissions made on behalf of prosecution by Mr. J.M.Panchal, learned Special Public Prosecutor and reply submitted by learned counsel for the defence Mr.A.D.Shah about identification of wrong person viz. accused – Farook Ahmed Hasan instead of Mehbub Ahmed Yusuf Hasan @Latiko by PW-236 at Sr. No.7, para 7 at page No.12788, PW-236 has given the name of "Farook Ahmed Hasan, who is accused of Sessions Case No.79 of 2009". That Farook @Haji Bhuriyo son of Abdul Sattar Ibrahim Gaji is in fact convicted for life imprisonment being accused No.4 of Sessions Case No.79 of 2009 as per final judgment at Sr. No.16 of Schedule-C and Mehbub Ahmed Yusuf Hasan @Latiko convicted for death sentence being accused No.1 of Sessions Case No.84 of 2009 as per final judgment at Sr. No.11 of Schedule-A. Even in testimonies of PW-237, person at Sr. No.7 of para 7 at page No.12842 was identified as Mehbub Ahmed Yusuf Hasan @Latiko and again false name of Farook Ahmed Hasan was given. However, finally the court correctly recorded accused No.1 of Sessions Case No.84 of 2009 as Mehbub Ahmed Yusuf Hasan @Latiko. The identification of Mehbub Ahmed Yusuf Hasan @Latiko remained consistent by PW-236 and PW-237. Therefore, on scrutiny of record, we find that involvement of accused No.1 viz. Mehbub Ahmed Yusuf Hasan

@Latiko as accused No.1 of Sessions Case No.84 of 2009 at Sr. No.11 of Schedule-A is correctly recorded.

21 In view of this the chart produced herein above clearly disclose identity and involvement of the accused in the crime for which they are convicted and sentence and all these convicts were identified either in T.I. Parade or before the court, or both by the witnesses.

22 For those accused, who were apprehended from the scene of offence, no T.I. Parade is necessary and even identification in the court first time also cannot be said to be improper exercise as held by the Apex Court in the judgment referred to on the subject in Volume-II of the judgment for example Ramanbhai Naranbhai [supra] and the State of U.P. Rajju [supra].

23 The presence of accused, who are convicted and sentenced for life as per Schedule-C and Schedule-D respectively, their presence at scene of offence, possession and usage of weapons like dharias, iron pipes and inflammable material, Test Identification Parade and identification before the court for the crime committed by them stand established. It is not mere presence of the above accused, but also overt act being members of unlawful assembly resulting into taking conspiracy to its logical end to cause death of human beings and damage to Railway property and, therefore, they are rightly sentenced to life imprisonment by learned trial court, warranting no interference in exercise of the appellate powers.

24 That evidence with regard to 11 convicts of sections 302, 120B, 149 and other offences of IPC and sentenced to death, we do not want to repeat the evidence surfaced on record in view of our discussion

of evidence of witnesses, in the earlier paragraphs of this Part XII-A of above convicts hatching conspiracy and also executing the same with common object in brief emerges as under, which stands established and believed accordingly.

25 Initially, five accused persons hatched conspiracy viz. [1] Salim Zarda, [2] Shaukat @ Lalu, [3] Salim Panwala, [4] Jabir Binyamin and [5] Abdul Razak Kurkur. First four conspirators went to Kalabhai Petrol Pump in a tempi to buy petrol and Razak Kurkur and Siraj @Bala went on M-80 Moped to petrol pump. That 8 carboys were loaded in the rickshaw along with deadly weapons and accused reached near `A' Cabin via Ali Masjid. When the train stopped on second occasion a violent mob belonging to Muslim community gathered near `A' Cabin and started pelting stones and by use of weapons accused started breaking widow glasses and Abdul Razak Mohammad Kurkur and Salim Panwala reached at coach S/6 and Abdul Razak Mohammad Kurkur placed the mouth of the carboys in broken window on the side of toilet and another accused Salim Ibrahim Badam @Salim Panwala had lifted the bottom and spilled the petrol from the carboy into the coach. In the meanwhile other accused had also taken remaining carboys full of petrol and reached between coach S/6 and S/7. At the scene of offence near `A' cabin where Sabarmati Express had stopped on second time, Mehboob Latika and Jabir Binyamin, who were present with other conspirators made holes to two carboys, cut open vestibules between S/6 and S/7 and Mehboob Latika handed over knife to Shaukat Ahmed Charkha, who made holes in remaining carboys at the ground and at the same time the sliding door of the rear side of S/6 coach was broke open by Mehboob Latika and Jabir Binyamin and Shaukat Ahmed Charkha, handed over two carboys having holes and Mehboob Latika and Jabir Binyamin with these two carboys entered into S/6 corridor and

thereafter immediately Shaukat Ahmed Charkha, followed the same route that of Mehboob Latika and Jabir Binyamin. Another accused Rafik Batuk handed over one carboy to Shaukat Ahmed Charkha, who opened the door from inside of S/6 coach towards platform [Godhra] side. Then, Rafik Hussain Bhatuk, Irfan Bhobha and Imram Bhatuk, with three carboys entered into S/6 coach and poured inflammable material inside while Hasan Ahmed Charkha @Lalu, Irfan Mohmmad Hanif Abdul Gani Pataliya and Ramzani Binyamin from outside sprinkled and poured inflammable material on broken window and doors and immediately Hasan Ahmed Charkha @Lalu burnt a rag and threw it inside the coach, which ignited the fire.

26 **Upon a careful scrutiny and consideration of the evidence that emerge on appreciation of the entire record of all these cases viz. Reference cases, appeals and applications filed by the State of Gujarat, convicts and also by victims arising out of the judgment and order dated 01.03.2011 of Sessions Case Nos.69 to 86 of 2009 and in that backdrop of the above judgment, which is under challenge, relevant provisions of IPC, Code of Criminal Procedure, 1973, Evidence Act and other penal statutes, interpretation of relevant provisions of above laws in cases decided by the Apex Court in the context of submissions made by learned Special Public Prosecutor of this volume of the judgment by assigning reasons for the basis of our findings recorded, we conclude that the trial court has not committed any error in believing the case of the prosecution as proved beyond reasonable doubt qua those convicts listed in Schedules A & C and convicted as per Schedules B & D of the operative part of the impugned judgment and order dated 01.03.2011 for the offences for which the charge was framed against them.**

27 **Thus, subject to our findings and conclusions about guilt of the convicts in view of prosecution proved its case beyond reasonable doubt we confirm the final order in para 98 of the impugned judgment and order dated 01.03.2011 in Sessions Case Nos. 69 to 86 of 2009.**

PART XIII-A

APPEALS AGAISNT ACQUITTAL

1 On careful perusal of entire record and especially relied on by the leaned Special Public Prosecutor as well learned counsel for victims we find that evidence that surfaced on record in the form of T.I.Parade exclusively or identification before the court with some hesitation and uncertainty by the witnesses not believed by the learned Trial Judge by assigning reasons. No doubt in a given case, it is open for the appellate court exercising powers under Section 378 read with Section 386 of Code, 1973 to re-appreciate entire evidence on record, but a possible view is taken by the trial court of failure on the part of the prosecution to prove its case beyond reasonable doubt resulting into acquittal which is possible and suffer from no patent illegality for wholly unsustainable do not required to be disturbed. The Apex Court in catena of decisions laid down the law in this regard. Two such cases are; [i] **K. Prakashan vs. P.K.Surenderan [(2008)1 SCC 258]** and [ii] **T. Subramanian vs. State of T.N. [(2006)1 SCC 401].**

2 It is trite that in an appeal against acquittal filed under Section 378 of the Code, 1973, as such there is no limitation on the Appellate Court to review the evidence. But at the same time, if on fact as well as on law, conclusion drawn by the trial Court based on appreciation of evidence unless compelling, cogent and substantial reasons appear for interference and when findings of the trial Court are palpably wrong, manifestly erroneous or demonstrably unsustainable,

acquittal is not to be reversed or disturbed. When acquittal is based on the surmises and conjectures and not substantiated by law and evidence on record, an Appellate Court may re-appreciate and review the entire evidence to see that undue benefit is not given to the accused. Now, it is well settled that even if two views are possible, the Appellate Court shall not ordinarily interfere with the judgment of acquittal in a routine manner unless the judgment of the trial Court is *per se* wrong on facts and on law or perverse, substituting its own views by the High Court is not permissible. That in case of acquittal, it is to be borne into mind by the Appellate Court that there is double presumption in favour of the accused that firstly, presumption of innocence in favour of a guilty on the premise that every person should be presumed to be innocent unless he is proved to be guilty by the Court of Law, and secondly, when accused secures an acquittal, such presumption of innocence is reinforced and reaffirmed by the trial Court. That it is further well settled that even if two views are possible in an appeal against acquittal, the view taken by the trial Court is one of the possible views, then the view which favours acquittal is not to be disturbed or interfered with.

3 That a brief mention about nature of evidence relied on by the leaned Special Public Prosecutor as well learned counsel for victims reveal that PW-199 Prabhatbhai, GRP constable; PW-173 Karansinh Yadav, RPF constable; PW-152 Mahendrasinh Mahida, GRP constable; PW-164 Shrimohan Yadav RPF constable, PW-171 Ambishkumar Sanke, PRF constable, who are almost common in naming accused A-18, A-17, A-21, A-22, A-23, A-24, A-27, A-28 of Sessions Case No.69 of 2009. A-32, A-31, were named by PW-151 Dipakkumar N. Soni, local resident and A-31 was identified by PW-175 Gayatri Panchal, an injured passenger. That PW-151 Dipakkumar N. Soni also named and identified A-32 and A-33 of Sessions Case No.69 of 2009. A-34 was again

identified by local resident PW-159 Rajesh Darji. A-35 was identified by PW-208 Murlidhar Mulchand, local resident. A-36 and A-37 again were identified by local resident PW-154 Chandrashankar Sheniya; PW-172 Nitinkumar H. Pathak; PW-139 Jashvant Baria GTP constable, PW-173 Karansinh Yadav, RPF constable.

4 A-39, A-41 and A-42 were seen in the mob and identified by PW-155 Manoj Hiralal Advani, local resident; PW-208 Murlidhar Mulchandani, local resident and other panchas of GTP constables. Likewise, PW-167 Harsukh Advani, local resident, named and identified A-43, A-44 and A-45. A-47 is identified by PW-208 Murlidhar Mulchandani, local resident, A-52 by PW-168 Mandakani Bhatiya, injured passenger, PW-148 Hemendra R. Das, GRP constable and PW-230 Mohhabatsinh Jhala, PSI GRP. A-53 and A-54 are identified by injured passengers and GRP constables PW-150 and 146 and PW-139 and PW-143. All the above accused belong to Sessions Case No.69 of 2009.

5 A-1 of Sessions Case No.70 of 2009 was identified by injured passenger PW-124 and PW-160 and local resident PW-203.

6 A-5 and A-6 of Sessions Case No.71 of 2009 were identified by local resident PW-149 and passenger PW-109 and PW-161, ASI, GRP.

7 A-1 of Sessions Case No.72 of 2009 was named in deposition by PW-233.

8 A-2 of Sessions Case No.73 of 2009 named and identified by local resident PW-149.

9 A-1, A-2 and A-3 of Sessions Case No.75 of 2009 were identified by local residents and also identified other accused viz. PW-159, PW-175, injured passenger, PW-208 and PW-172 respectively.

10 A-1 and A-2 of Sessions Case No.76 of 2009 were identified by PW-149, PW-208, local resident.

11 A-4 of Sessions Case No.78 of 2009 was identified by local resident PW-172 and injured passenger PW-168.

12 A-2 of Sessions Case No.79 of 2009 was identified by PW-149 local resident.

13 A-1 of Sessions Case No.80 of 2009 was identified b y PW-163 PW-236 and PW-199.

14 A-1 of Sessions Case No.81 of 2009 was identified by local resident and injured passenger PW-149 and PW-150.

15 A-1 of Sessions Case No.83 of 2009 was identified by PW-146 GRPO constable.

16 A-1 of Sessions Case No.86 of 2009 was identified by two injured passengers viz. PW-168 and PW-170 and local resident PW-172.

17 A-1 of Sessions Case No.204 of 2009 was identified by PW-172 local resident.

18 That above nature of evidence according to the learned trial Judge was not sufficient enough to convict the accused for the crime for

which they were charged and on scrutiny of the above witnesses, we are unable to disagree with the reasons assigned by learned trial Judge for acquitting the accused and no interference is called for by this court on this count.

PART XIV

SECTION 391 OF CR.P.C., AN APPLICATION FOR TAKING AN ADDITIONAL EVIDENCE IN CRIMINAL MISC. APPLICATION NO.17914 OF 2011 [DISPOSED OF BY AN ORDER DATED 24.02.2012 BY RESERVING LIBERTY TO RAISE CONTENTIONS AT THE STAGE OF FINAL HEARING OF APPEAL

1 In the application preferred by one of the accused for taking additional evidence under Section 391 of the Code, 1973 is concerned, Mr. Jamuar, learned counsel for SIT while adopting submissions of Mr. J.M.Panchal, learned Special Public Prosecutor appearing for the State of Gujarat produces on record orders dated 26.03.2008 and 01.05.2009 passed by the Apex Court in the case of NHRC Vs. State of Gujarat reported in AIR 2009 SC Suppl. 318 about constitution of SIT, object behind it and direction contained therein to undertake further investigation and finally satisfaction was expressed by the Apex Court about investigation carried out by SIT for the subject matter. Even at the later stage while relieving the Chairman of the SIT vide order dated 13.04.2017, the Apex Court placed on record appreciation for the service rendered to the court by the learned *amicus curaie* and the court was immensely satisfied with the manner in which the proceedings had been conducted in all the trials resulting into conclusion of all but one trial.

2 Be that as it may, the above facts reveal about satisfactory investigation carried out by the SIT and the conclusion of various trial for which SIT was constituted by the Apex Court to conduct fair

investigation. By adverting ourselves to Section 391 of the Code, 1973, the appellate court may take further evidence itself or direct it to be taken by a Magistrate or by a court of Sessions by recording its reasons. As held by the Apex Court in the case of Ashok Tshering Bhutia [supra] that additional evidence can be taken at the appellate stage in exceptional circumstances to remove irregularities, where the circumstances so warrant in public interest.

3 Further, at interim stage of trial an application for issuance of summons for defence witnesses viz. A reporter of Tehalka Magazine, who alleged to have conducted `sting operation' of certain prosecution witnesses came to be rejected on 20.08.2010 by learned trial Judge against which no appeal was preferred before the higher forum. Further, no recourse was even taken under Section 311 of th Code, 1973 and powers under Section 391 are to be exercised in exceptional circumstances, as held by the Apex Court and PW-224 Ranjitbhai Jodhabha was stated to be cross-examined in this regard and questions were put to him which were answered by denying such allegations.

4 In view of the above and as found by us that neither irregularities nor illegalities in investigation is surfaced on record, which may result into miscarriage of justice, we find no exceptional circumstance exist to entertain prayer for taking an additional evidence at this stage and it is hereby declined.

5 This court vide order dated 24.02.2012 while deciding Criminal Misc. Application No.17914 of 2011 observed that it is open for the applicant to raise all the issues at the time of final hearing of all these cases. However, in absence of merit, no order is required on this application for taking an additional evidence.

PART XV

VICTOMOLOGY AND COMPENSATION

1 Loss of life cannot be compensated in terms of money. It may, at the most offer some consolation or provide succour to the victim of the crime.

2 Provisions for compensation have been made in sections 357 and 357A of Code of Criminal Procedure (for short Cr.PC). While the former burdens the accused with liability inter alia for compensation, if required by the court; the later which has been brought on the statue book in 2009, contemplates the scheme for compensation. Section 357 of Cr.PC has its apparent limitations inasmuch as it inter alia relies upon the paying capacity of the accused and in our opinion it would be ineffective remedy in the cases involving mass casualties where paying capacity of the accused may be minimal. In the facts of the present case we are mostly concerned with the accused coming from economically weaker section of the society who would not be able to bear the compensation for 59 deaths and other injured victims.

3 Apart from the fact that the provision of a meager compensation of Rs.1.5 lakhs made in Notification dated 02.01.2016 issued by the Home Department, State of Gujarat, in exercise of powers conferred by Section 357A of the Code, 1973 whereby a Scheme is framed for providing funds for compensation to the victims / their dependents, who have suffered loss or injury as a result of crime against the body and who require rehabilitation and definition clause 2[e] defines “victim” means a person who has suffered loss or injury as a

result of crime and requires rehabilitation and the expression victim includes his/her dependents. Further, the above notification provide for Victim Compensation Fund, Eligibility and procedure for grant of compensation other than acid attach in clauses 3, 4 and 5 respectively and Schedule under Rule 5(8) at Sr. No.1 provide for loss of life compensation to the maximum limit of Rs.1,50,000/-. In our opinion, the above amount of Rs.1,50,000/- for loss of human life is grossly inadequate and add an insult to injury. No doubt, Section 375A inserted by Act 5 of 2009 w.e.f. 31.12.2009 and in the facts of this case, the offence was registered on 27.02.2002 and the Sessions Cases came to be decided by judgment and order dated 01.03.2011, we are of the view that appellate powers can be exercised by this Court for awarding compensation under the above Scheme as well as under Section 386(e), whereby it is open for the appellate court to make any amendment or any consequential or incidental order that may be just and proper keeping in mind Article 21 of the Constitution of India. Further, Section 357 of the Code, 1973 viz. Order to pay compensation contain subsection (4) which empowers the appellate court or the High Court to award such compensation. As a necessary corollary powers under Section 357A of awarding compensation under the Scheme framed by the State Government can be exercised by the appellate court irrespective of the offence took place and registered prior to amendment Act, 5 of 2009, which came into force w.e.f. 31.12.2009. In addition to the above, the High Court in a case like this cannot remain as mute spectator and restrict exercise of powers to a meager compensation of Rs.1,50,000/- in case of a death / loss of life.

4 It cannot be disputed that the courts of jurisdictions other than the one under Art. 226 or 32 or 142 of the Constitution of India can also invoke constitutional provisions if such need arises. We, therefore

as a court of appeal under section 378 of Cr.PC in the peculiar facts of this case propose to invoke Article 21 of the Constitution of India.

5 Article 21 of the Constitution of India has been thus invoked in the cases involving violation of human rights by public servants:

In ***D. K. Basu , Petitioner v. State of W.B. , with Ashok K. Johri, v. State of U.P. [AIR 1997 SC 610]***, it was observed in paragraph No.42A to 55 thus:

> ***"42A****. Article 9(5) of the International Covenant on Civil and Political Rights, 1966 (ICCPR) provides that "anyone who has been the victim of unlawful arrest or detention shall have enforceable right to compensation". Of course, the Government of India at the time of its ratification (of ICCOR) in 1979 had made a specific reservation to the effect that the Indian legal system does not recognize a right to compensation for victims of unlawful arrest or detention and thus did not become a party to Covenant. That reservation, however, has now lost its relevance in view of the law laid down by this Court in a number of cases awarding compensation for the infringement of the fundamental right to life of a citizen. (See with advantage Rudal Shah v. State of Bihar, (1983) 4 SCC 141 : (AIR 1983 SC 1086; Sebastian M. Hongrey v. Union of India; Rajendra Singh v. Smt. Usha Rani, (1984) 3 SCC 339 : (AIR 1984 SC 956), (1984) 3 SCC 82 : (AIR 1984 SC 1026); Bhim Singh v. state of Jammu and Kashmir 1984 (Supp) SCC 504 and (1985) 4 SCC 677 : (AIR 1986 SC 494), Saheli v. Commissioner of Police, Delhi, (1990) 1 SCC 422 : (AIR 1990 SC 513). There is indeed no express provision in the Constitution of India for grant of compensation for violation of a fundamental right to life, nonetheless, this Court has judicially evolved a right to compensation in cases of established unconstitutional deprivation of personal liberty or life. (See : Neelabati Behera v. State (1993 AIR SCW 2366) (supra))*.
>
> ***43****. Till about two decades ago the liability of the Government for tortious act of its public servants was generally limited and the person affected could enforce his right in tort by filing a civil suit and there again the defence of sovereign immunity was allowed to have its play. For the violation of the fundamental right to life or the basic*

human rights, however, this Court has taken the view that the defence of sovereign immunity is not available to the State for the tortious acts of the public servants and for the established violation of the rights guaranteed by Article 21 of the Constitution of the India. In Nilabati Beehera v. State (1993 AIR SCW 2366) (supra) the decision of this Court in Kasturi Lal Ralia Ram Jain v. State of U.P. (1965) 1 SCR 375 : (AIR 1965 SC 1039), wherein the plea of sovereign immunity had been upheld in a case of vicarious liability of the State for the tort committed by its employees was explained thus (at p. 2376 of AIR SCW):

"In this context, it is sufficient to say that the decision of this Court in Kasturilal upholding the State's plea of sovereign immunity for tortious acts of its servants is confined to the sphere of liability in tort, which is distinct from the State's liability for contravention of fundamental rights to which the doctrine of sovereign immunity has no application in the constitutional scheme, and is no defence to the constitutional remedy under Article 32 and 226 of the Constitution which enables award of compensation for contravention of fundamental rights, when the only practicable mode of enforcement of the fundamental rights can be the award of compensation. The decisions of this Court in Rudul Sah (AIR 1983 SC 1086) and others in that line relate to award of compensation for contravention of fundamental rights, in the constitutional remedy under Articles 32 and 226 of the Constitution. On the other hand, Kasturilal related to the value of goods seized and not returned to the owner due to the fault of Government Servants, the claim being of damages for the tort of conversion under the ordinary process, and not a claim for compensation for violation of fundamental rights. Kasturilal is, therefore, inapplicable in this context and distinguishable."

***44**. The claim in public law for compensation for unconstitutional deprivation of fundamental right to life and liberty, the protection of which is guaranteed under the Constitution, is a claim based on strict liability and is in addition to he claim available in private law for damages for tortious acts of the public servants. Public law proceedings serve a different purpose than the private law proceedings. Award of compensation for established infringement of the indefeasible rights guaranteed under Article 21 of the Constitution is a remedy available in public law since the purpose of public law is not only to civilise public power but also to assure the citizens that they live under a legal system wherein their rights and interests shall be protected and preserved. Grant of compensation in proceedings under Article 32 or 226 of the Constitution of India for*

the established violation of the fundamental rights guaranteed under Article 21, is an exercise of the Courts under the public law jurisdiction for penalising the wrong doer and fixing the liability for the public wrong on the State which failed in the discharge of its public duty to protect the fundamental rights of the citizen.

***45**. The old doctrine of only relegating the aggrieved to the remedies available in civil law limits the role of the Courts too much, as the protector and custodian of the indefeasible rights of the citizen. The Courts have the obligation to satisfy the social aspirations of the citizen because the Courts and the law are for the people and expected to respond to their aspirations. A Court of law cannot close its consciousness and aliveness to stark realities. Mere punishment of the offender cannot give much solace to the family of the victim - civil action for damages is a long drawn and cumbersome judicial process. Monetary compensation for redressal by the Court finding the infringement of the indefeasible right to life of the citizen is, therefore, a useful and at times perhaps the only effective remedy to apply balm to the wounds of the family members of the deceased victim, who may have been the bread of the family.*

- *In Nilabati Behera's case (1993 AIR SCW 2366) (supra), it was held (at pp. 2382 and 2383 of AIR SCW) :*

"Adverting to the grant of relief to the heirs of a victim of custodial death for the infraction or invasion of his rights guaranteed under Article 21 of the Constitution of India, it is not always enough to relegate him to the ordinary remedy of a civil suit to claim damages for the tortious act of the State as that remedy in private law indeed is available to the aggrieved party. The citizen complaining of the infringement of the indefeasible right under Article 21 of the Constitution cannot be told that for the established violation of the fundamental right to life, he cannot get any relief under the public law by the Courts exercising writ jurisdiction. The primary source of the public law proceedings stems from the prerogative writs and the Courts have, therefore, to evolve 'new' tools' to give relief in public law by moulding it according to the situation with a view to preserve and protect the Rule of Law. While concluding his first Hamlyn Lecture in 1949 under the title "Freedom under the Law" Lord Denning in has own style warned :

"No one can suppose that the executive will never be guilty of are sins that the common to all of us. You may be sure that they will sometimes do things which they ought not to do : and will not do

things that they ought to do. But if and when wrongs are thereby suffered by any of us what is the remedy ? Our procedure for securing our personal freedom is efficient, our procedure for preventing the abuse of power is not. Just as the pick and shovel is no longer suitable for the winning of coal, so also the procedure of mandamus, certiorari, and actions on the case are not suitable for the winning of freedom in the new age. They must be replaced by new and up-to date machinery, by declarations, injunctions and actions for negligence... This is not the task of Parliament...the Courts must do this. Of all the great tasks that lie ahead this is the greatest. Properly exercised the new powers of the executive lead to the welfare State; but abused they lead to a totalitarian State. None such must ever be allowed in this country".

47. *A similar approach of redressing the wrong by award of monetary compensation against the State for its failure to protect the fundamental rights of the citizen has been adopted by the Courts of Ireland, which has a written constitution, guaranteeing fundamental rights, but which also like the Indian Constitution contains no provision of remedy for the infringement of those rights. That has, however, not prevented the Courts in Ireland from developing remedies, including the award of damages, not only against individuals guilty of infringement, but against the State itself.*

48. *The informative and educative observations of O' Dalaigh CJ in the State (At the Prosecution of Quinn v. Ryan (1965) IR 70 (122)) deserve special notice. The Learned Chief Justice said :*
"It was not the intention of the Constitution in guaranteeing the fundamental rights of the citizen that these rights should be set at naught or circumvented. The intention was that rights of substance were being assured to the individual and that the Courts were the custodians of those rights. As a necessary corollary, it follows that no one can with impunity set these rights at naught or circumvent them, and that the Court's powers in this regard are as ample as the defence of the Constitution requires."

(Emphasis supplied)

49.*In Byrne v. Ireland, (1972) IR 241, Walsh J. opined at p. 264:*
"In several parts in the Constitution duties to make certain provisions for the benefit of the citizens are imposed on the State in terms which bestow rights upon the citizen and, unless some contrary provision appears in the Constitution, the Constitution must be deemed to have created a remedy for the enforcement of these rights. It follows that, where the right is one guaranteed by the State, it is against the State

that the remedy must be sought if there has been a failure to discharge the constitution obligation imposed".
(Emphasis supplied)

***50**. In Maharaj v. Attorney General of Trinidad and Tobago (1978) 2 All ER 670, the Privy Council while interpreting Section 6 of the Constitution of Trinidad and Tobago held that though not expressly provided therein, it permitted an order for monetary compensation, by way of 'redress' for contravention of the basic human rights and fundamental freedoms. Lord Diplock speaking for the majority said :*

> *"It was argued on behalf of the Attorney General that Section 6 (2) does not permit of an order for monetary compensation despite the fact that this kind of redress was ordered in Jaundoo v. Attorney General of Guyana. Reliance was placed on the reference in the sub-section to 'enforcing, or securing the enforcement of, any of the provisions of the said foregoing section' as the purpose for which orders etc. could be made. An order for payment of compensation, it was submitted, did not amount to the enforcement of the rights that had been contravened. In their Lordships' view an order for payment of compensation when a right protected under Section 1 'has been' contravened is clearly a form of 'redress' which a person is entitled to claim under Section 6(1) and may well be the only practicable form of redress, as by now it is in the instant case. The jurisdiction to make such an order is conferred on the High Court by para (a) of Section 6(2), viz. jurisdiction 'to hear and determine any application made by any person in pursuance of sub-section (1) of this section'. The very wide powers to make orders, issue writs and give directions are ancillary to this*".

***51**. Lord Diplock then went on the observe (at page 680):*

> *"Finally, their Lordships would say something about the measure of monetary compensation recoverable under Section 6 where the contravention of the claimant's constitutional rights consists of deprivation of liberty otherwise than by due process of law. The claim is not a claim in private law for damages for the tort of false imprisonment, under which the damages recoverable are at large and would include damages for loss of reputation. It is a claim in public law for compensation for deprivation of liberty alone.*"

***52**. In Simpson v. Attorney General (Baigent's case) 1994 NZLR 667,*

the Court of Appeal in New Zealand, dealt with the issue in a very elaborate manner by reference to a catena of authorities from different jurisdictions. It considered the applicability of the doctrine of vicarious liability for torts, like unlawful search, committed by the police officials which violate the New Zealand Bill of Rights Act, 1990. While dealing with the enforcement of rights and freedoms as guaranteed by the Bill of Rights for which no specific remedy was provided. Hardie Boys, J. observed.

> *"The New Zealand Bill of Rights Act, unless it is to be no more than an empty statement, is a commitment by the Crown that those who in the three branches of the Government exercise its functions, powers and duties will observe the rights that the Bill affirms. It is consider implicit in that commitment, indeed essential to its worth, that the Courts are not only to observe the Bill in the discharge of their own duties but are able to grant appropriate and effective remedies where rights have been infringed. I see no reason to think that this should depend on the terms of a written constitution. Enjoyment of the basic human rights are the entitlement of every citizen, and their protection the obligation of every civilised State. They are inherent in and essential to the structure of society. They do not depend on the legal or constitutional form in which they are declared. The reasoning that has led the Privy Council and the Courts of Ireland and India to the conclusions reached in the cases to which I have referred (and they are but a sample) is in my opinion equally valid to the New Zealand Bill of Rights Act if it is to have life and meaning*".
>
> *(Emphasis supplied)*

***53**. The Court of Appeal relied upon the judgments of the Irish Courts, the Privy Council and referred to the law a laid down in Nilabati Behera v. State (1993 AIR SCW 2366) (supra) thus :*

> *"Another valuable authority comes from India, where the constitution empowers the Supreme Court to enforce rights guaranteed under it. In Nilabati Bahera v. State of Orissa, 1993 Cri LJ 2899, the Supreme Court awarded damages against the State to the mother of a young man beaten to death in police custody. The Court held that its power of enforcement imposed a duty to "forgenew tools", of which compensation was an appropriate one where that was the only mode of redress available. This was not a remedy in tort, but one in public law based on strict liability for the contravention of fundamental*

rights to which the principle of sovereign immunity does not apply. These observations of Anand, J. at p. 2912 may be noted.

The old doctrine of only relegating the aggrieved to the remedies available in civil law limits the role of the Courts too much as protector and guarantor of the indefeasible rights of the citizens. The Courts have the obligation to satisfy the social aspirations of the citizens because the Courts and the law are for the people and expected to respond to their aspirations. The purpose of public law is not only to civilize public power but also to assure the citizen that they live under a legal system which aims to protect their interests and preserve their rights".

***54**. Each of the five members of the Court of Appeal in Simpson's case (1994 NZLR 667) (supra) delivered a separate judgment but there was unanimity of opinion regarding the grant of pecuniary compensation to the victim, for the contravention of his rights guaranteed under the Bill of Rights Act, notwithstanding the absence of an express provision in that behalf in the Bill of Rights Act.*

***55**. Thus, to sum up, it is now a well accepted proposition in most of the jurisdiction, that monetary or pecuniary compensation is an appropriate and indeed an effective and sometimes perhaps the only suitable remedy for redressal of the established infringement of the fundamental right to life of a citizen by the public servants and the State is vicariously liable for their acts. The claim of the citizen is based on the principle of strict liability to which the defence of sovereign immunity is not available and the citizen must receive the amount of compensation from the State, which shall have the right to be indemnified by the wrong doer. In the assessment of compensation, the emphasis has to be on the compensatory and not on punitive element. The objective is to apply balm to the wounds and not to punish the transgressor or the offender, as awarding appropriate punishment for the offence (irrespective of compensation) must be left to the Criminal Courts in which the offender is prosecuted, which the State, in law, is duly bound to do. The award of compensation in the public law jurisdiction is also without prejudice to any other action like civil suit for damages which is lawfully available to the victim or the heirs of the deceased victim with respect to the same matter for the tortious act committed by the functionaries of the State. The quantum of compensation will, of course, depend upon the peculiar facts of each case and no strait-jacket formula can be evolved in that behalf. The relief to redress the wrong for the established invasion of*

the fundamental rights of the citizen, under the public law jurisdiction is, thus, in addition to the traditional remedies and not in derogation of them. The amount of compensation as awarded by the Court and paid by the State to redress the wrong done, may in a given case, be adjusted against any amount which may be awarded to the claimant by way of damages in a civil suit."

6 In ***Kewal Patil Vs. State of Uttar Pradesh [1995 3 SCC 600]*** compensation was awarded to a widow of a convict who was killed in jail by co-accused while serving the sentence under Section 302 of the Indian Penal Code, as it had resulted into deprivation of his life contrary to law and in violation of Article 21 of the Constitution of India.

7 As is evident from the decision in ***D K Basu (supra)***, the compensation for violation of human rights by public servants is awardable by resorting to Article 226 or 32 of the Constitution of India. However, in ***Kewal Patil (supra)***, the Apex Court took the step forward and awarded the compensation even in a case where human rights were not infringed by public servant, but by co-accused and it appears that the failure on the part of the jail authorities to ensure the safety of life of a prisoner in jail weighed with the Court for awarding the compensation. The order seems to have been passed in the plenary jurisdiction of the Apex Court under Article 142 of the Constitution of India; the question is whether the State can be held responsible under Article 21 of the Constitution for its failure to maintain law and order which failure admittedly resulted into deprivation of 59 lives in addition to severe burn injuries sustained by other occupants of the train.

8 In the case of **Suresh & Anr. v. State of Haryana [(2015)2 SCC 227]**, while dealing with the similar issue of awarding compensation to a victim under Section 357, 357A of the Code, 1973, the Apex Court in paras 13 and 14 held as under:

13 It would now be appropriate to deal with the issue. The provision has been incorporated in the Cr.P.C. vide Act V of 2009 and the amendment duly came into force in view of the Notification dated 31st December, 2009. The object and purpose of the provision is to enable the Court to direct the State to pay compensation to the victim where the compensation under Section 357 was not adequate or where the case ended in acquittal or discharge and the victim was required to be rehabilitated. The provision was incorporated on the recommendation of 154th Report of Law Commission. It recognises compensation as one of the methods of protection of victims. The provision has received the attention of this Court in several decisions including Ankush Shivaji Gaikwad v. State of Maharashtra [(2013) 6 SCC 770] Gang-rape ordered by Village Mangaroo Court in W.B., In re [(2014) 4 SCC 786], Mohommad Haroon v. Union of India [(2014)5 SCC 252] and Laxmi v. Union of India [(2014)4 SCC 427].

14 In Abdul Rashid v. State of Odisha and Ors. [2013 SCC OnLine Ori 493], to which one of us (Goel, J.) was party, it was observed : [SCC OnLine Ori paras 6-10]

> "6. Question for consideration is whether the responsibility of the State ends merely by registering a case, conducting investigation and initiating prosecution and whether apart from taking these steps, the State has further responsibility to the victim. Further question is whether the Court has legal duty to award compensation irrespective of conviction or acquittal. When the State fails to identify the accused or fails to collect and present acceptable evidence to punish the guilty, the duty to give compensation remains. Victim of a crime or his kith and kin have legitimate expectation that the State will punish the guilty and compensate the victim. There are systemic or other failures responsible for crime remaining unpunished which need to be addressed by improvement in quality and integrity of those who deal with investigation and prosecution, apart from improvement of infrastructure but punishment of guilty is not the only step in providing justice to victim. Victim expects a mechanism for rehabilitative measures, including monetary compensation. Such compensation has been directed to be paid in public law remedy with

reference to Article 21. In numerous cases, to do justice to the victims, the Hon'ble Supreme Court has directed payment of monetary compensation as well as rehabilitative settlement where State or other authorities failed to protect the life and liberty of victims. For example, Kewal Pati v. State of U.P. (1995) 3 SCC 600 : (1995 AIR SCW 2236) (death of prisoner by co-prisoner), Supreme Court Legal Aid Committee v. State of Bihar, (1991) 3 SCC 482 (failure to provide timely medical aid by Jail Authorities, Chairman, Rly. Board v. Chandrima Das, (2000) 2 SCC 465 : (AIR 2000 SC 988) (Rape of Bangladeshi National by Railway Staff), Nilabati Behera v. State of Orissa, (1993) 2 SCC 746 : (AIR 1993 SC 1960) (Custodial death), Khatri (I) v. State of Bihar (1981) 1 SCC 623 (Prisoners' Blinding by Jail Staff), Union Carbide Corporation v. Union of India, (1989) 1 SCC 674 (Gas Leak Victims).

7 Expanding scope of Article 21 is not limited to providing compensation when the State or its functionaries are guilty of an act of commission but also to rehabilitate the victim or his family where crime is committed by an individual without any role of the State or its functionary. Apart from the concept of compensating the victim by way of public law remedy in writ jurisdiction, need was felt for incorporation of a specific provision for compensation by courts irrespective of the result of criminal prosecution. Accordingly, Section 357-A has been introduced in the Cr.P.C. and a Scheme has been framed by the State of Odisha called 'The Odisha Victim Compensation Scheme, 2012'. Compensation under the said Section is payable to victim of a crime in all cases irrespective of conviction or acquittal. The amount of compensation may be worked out at an appropriate forum in accordance with the said Scheme, but pending such steps being taken, interim compensation ought to be given at the earliest in any proceedings.

8. In Ankush Vhivaji Gaikwad v. State of Maharashtra, (2013) 6 SCC 770 : (AIR 2013 SC 2454), the matter was reviewed by the Hon'ble Supreme Court with reference to development in law and it was observed : [SCC pp.785-91 & 797, paras 33-48 & 66-67]

"33. The long line of judicial pronouncements of this Court recognised in no uncertain terms a paradigm shift in the approach towards victims of crimes who were held entitled to reparation, restitution or compensation for loss or injury suffered by them. This shift from retribution to restitution began in the mid 1960s and gained momentum in the decades that followed. Interestingly the clock appears to have come full circle by the law-makers and courts going back in a great measure to what was in ancient times common place. Harvard Law Review (1984) in an article on "Victim Restitution in Criminal Law Process: A Procedural Analysis" sums up the historical perspective of the concept of restitution in the following words:

> "Far from being a novel approach to sentencing, restitution has been employed as a punitive sanction throughout history. In ancient societies, before the conceptual separation of civil and criminal law, it was standard practice to require an offender to reimburse the victim or his family for any loss caused by the offense. The primary purpose of such restitution was not to compensate the victim, but to protect the offender from violent retaliation by the victim or the community. It was a means by which the offender could buy-back the peace he had broken. As the State gradually established a monopoly over the institution of punishment, and a division between civil and criminal law emerged, the victim's right to compensation was incorporated into civil law."

34 With modern concepts creating a distinction between civil and criminal law in which civil law provides for remedies to award compensation for private wrongs and the criminal law takes care of punishing the wrongdoer, the legal position that emerged till recent

times was that criminal law need not concern itself with compensation to the victims since compensation was a civil remedy that fell within the domain of the civil Courts. This conventional position has in recent times undergone a notable sea change, as societies world over have increasingly felt that victims of the crimes were being neglected by the legislatures and the Courts alike. Legislations have, therefore, been introduced in many countries including Canada, Australia, England, New Zealand, Northern Ireland and in certain States in the USA providing for restitution/reparation by Courts administering criminal justice.

35 England was perhaps the first to adopt a separate statutory scheme for victim compensation by the State under the Criminal Injuries Compensation Scheme, 1964. Under the Criminal Justice Act, 1972 the idea of payment of compensation by the offender was introduced. The following extract from the Oxford Handbook of Criminology (1994 Edn., pp.1237-1238), which has been quoted with approval in Delhi Domestic Working Women's Forum v. Union of India and Ors. (1995) 1 SCC 14 is apposite: (SCC pp.20-21, para-16)

> "16....Compensation payable by the offender was introduced in the Criminal Justice Act, 1972 which gave the Courts powers to make an ancillary order for compensation in addition to the main penalty in cases where 'injury, loss, or damage' had resulted. The Criminal Justice Act, 1982 made it possible for the first time to make a compensation order as the sole penalty. It also required that in cases where fines and compensation orders were given together, the payment of compensation should take priority over the fine. These developments signified a major shift in penology thinking, reflecting the growing importance attached to restitution and reparation over the more narrowly retributive aims of conventional punishment. The Criminal Justice Act, 1982 furthered this shift. It required courts to consider the making of a compensation order in every case of death, injury, loss or damage and, where such an order was not given,

> imposed a duty on the court to give reasons for not doing so. It also extended the range of injuries eligible for compensation. These new requirements mean that if the court fails to make a compensation order it must furnish reasons. Where reasons are given, the victim may apply for these to be subject to judicial review.....
>
> The 1991 Criminal Justice Act contains a number of provisions which directly or indirectly encourage an even greater role for compensation.'
>
> (Emphasis supplied)

36 In the United States of America, the Victim and Witness Protection Act of 1982 authorizes a federal court to award restitution by means of monetary compensation as a part of a convict's sentence. Section 3553(a)(7) of Title 18 of the Act requires Courts to consider in every case "the need to provide restitution to any victims of the offense". Though it is not mandatory for the Court to award restitution in every case, the Act demands that the Court provide its reasons for denying the same. Section 3553(c) of Title 18 of the Act states as follows:-

> "If the court does not order restitution or orders only partial restitution, the court shall include in the statement the reason thereof."
>
> (Emphasis supplied)

37 In order to be better equipped to decide the quantum of money to be paid in a restitution order, the United States federal law requires that details such as the financial history of the offender, the monetary loss caused to the victim by the offence, etc. be obtained during a Presentence Investigation, which is carried out over a period of 5 weeks after an offender is convicted.

38 Domestic/Municipal Legislation apart even the UN General Assembly recognized the right of victims of crimes to receive compensation by passing a resolution titled "Declaration on Basic Principles of Justice for Victims and Abuse of Power, 1985". The Resolution

contained the following provisions on restitution and compensation:

" Restitution

8. Offenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependents. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights.

9 Governments should review their practices, Regulations and laws to consider restitution as an available sentencing option in criminal cases, in addition to other criminal sanctions.

10 In cases of substantial harm to the environment, restitution, if ordered, should include, as far as possible, restoration of the environment, re-construction of the infrastructure, replacement of community facilities and reimbursement of the expenses of re-location, whenever such harm results in the dislocation of a community.

11 Where public officials or other agents acting in an official or quasi-official capacity have violated national criminal laws, the victims should receive restitution from the State whose officials or agents were responsible for the harm inflicted. In cases where the Government under whose authority the victimizing act or omission occurred is no longer in existence, the State or Government successor-in-title should provide restitution to the victims.

Compensation

12 When compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation to:

> [a] Victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes;
>
> [b] The family, in particular dependents of persons who have died or become physically or mentally incapacitated as a result of such victimization.
>
> 13 The establishment, strengthening and expansion of national funds for compensation to victims should be encouraged. Where appropriate, other funds may also be established for this purpose, including in those cases where the State of which the victim is a national is not in a position to compensate the victim for the harm."

39 The UN General Assembly passed a resolution titled "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 2005" which deals with the rights of victims of international crimes and human rights violations. These Principles (while in their Draft form) were quoted with approval by this Court in State of Gujarat and Anr. v. Hon'ble High Court of Gujarat (1998) 7 SCC 392 : (AIR 1998 SC 3164) in the following words:

> "94. In recent years the right to reparation for victims of violation of human rights is gaining ground. United Nations Commission of Human Rights has circulated draft Basic Principles and Guidelines on the Right to Reparation for Victims of Violation of Human Rights, (see Annexure)."

40 Amongst others the following provisions on restitution and compensation have been made:

"12 Restitution shall be provided to re-establish the situation that existed prior to the violations of human

rights or international humanitarian law. Restitution requires inter alia, restoration of liberty, family life citizenship, return to one's place of residence, and restoration of employment or property.

13 Compensation shall be provided for any economically assessable damage resulting from violations of human rights or international humanitarian law, such as:

> [a] Physical or mental harm, including pain, suffering and emotional distress;
>
> [b] Lost opportunities including education;
>
> [c] Material damages and loss of earnings, including loss of earning potential;
>
> [d] Harm to reputation or dignity;
>
> [e] Costs required for legal or expert assistance, medicines and medical services."

41 Back home the Code of Criminal Procedure of 1898 contained a provision for restitution in the form of Section 545, which stated in sub-clause 1(b) that the Court may direct-

> "payment to any person of compensation for any loss or injury caused by the offence when substantial compensation is, in the opinion of the Court, recoverable by such person in a Civil Court."

42 The Law Commission of India in its 41st Report submitted in 1969 discussed Section 545 of the Code of Criminal Procedure of 1898 extensively and stated as follows:

> "46. 12.. Section 545 - Under Clause (b) of sub-section (1) of Section 545, the Court may direct
>
> > "in the payment to any person of compensation for any loss or injury caused

> by the offence when substantial compensation is, in the opinion of the Court, recoverable by such person in a Civil Court."
>
> The significance of the requirement that compensation should be recoverable in a Civil Court is that the act which constitutes the offence in question should also be a tort. The word "substantial" appears to have been used to exclude cases where only nominal damages would be recoverable. We think it is hardly necessary to emphasise this aspect, since in any event it is purely within the discretion of the Criminal Courts to order or not to order payment of compensation, and in practice, they are not particularly liberal in utilizing this provision. We propose to omit the word "substantial" from the clause."
>
> (Emphasis supplied)

43 On the basis of the recommendations made by the Law Commission in the above report, the Government of India introduced the Code of Criminal Procedure Bill, 1970, which aimed at revising Section 545 and introducing it in the form of Section 357 as it reads today. The Statement of Objects and Reasons underlying the Bill was as follows:

> "Clause 365 [now Section 357] which corresponds to Section 545 makes provision for payment of compensation to victims of crimes. At present such compensation can be ordered only when the Court imposes a fine the amount is limited to the amount of fine. Under the new provision, compensation can be awarded irrespective of whether the offence is punishable with fine and fine is actually imposed, but such compensation can be ordered only if the accused is convicted. The compensation should be payable for any loss or injury whether physical or pecuniary and the Court shall have due regard to the nature of injury, the manner of inflicting the same, the capacity of the accused to pay and other relevant

factors. "

(Emphasis supplied)

44 As regards the need for Courts to obtain comprehensive details regarding the background of the offender for the purpose of sentencing, the Law Commission in its 48th Report on "Some Questions Under the Code of Criminal Procedure Bill, 1970" submitted in 1972 discussed the matter in some detail, stating as follows:

> "45. Sentencing - It is now being increasingly recognised that a rational and consistent sentencing policy requires the removal of several deficiencies in the present system. One such deficiency is a lack of comprehensive information as to the characteristics and background of the offender.
>
> The aims of sentencing - themselves obscure - become all the more so in the absence of comprehensive information on which the correctional process is to operate. The public as well as the courts themselves are in the dark about judicial approach in this regard.
>
> We are of the view that the taking of evidence as to the circumstances relevant to sentencing should be encouraged, and both the prosecution and the accused should be allowed to co-operate in the process."
>
> (Emphasis supplied)

45 The Code of Criminal Procedure of 1973 which incorporated the changes proposed in the said Bill of 1970 states in its Objects and Reasons that Section 357 was "intended to provide relief to the proper sections of the community" and that the amended Cr.P.C. empowered the Court to order payment of compensation by the accused to the victims of crimes "to a larger extent" than was previously permissible under the Code. The changes brought about by the introduction of Section 357 were as follows:

[i] The word "substantial" was excluded.

[ii] A new sub-section (3) was added which provides for payment of compensation even in cases where the fine does not form part of the sentence imposed.

[iii] Sub-section (4) was introduced which states that an order awarding compensation may be made by an Appellate Court or by the High Court or Court of Session when exercising its powers of revision.

46 The amendments to the Code of Criminal Procedure brought about in 2008 focused heavily on the rights of victims in a criminal trial, particularly in trials relating to sexual offences. Though the 2008 amendments left Section 357 unchanged, they introduced Section 357-A under which the Court is empowered to direct the State to pay compensation to the victim in such cases where-

> "the compensation awarded under Section 357 is not adequate for such rehabilitation, or where the case ends in acquittal or discharge and the victim has to be rehabilitated."

Under this provision, even if the accused is not tried but the victim needs to be rehabilitated, the victim may request the State or District Legal Services Authority to award him/her compensation. This provision was introduced due to the recommendations made by the Law Commission of India in its 152nd and 154th Reports in 1994 and 1996 respectively.

47 The 154th Law Commission Report on the Code of Criminal Procedure devoted an entire chapter to 'Victimology' in which the growing emphasis on victim's rights in criminal trials was discussed extensively as under:

> "1 Increasingly the attention of criminologists, penologists and reformers of criminal justice system has been directed to victimology, control

of victimization and protection of victims of crimes. Crimes often entail substantive harms to people and not merely symbolic harm to the social order. Consequently the needs and rights of victims of crime should receive priority attention in the total response to crime. One recognized method of protection of victims is compensation to victims of crime. The needs of victims and their family are extensive and varied.

xx xx xx xx xx

9.1 The principles of victimology has foundations in Indian constitutional jurisprudence. The provision on Fundamental Rights (Part III) and Directive Principles of State Policy (Part IV) form the bulwark for a new social order in which social and economic justice would blossom in the national life of the country (Article 38). Article 41 mandates inter alia that the State shall make effective provisions for "securing the right to public assistance in cases of disablement and in other cases of undeserved want." So also Article 51-A makes it a fundamental duty of every Indian citizen, inter alia 'to have compassion for living creatures' and to 'develop humanism'. If emphatically interpreted and imaginatively expanded these provisions can form the constitutional underpinnings for victimology.

9.2 However, in India the criminal law provides compensation to the victims and their dependents only in a limited manner. Section 357 of the Code of Criminal Procedure incorporates this concept to an extent and empowers the Criminal Courts to grant compensation to the victims.

xx xx xx xx xx

11 In India the principles of compensation to crime victims need to be reviewed and expanded to cover all cases. The compensation should not be limited only to fines, penalties and forfeitures realized. The State should accept the principle of

providing assistance to victims out of its own funds....."

48 The question then is whether the plenitude of the power vested in the Courts under Sections 357 and 357-A, notwithstanding, the Courts can simply ignore the provisions or neglect the exercise of a power that is primarily meant to be exercised for the benefit of the victims of crimes that are so often committed though less frequently punished by the Courts. In other words, whether Courts have a duty to advert to the question of awarding compensation to the victim and record reasons while granting or refusing relief to them?

xx xx xx xx xx

66 To sum up: While the award or refusal of compensation in a particular case may be within the Court's discretion, there exists a mandatory duty on the Court to apply its mind to the question in every criminal case. Application of mind to the question is best disclosed by recording reasons for awarding/refusing compensation. It is axiomatic that for any exercise involving application of mind, the Court ought to have the necessary material which it would evaluate to arrive at a fair and reasonable conclusion. It is also beyond dispute that the occasion to consider the question of award of compensation would logically arise only after the court records a conviction of the accused. Capacity of the accused to pay which constitutes an important aspect of any order under Section 357, Code of Criminal Procedure would involve a certain enquiry albeit summary unless of course the facts as emerging in the course of the trial are so clear that the court considers it unnecessary to do so. Such an enquiry can precede an order on sentence to enable the court to take a view, both on the question of sentence and compensation that it may in its wisdom decide to award to the victim or his/her family.

67 Coming then to the case at hand, we regret to say that the trial Court and the High Court appear to have remained oblivious to the provisions of Section 357, Code of Criminal Procedure. The judgments under

appeal betray ignorance of the Courts below about the statutory provisions and the duty cast upon the Courts. Remand at this distant point of time does not appear to be a good option either. This may not be a happy situation but having regard to the facts and the circumstances of the case and the time lag since the offence was committed, we conclude this chapter in the hope that the courts remain careful in future."

9 In Rohtash alias Pappu v. State of Haryana (Cri. A. No. 250 of 1999, decided on 1.4.2008), a Division Bench of the Punjab and Haryana High Court observed:

> "18. May be, in spite of best efforts, the State fails in apprehending and punishing the guilty but that does not prevent the State from taking such steps as may re-assure and protect the victims of crime. Should justice to the victims depend only on the punishment of the guilty? Should the victims have to wait to get justice till such time that the handicaps in the system which result in large scale acquittals of guilty, are removed? It can be a long and seemingly endless wait. The need to address cry of victims of crime, for whom the Constitution in its Preamble holds out a guarantee for 'justice' is paramount. How can the tears of the victim be wiped off when the system itself is helpless to punish the guilty for want of collection of evidence or for want of creating an environment in which witnesses can fearlessly present the truth before the Court? Justice to the victim has to be ensured irrespective of whether or not the criminal is punished.
>
> 19 The victims have right to get justice, to remedy the harm suffered as a result of crime. This right is different from and independent of the right to retribution, responsibility of which has been assumed by the State in a society governed by Rule of Law. But if the State fails in discharging this responsibility, the State must still provide a mechanism to ensure that the victim's right to be compensated for his injury is not ignored or defeated.

20 Right of access to justice under Article 39-A and principle of fair trial mandate right to legal aid to the victim of the crime. It also mandates protection to witnesses, counselling and medical aid to the victims of the bereaved family and in appropriate cases, rehabilitation measures including monetary compensation. It is a paradox that victim of a road accident gets compensation under no fault theory, but the victim of crime does not get any compensation, except in some cases where the accused is held guilty, which does not happen in a large percentage of cases.

21. Though a provision has been made for compensation to victims under Section 357, Cr.P.C., there are several inherent limitations. The said provision can be invoked only upon conviction, that too at the discretion of the Judge and subject to financial capacity to pay by the accused. The long time taken in disposal of the criminal case is another handicap for bringing justice to the victims who need immediate relief, and cannot wait for conviction, which could take decades. The grant of compensation under the said provision depends upon financial capacity of the accused to compensate, for which, the evidence is rarely collected. Further, victims are often unable to make a representation before the Court for want of legal aid or otherwise. This is perhaps why even on conviction this provision is rarely pressed into service by the Courts. Rate of conviction being quite low, inter alia, for competence of investigation, apathy of witnesses or strict standard of proof required to ensure that innocent is not punished, the said provision is hardly adequate to address to need of victims.

In Hari Krishan and State of Haryana v. Sikhbir Singh, AIR 1988 SC 2127, referring to provisions for compensation, the Hon'ble Supreme Court observed:-

"10. ..... This power was intended to do

> something to re-assure the victim that he or she is not forgotten in the criminal justice system. It is a measure of responding appropriately to crime as well of reconciling the victim with the offender. It is, to some extent, a constructive approach to crimes. It is indeed a step forward in our criminal justice system. We, therefore, recommend to all Courts to exercise this power liberally so as to meet the ends of justice in a better way."

22 It is imperative to educate the investigating agency as well as the trial Judges about the need to provide access to justice to victims of crime, to collect evidence about financial status of the accused. It is also imperative to create mechanisms for rehabilitation measures by way of medical and financial aid to the victims. The remedy in civil law of torts against the injury caused by the accused is grossly inadequate and illusory.

23 This unsatisfactory situation is in contrast to global developments and suggestions of Indian experts as well. Some of the significant developments in this regard may be noticed as under:-

> [1] UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985, highlighting the following areas:-
>
> [i] Access to Justice and fair treatment;
> [ii] Restitution;
> [iii] Compensation;
> [iv] Assistance.
>
> [2] Council of Europe Recommendation on the Position of the Victim in the Framework of Criminal Law and Procedure, 1985.
>
> [3] Statement of the Victims' Rights in the Process of Criminal Justice, issued by the European Forum for Victims' Services in 1996.

[4] European Union Framework Decision on the Standing of Victims in Criminal Proceedings.

[5] Council of Europe Recommendations on assistance to Crime victims adopted on 14.6.2006.

[6] 152nd and 154th Report of the Law Commission of India, 1994 and 1996 respectively, recommending introduction of Section 357-A in Criminal Procedure Code, prescribing, inter alia, compensation to the victims of crime.

[7] Recommendations of the Malimath Committee, 2003.

24 The subject-matter has been dealt with by experts from over 40 countries in series of meetings and a document has been developed in co-operation with United Nations Office at Vienna, Centre for International Crime Prevention and the compilation under the heading "Handbook on Justice for Victims" which deals with various aspects of impact of victimization, victims assistance programmes and role and responsibility of front-line professionals and others to victims. The South African Law Commission, in its "Issue Paper 7" (1997) under the heading "Sentencing Restorative Justice: Compensation for Victims of Crime and Victim Empowerment" has deliberated on various relevant aspects of this issue.

xx xx xx xx xx

27 In Malimath Committee Report (March 2003), it was observed:-

"6.7.1 Historically speaking, Criminal Justice System seems to exist to protect the power, the privilege and the values of the elite sections in society. The way crimes are defined and the system is administered demonstrate that there is an element of truth in the above perception even in modern times. However, over the years the dominant function of criminal justice is projected to be protecting all citizens from harm to either their person or property, the assumption being

that it is the primary duty of a State under rule of law. The State does this by depriving individuals of the power to take law into their own hands and using its power to satisfy the sense of revenge through appropriate sanctions. The State (and society), it was argued, is itself the victim when a citizen commits a crime and thereby questions its norms and authority. In the process of this transformation of torts to crimes, the focus of attention of the system shifted from the real victim who suffered the injury (as a result of the failure of the State) to the offender and how he is dealt with by the State. Criminal Justice came to comprehend all about crime, the criminal, the way he is dealt with, the process of proving his guilt and the ultimate punishment given to him. The civil law was supposed to take care of the monetary and other losses suffered by the victim. Victims were marginalized and the State stood forth as the victim to prosecute and punish the accused.

6.7.2 What happens to the right of victim to get justice to the harm suffered? Well, he can be satisfied if the State successfully gets the criminal punished to death, a prison sentence or fine. How does he get justice if the State does not succeed in so doing? Can he ask the State to compensate him for the injury? In principle, that should be the logical consequence in such a situation; but the State which makes the law absolves itself.

6.8.1 The principle of compensating victims of crime has for long been recognized by the law though it is recognized more as a token relief rather than part of a punishment or substantial remedy. When the sentence of fine is imposed as the sole punishment or an additional punishment, the whole or part of it may be directed to be paid to the person having suffered loss or injury as per the discretion of the Court (Section 357, Cr.P.C.). Compensation can be awarded only if the offender has been convicted of the offence with which he is charged.

xx xx xx xx xx

> 6.8.7 Sympathizing with the plight of victims under Criminal Justice administration and taking advantage of the obligation to do complete justice under the Indian Constitution in defense of human rights, the Supreme Court and High Courts in India have of late evolved the practice of awarding compensatory remedies not only in terms of money but also in terms of other appropriate reliefs and remedies. Medical justice for the Bhagalpur blinded victims, rehabilitative justice to the communal violence victims and compensatory justice to the Union Carbide victims are examples of this liberal package of reliefs and remedies forged by the Apex Court. The recent decisions in Nilabati Behera v. State of Orissa (1993) 2 SCC 746 : (AIR 1993 SC 1960) and in Chairman, Railway Board v. Chandrima Das, are illustrative of this new trend of using Constitutional jurisdiction to do justice to victims of crime. Substantial monetary compensations have been awarded against the instrumentalities of the State for failure to protect the rights of the victim.
>
> 6.8.8 These decisions have clearly acknowledged the need for compensating victims of violent crimes irrespective of the fact whether offenders are apprehended or punished. The principle invoked is the obligation of the State to protect basic rights and to deliver justice to victims of crimes fairly and quickly. It is time that the Criminal Justice System takes note of these principles of Indian Constitution and legislate on the subject suitably." "

10 In Re: State of Assam and 2 others (PIL (Suo Motu) No. 26/2013) vide judgment dated 24.4.2013, a Division Bench of Gauhati High Court observed :

> "We have heard learned counsel for the parties on the issue whether in absence of any prohibition under the scheme, interim compensation ought to

> be paid at the earliest to the victim irrespective of stage of enquiry or trial, either on application of the victim or suo motu by the Court.

In Savitri v. Govind Singh Rawat, (1985) 4 SCC 337 : (AIR 1986 SC 984), question of interim maintenance under Section 125, Cr.P.C. was considered and it was observed : [SCC pp. 339-42, paras 3 & 6]

> "3. It is true that there is no express provision in the Code which authorises a Magistrate to make an interim order directing payment of maintenance pending disposal of an application for maintenance. The Code does not also expressly prohibit the making of such an order. The question is whether such a power can be implied to be vested in a Magistrate having regard to the nature of the proceedings under Section 125 and other cognate provisions found in Chapter IX of the Code which is entitled "Order for Maintenance of Wives, Children and Parents". Section 125 of the Code confers power on a Magistrate of the First Class to direct a person having sufficient means but who neglects or refuses to maintain (i) his wife, unable to maintain herself, or (ii) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or (iii) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or (iv) his father or mother, unable to maintain himself or herself, upon proof of such neglect or refusal, to pay a monthly allowance for the maintenance of his wife or such child, father or mother, as the case may be, at such monthly rate not exceeding five hundred rupees in the whole as such Magistrate thinks fit. Such allowance shall be payable from the date of the order, or, if so ordered from the date of the application for maintenance. Section 126 of the Code prescribes the procedure for the disposal of an application made under Section 125. Section 127 of the Code provides for alteration of the rate

of maintenance in the light of the changed circumstances or an order or decree of a competent civil court. Section 128 of the Code deals with the enforcement of the order of maintenance. It is not necessary to refer to the other details contained in the abovesaid provisions.

6. In view of the foregoing it is the duty of the court to interpret the provisions in Chapter IX of the Code in such a way that the construction placed on them would not defeat the very object of the legislation. In the absence of any express prohibition, it is appropriate to construe the provisions in Chapter IX as conferring an implied power on the Magistrate to direct the person against whom an application is made under Section 125 of the Code to pay some reasonable sum by way of maintenance to the applicant pending final disposal of the application. It is quite common that applications made under Section 125 of the Code also take several months for being disposed of finally. In order to enjoy the fruits of the proceedings under Section 125, the applicant should be alive till the - 17 - date of the final order and that the applicant can do in a large number of cases only if an order for payment of interim maintenance is passed by the court. Every court must be deemed to possess by necessary intendment all such powers as are necessary to make its orders effective. This principle is embodied in the maxim "ubi aliquid conceditur, conceditur et id sine quo res ipsa esse non potest" (Where anything is conceded, there is conceded also anything without which the thing itself cannot exist). [Vide Earl Jowitt's Dictionary of English Law, 1959 Edn., p. 1797.] Whenever anything is required to be done by law and it is found impossible to do that thing unless something not authorised in express terms be also done then that something else will be supplied by necessary intendment. Such a construction though it may not always be admissible in the present case however would advance the object of the

legislation under consideration. A contrary view is likely to result in grave hardship to the applicant, who may have no means to subsist until the final order is passed. There is no room for the apprehension that the recognition of such implied power would lead to the passing of interim orders in a large number of cases where the liability to pay maintenance may not exist. It is quite possible that such contingency may arise in a few cases but the prejudice caused thereby to the person against whom it is made is minimal as it can be set right quickly after hearing both the parties. The Magistrate may, however, insist upon an affidavit being filed by or on behalf of the applicant concerned stating the grounds in support of the claim for interim maintenance to satisfy himself that there is a prima facie case for making such an order. Such an order may also be made in an appropriate case ex parte pending service of notice of the application subject to any modification or even an order of cancellation that may be passed after the respondent is heard. If a civil court can pass such interim orders on affidavits, there is no reason why a Magistrate should not rely on them for the purpose of issuing directions regarding payment of interim maintenance. The affidavit may be treated as supplying prima facie proof of the case of the applicant. If the allegations in the application or the affidavit are not true, it is always open to the person against whom such an order is made to show that the order is unsustainable. Having regard to the nature of the jurisdiction exercised by a Magistrate under Section 125 of the Code, we feel that the said provision should be interpreted as conferring power by necessary implication on the Magistrate to pass an order directing a person against whom an application is made under it to pay a reasonable sum by way of interim maintenance subject to the other conditions referred to therein pending final disposal of the application. In taking this view we have also taken note of the provisions of Section 7(2)(a) of the Family Courts Act, 1984 (Act 66 of

> 1984) passed recently by Parliament proposing to transfer the jurisdiction exercisable by Magistrates under Section 125 of the Code to the Family Courts constituted under the said Act."
>
> Above view has been reiterated, inter alia, in Shail Kumari Devi v. Krishan Bhagwan Pathak, (2008) 9 SCC 632 : (AIR 2008 SC 3006).
>
> > We are of the view that above observations support the submission that interim compensation ought to be paid at the earliest so that immediate need of victim can be met. For determining the amount of interim compensation, the Court may have regard to the facts and circumstances of individual cases including the nature of offence, loss suffered and the requirement of the victim. On an interim order being passed by the Court, the funds available with the District/State Legal Services Authorities may be disbursed to the victims in the manner directed by the Court, to be adjusted later in appropriate proceedings. If the funds already allotted get exhausted, the State may place further funds at the disposal of the Legal Services Authorities."

9 In the case of **Suresh** [supra], the Apex Court was considering the above provisions of Section 357, 357A of the Code, 1973 in the backdrop of the offence under Section 302 of the IPC which took place on 18.12.2000, which was admittedly prior to amendment of Act 5 of 2009 and considering the law of compensation and victimology at length the Apex Court awarded Rs.10,00,000/-.

10 Maintenance of law and order is State's absolute responsibility without any exception and in the event of mass casualty at a public place in a case where there was a mass declaration of a vow by members of public to perform Kar Seva at the highly disputed Ayodhya site, the State's responsibility multiplied manifold and failure to maintain

law and order in such a situation would necessarily render the State to the liability of compensation for the victims of crime. It is evident from the testimony of several witnesses (to illustrate see PW 83, 84, 85) that it was a public call to take part in a religious ceremony for Seva Puja / Aahuti given by religious bodies like Vishwa Hindu Parishad, Bajrang Dal, etc., in the month of February, 2002 on an around 18th of February, 2002 at Ayodhya. There is a long drawn dispute in relation to Ram Janma Bhumi and Babri Masjid in Ayodhya and State cannot plead ignorance of the said situation. Constitutional obligation to maintain law and order obligated the State to ensure safety of the persons who ventured to go to Ayodhya for Aahuti, etc. Furthermore, Signal Faliya, Godhra is highly sensitive communal riots prone zone to the knowledge of the State. In the above factual scenario, the Government ought to have apprehended the trouble at least in sensitive areas like Signal Faliya where-from the train was scheduled to pass. Evidence on record do not indicate any dedicated efforts of maintaining law and order at sensitive place like Signal Faliya, except few constables / RPF personnels loitering here and there before the incident in question. It is the case of the State that as many as 59 persons were roasted alive and many more were injured during the incident in question. This argument itself admits the failure on the part of the State to maintain law and order.

11 This is not a case where in a stray incident one or two lives are lost. It is a case of mass casualty and when mass casualty occurs, State's responsibility multiplies manifold and it can have no reason to deny just fair and reasonable compensation. The compensation is thus not a bounty but it can be sourced to Article 21 of the Constitution of India. It can be argued that if the State lays down the rule of behaviour, it should not only punish the violation thereof but also look after the

suffers of the violation; if the State prohibits all private vengeance, it should go to the rescue of victim of crime, the perpetration of which it failed to contain; if the reformatory measures are necessary for rehabilitation of offenders, the compensatory measures for rehabilitation of the victims of crime are also necessary.

12 It cannot be disputed that each and every individual either dead or injured in the incident in question had guaranteed right to life and liberty under Article 21 of the Constitution of India and the lack of maintenance of law and order in the factual scenario above-stated would render the State liable to compensation not only because lives are lost; but because it failed to maintain the expected law and order.

13 Likewise, Indian Railways, particularly, North, Central and Western Zones and authorities In-charge thereof were fully aware about overcrowded trains running through the territories under their control for which no measures were taken to ensure safety of the passengers or to provide alternatives. We are, therefore, of the view that not only the State Government, but the Ministry of Railways, Union of India, are equally negligent in performing the duties for providing safety to the passengers travelling in the trains. That compensation can neither be peanuts for the victim nor a bounty. It must be just, fair and reasonable. The cases on hand have gone through the gamut of investigation, further investigation, constituting SIT by the Apex Court, then trial and proceedings before this Court and the incident which took place in the year 2002, compensation that is to be decided and paid in the year 2017 if determined reasonably, meaning thereby without entering into the percentage of interest, etc, the amount of compensation to be awarded to each of the victim for loss of life shall be Rs.10 lakhs will be just and

fair to be shared equally by the State of Gujarat and the Ministry of Railways, Union of India. In case, any *ex gratia* payment is made to the victim either by the State of Gujarat or Ministry of Railways, or under any scheme of the Central Government, such amount is to be excluded against this amount.

14 So far as injured victims receiving grievous injuries and simple injuries are concerned, minimum Rs.3 lakhs and Rs.10,000/- respectively to be awarded by taking the above figure of Rs.10 lakhs as basis and to be increased depending upon the percentage of disablement sustained by them and other criteria applicable in deciding Motor Accident Claims Petitions to be applied and compensation must be awarded to them upon establishing their identity for which no detailed inquiry is necessary.

15 Since the amount of compensation is determined as above, we leave the exercise of disbursing the compensation to Gujarat State Legal Services Authority. The authority would take into consideration the material available on record and also by following procedure laid down in Notification dated 02.01.2016 of the Home Department, Sachivalaya, Gandhinagar.

PART XVI

SENTENCE

16 As held by us in preceding chapters of this judgment whereby findings and conclusions about guilt of accused are substantially sustained and conviction recorded and ordered by the learned Trial Judge do not require any interference in view of prosecution succeeding in proving its case beyond reasonable doubt for

various offences under penal statutes for which they were charged, but while answering Reference Case Nos.1 to 10 of 2011 referred to **under Section 28(2) of the Code, 1973 read with Section 366 pertaining to sentence of capital punishment `to be hanged by neck till death'** submitted by the court of sessions for confirmation under Chapter XXVIII of the Code, 1973, the powers are conferred upon the High court under section 368 to confirm sentence or annul conviction and **Section 368(a) confers discretion upon the High Court to which case is submitted under section 366 of the Code, 1973 to confirm the sentence or pass any other sentence warranted by law**. Accordingly, we address the issue of awarding sentence of death upon 11 convicts referred to in Schedule-A and Schedule-B of the operative part of the judgment of the trial court is to be confirmed or any other sentence warranted by law to be inflicted.

17 We have gone through the decisions relied on by the learned counsels for the defence and the learned Special Public Prosecutor and considered by learned trial Judge in para 99 of the judgment dated 01.03.2011 under challenge in which submissions made by learned Special Public Prosecutor about dastardly, diabolic, grotesque, heinous crime committed by the accused, now convicts, and criteria of rarest of rare cases including mitigating and non-mitigating circumstances based on factual scenario and having regard to the magnitude of the crime and death of 59 persons and other injured learned trial Judge thought it fir to award capital punishment to 11 accused. We have also perused Section 354(3) of the Code, 1973 for assigning special reasons while awarding capital punishment.

18 The Apex Court in the case of **Mohd. Jamiludin Nasir** [supra] was considering the charge of Sections 121, 121-A and 122 read

with Section 120-B and Section 302, etc of IPC where in the attack of American Centre, Calcutta wherein 5 policemen were killed and 13 policemen and several civilians were injured. The above judgment is referred to in Volume-II of the judgment in the context of Section 164 of the Code, 1973 and also for appreciation of evidence and Sections 10 and 30 of the evidence Act. We are inclined to refer to para 170 of the judgment which contain question of sentence considered by the Apex Court in which the case of **Ramnaresh v. State of Chhatisgarh [(2012)4 SCC 257] is considered, which read as under:**

> **"170 A decision of this Court of recent times on the question of sentence is reported in Ramnaresh and others v. State of Chhattisgarh (2012) 4 SCC 257 : (AIR 2012 SC 1357). The principles laid down therein have been summarized as under in paragraphs 77 and 78 : (SCC pp. 286-87)**
>
> > **"77. While determining the questions relatable to sentencing policy, the Court has to follow certain principles and those principles are the loadstar besides the above considerations in imposition or otherwise of the death sentence. Principles;**
> >
> > **[1] The Court has to apply the test to determine, if it was the "rarest of rare" case for imposition of a death sentence.**
> >
> > **[2] In the opinion of the Court, imposition of any other punishment i.e. life imprisonment would be completely inadequate and would not meet the ends of justice.**
> >
> > **[3] Life imprisonment is the rule and death sentence is an exception.**
> >
> > **[4] The option to impose sentence of imprisonment for life cannot be cautiously exercised having regard to the nature and circumstances of the crime and all relevant considerations.**
> >
> > **[5] The method (planned or otherwise) and the manner (extent of brutality and inhumanity, etc.) in which the crime was committed and the circumstances leading to commission of such heinous crime.**

> **78.....It is difficult to state it as an absolute rule. Every case has to be decided on its own merits. The judicial pronouncements, can only state the precepts that may govern the exercise of judicial discretion to a limited extent. Justice may be done on the facts of each case. These are the factors which the Court may consider in its endeavour to do complete justice between the parties.**"

171 One other recent decision on imposition of death penalty is reported in State of Maharashtra v. Goraksha Ambaji Adsul (2011) 7 SCC 437 : (AIR 2011 SC 2689). Paragraph 33 is relevant which reads as under:

> "33. The Constitution Bench Judgment of this Court in Bachan Singh (AIR 1980 SC 898) has been summarised in para 38 in Machhi Singh v. State of Punjab (AIR 1983 SC 957) and the following guidelines have been stated while considering the possibility of awarding sentence of death: (Machhi Singh case, SCC p. 489)
>
> > "**[i] The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.**
> >
> > **[ii] Before opting for the death penalty the circumstances of the 'offender' also requires to be taken into consideration along with the circumstances of the 'crime'.**
> >
> > **[iii] Life imprisonment is the rule and death sentence is an exception.? death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.**
> >
> > **[iv] A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.**"

172 On the question of sentence, we can make useful reference to recent decision of this Court in Sanjay Kumar (AIR 2013 SC (Cri) 267) (supra) wherein after referring to the earlier decisions reported in Swamy Shraddananda v. State of Karnataka (2008) 13 SCC 767 : (AIR 2008 SC 3040), Rameshbhai Chandubhai Rathod v. State of Gujarat (2011) 2 SCC 764 : (AIR 2011 SC 803) and Brajendrasingh v. State of Madhya Pradesh (2012) 4 SCC 289 : (AIR 2012 SC 1552), observed as under paragraph 24:

> "24. In view of the above, we reach the inescapable conclusion that the submissions advanced by the learned counsel for the State are unfounded. The aforesaid Judgments make it crystal clear that this Court has merely found out the via media, where considering the facts and circumstances of a particular case, by way of which it has come to the conclusion that it was not the "rarest of rare cases", warranting death penalty, but a sentence of 14 years or 20 years, as referred to in the guidelines laid down by the States would be totally inadequate. The life imprisonment cannot be equivalent to imprisonment for 14 years or 20 years, rather it always meant as the whole natural life. This Court has always clarified that the punishment so awarded would be subject to any order passed in exercise of the clemency powers of the President of India or the Governor of the State, as the case may be. Pardons, reprieves and remissions are granted in exercise of prerogative power. There is no scope of judicial review of such orders except on very limited grounds, for example, non-application of mind while passing the order; non-consideration of relevant material; or if the order suffers from arbitrariness. The power to grant pardons and to commute sentences is coupled with a duty to exercise the same fairly and reasonably. Administration of justice cannot be perverted by executive or political pressure. Of course, adoption of uniform standards may not be possible while exercising the power of pardon. Thus, such orders do not interfere with the sovereign power of the State. More so, not being in contravention of any statutory or constitutional provision, the orders, even if treated to have been passed under Article 142 of the Constitution do not deserve to be labelled as unwarranted. The aforesaid orders have been passed considering the gravity of the offences in those cases that the accused would not be entitled to be considered for premature release under the guidelines issued for that purpose i.e. under the Jail Manual, etc. or even under Section 433A, Cr PC."

173 Sentencing is a delicate task requiring an interdisciplinary approach and calls for special skills and

talents. A proper sentence is the amalgam of many factors, such as, the nature of offence, circumstances - extenuating or aggravating - of the offence, prior criminal record of the offender, age and background of the offender with reference to education, home life, sobriety, social adjustment, emotional and mental condition, the prospects for his rehabilitation etc. The above passage can be found in Ratanlal and Dhirajlal's Law of Crimes, 26th Edition at page 185 on the topic 'Of Punishments'.

174 We also keep in mind that under Section 121 for the offence of waging or attempting to wage war or abetting waging of war against the Government of India, the punishment provided is with death or imprisonment for life and also liable to imposition of fine. We have also noted that under Section 354(3) of Cr.P.C., when the conviction is for an offence punishable with death or in the alternative with imprisonment for life or imprisonment for term of years, the Judgment should state the reasons for the sentence awarded and in the case of sentence of death the special reasons for awarding such sentence.

175 Having noted the above decisions on the question of sentence we formulate the following fundamental principles to be borne in mind while dealing with the sentence to be imposed in respect of crimes committed of such grotesque nature:

175.1 The sentence to be awarded should achieve twin objectives

[a] Deterrence
[b] Correction

175.2 The Court should consider social interest and consciousness of the society for awarding appropriate punishment.

175.3 Seriousness of the crime and the criminal history of the accused is yet another factor.

175.4 Graver the offence longer the criminal record should result severity in the punishment.

175.5 Undue sympathy to impose inadequate sentence would do more harm to the public.

175.6 Imposition of inadequate sentence would undermine the public confidence in the efficacy of law and society cannot endure such threats.

176 In cases of this nature where charges under Sections 121, 122,

121A read with 120B, IPC as well as 302, IPC are involved, other principles should also be kept in mind, namely:

176.1 Most important factor should be the intention and purpose behind the waging of war against the State should be ascertained.

176.2 The modus operandi adopted which involved mobilization of men materials such as arms and ammunitions indulging in serious conspiracy over a period of time are another relevant factor.

176.3 It will not depend upon the number of persons - even limited persons can indulge in more harmful crime than large crowd of persons could do.

176.4 There need not be pomp and pageantry like a battle field.

176.5 Not all violent behaviour would fall within the prescription of waging war as stipulated under Sections 121, 121A, 122 read with 120B.

176.6 The object sought to be achieved should be directed against the sovereignty of the State and not merely commission of crime even if it is of higher velocity.

176.7 The concept of 'waging war' should not be stretched too far.

176.8 A balanced and realistic approach should be maintained while construing the offence committed and find out whether it would amount to waging of war against the State.

176.9 Mere organized movement with violence without any intention of acting against the interest of the nation has to be examined.

176.10 Neither the number engaged nor the power employed nor the arms used can be the criteria.

176.11 It should be seen as to what is the purpose behind the choosing of a target of attack.

176.12 When a planned operation is executed, what was the extent of disaster resulted, is to be seen.

176.13 It is to be seen whether it is a mere desperate act of a small group of persons who indulged in the crime.

176.14 It must be seen whether the undoubted objective and determination of the offender was it to impinge on the sovereignty of

the nation.

176.15 In this context the expansive definition of Government of India should be understood".

19 No doubt, the learned trial judge has refereed to the cases of Bachan Singh [supra] and Machhi Singh [supra] and principles laid down therein also find place in Mohmmad Nasir [supra] along with other decisions.

20 In addition to the law of awarding capital sentence as laid down by the Apex Court in the cases of Bachan Singh [supra] and Machhi Singh [supra], we have considered various other judgments and deliberated on the subject to which reference is also made in the Report No.262 of Law Commission of India on death penalty of Accused, 2015 and to avoid repetition, we do not enumerate the same.

21 We have come across consultation paper of capital punishment published by the Government of India, Law Commission of India of May, 2014 whereby Law Commission of India invited suggestions and representations so as to provide inputs to study the issue of capital punishment by issuing a questionnaire of capital punishment so that timely and much needed public debate on this issue involving a wider community of concerned citizens could elicit their views. After receiving such suggestions, representations and views, a report No.262 was submitted on the death penalty in August, 2015. We would like to reproduce `summary' of the report prepared by us along with conclusions, which examined cases decided by the Apex Court in which death sentence so awarded, which read as under:

REPORT NO.262

THE DEATH PENALTY
AUGUST, 2015

22 In the context of decision in the case of Shankar Kisanrao Khade v. State of Maharashtra, [(2013)5 SCC 546], while dealing with an appeal on the issue of death sentence, the Apex Court called for the intervention of the Law Commission of India on two issues, which read as under:

> "It seems to me that though the courts have been applying the rarest of rare principle, the executive has taken into consideration some factors not known to the courts for converting a death sentence to imprisonment for life. It is imperative, in this regard, since we are dealing with the lives of people (both the accused and the rape-murder victim) that the courts lay down a jurisprudential basis for awarding the death penalty and when the alternative is unquestionably foreclosed so that the prevailing uncertainty is avoided. Death penalty and its execution should not become a matter of uncertainty nor should converting a death sentence into imprisonment for life become a matter of chance. Perhaps the Law Commission of India can resolve the issue by examining whether death penalty is a deterrent punishment or is retributive justice or serves an incapacitative goal, Shankar Kishanrao Khade v. State of Maharashtra [2013]5 SCC 546, at para 148. (Emphasis supplied)
>
> It does prima facie appear that two important organs of the State, that is, the judiciary and the executive are treating the life of convicts convicted of an offence punishable with death with different standards. While the standard applied by the judiciary is that of the rarest of rare principle (however subjective or Judge-centric it may be in its application), the standard applied by the executive in granting commutation is not known. Therefore, it could happen (and might well have happened) that in a given case the Sessions Judge, the High Court and the Supreme Court are unanimous in their view in awarding the death penalty to a convict, any other option being unquestionably foreclosed, but the executive has taken a diametrically opposite opinion and has commuted the death penalty. This may also need to be considered by the Law

Commission of India, Shankar Kishanrao Khade v. State of Maharashtra [2013]5 SCC 546, at para 112 (Emphasis supplied)"

22.1 Accordingly, the Law Commission of India [`the Commission'] addressed the above Reference on the death penalty. Earlier, emphasis of the Apex Court on importance of credible research on the subject was noticed in Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra, [2009]6 SCC 498.

22.2 That previous reports of the Commission viz. The 35th Report on Capital Punishment [1967] and The 187th Report on the Mode of Execution [2003] were also considered. As per The 35th Report of the Commission, opinion was rendered that capital punishment should be retained in the present state of the country and The 187th Report was only on the Mode of Execution. The Commission in the Report No.262 further considered various data prevailing at the time of submitting The 35th Report and in the year 2011-12 available on education, general well-being and social and economic conditions based on net national income at constant prices, adult literacy, life expectancy, etc. and reports of National Crime Records Bureau and data available on decline in the murder rate has coincided with a corresponding decline in the rate of executions. In the light of Section 354(3) of the new code being Code of Criminal Procedure, 1973 which managed the Code to assign `special reasons' to be given when the death sentence is imposed for an offence where the punishment could be life imprisonment or death. That in the case of Bachan Singh v. State of Punjab, [(1980)2 SCC 684], the above Scheme came to be interpreted by the Apex Court and it would mean that normal sentence for murder should be imprisonment for life, and that only in the rarest of rare cases should the death penalty be imposed.

22.3 By noticing the emergence of constitutional due-process standards, post-1967, and interpretation of Article 21 of the Constitution of India reading into the right to dignity and substantive and due process after decision in the case of Maneka Gandhi vs. Union of India [(1978)1 SCC 248] that the procedure prescribed by law has to be as per just and reasonable, not fanciful, oppressive or arbitrary. Further, even in the case of Bachan Singh [supra], the Apex Court observed that Section 354(3) of the Code, 1973 is part of the due process framework on the death penalty. In this regard, the Apex Court in the case of Bachan Singh [supra], held as under:

> "There are numerous other circumstances justifying the passing of the lighter sentence; as there are countervailing circumstances of aggravation. We cannot obviously feed into a judicial computer all such situations since they are astrological imponderables in an imperfect and undulating society. Nonetheless, it cannot be overemphasised that the scope and concept of mitigating factors in the area of death penalty must receive a liberal and expansive construction by the courts in accord with the sentencing policy writ large in Section 354(3). Judges should never be bloodthirsty. Hanging of murderers has never been too good for them. Facts and Figures, albeit incomplete, furnished by the Union of India, show that in the past, courts have inflicted the extreme penalty with extreme infrequency — a fact which attests to the caution and compassion which they have always brought to bear on the exercise of their sentencing discretion in so grave a matter. It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guide-lines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354(3) viz. that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed. [Bachan Singh v. State of Punjab,

(1980)2 SCC 684 para 209."

(Emphasis supplied)

22.4 **Thus, according to the Commission, the `rarest of rare' standard has at its core the conception of the death penalty as a sentence that is unique in its absolute denunciation of life. The punishment is completely irrevocable and alternative option is unquestionably foreclosed.**

22.5 Again the Commission also noticed judicial developments on the arbitrary and subjective application of the death penalty and various grounds in the country applied the rarest of rare dictum pronounced in Bachan Singh [supra] has been inconsistently applied. In the above context, the Commission examined the following decisions:

[1] Aloke Nath Dutta v. State of West Bengal, [2007)12 SCC 230.

[2] Swamy Shraddhananda v. State of Karnataka ('Swamy Shraddhananda'), [2008]13 SCC 767.

[3] Farooq Abdul Gafur v. State of Maharashtra ('Gafur'), [2010]14 SCC 641.

[4] Sangeet v. State of Haryana ('Sangeet'), [2013] 2 SCC 546.

[5] Shankar Kisanrao Khade v. State of Maharashtra, [(2013)5 SCC 546]

22.6 According to the Commission, the Apex Court noticed the subjective and arbitrary application of the death penalty has led "principled sentencing" to become "judge-centric sentencing" [Sangeet v. State of Haryana, (2013)2 SCC 452], based on the "personal predilection of the judges constituting the Bench".

22.7 The commission further prefaced history of the death penalty in India and debates between 1947 and 1949 in the constituent assembly on the death penalty. The Commission even noted opinion of Dr. Babasaheb Ambedkar in favour of abolition of death penalty. The legislative history on the subject during pre-independence era and when first challenge to the constitutionality of the death penalty in India came to be decided in the case of Jagmohan Singh v. State of U.P. [(1973)1 SCC 20] upon challenge that the death penalty violated Articles 14, 19 and 21 of the Constitution of India, in which the decision of the US Supreme Court in Furman v. Georgia was considered in which the death penalty was declared to be unconstitutional as being cruel and unusual punishment. The above case was decided before the Code of Criminal Procedure was re-enacted in 1973. In the above case, the Apex Court found that the death penalty was permissible punishment and did not violate the Constitution. By referring to the case of Rajendra Prasad v. State of Uttar Pradesh, [(1979)3 SCC 646], in which the Apex Court discussed what are, "special reasons necessary for imposing death penalty must relate, not to the crime as such but to the criminal". In the above case, the Apex Court held as under:

> "the retributive theory has had its day and is no longer valid. Deterrence and reformation are the primary social goals which make deprivation of life and liberty reasonable as penal panacea [Rajendra Prasad v. State of Uttar Pradesh, [(1979)3 SCC 646]". Significantly, voicing concerns that have begun to reemerge, the court asked: "Who, by and large, are the men whom the gallows swallow?"83 and found that, with a few exceptions, it was "the feuding villager ... the striking workers … the political dissenter ... the waifs and strays whom society has hardened by neglect into street toughs, or the poor householder-husband or wife driven by necessity of burst of tantrums" [Rajendra Prasad v. State of Uttar Pradesh, [(1979)3 SCC 646] who were visited with the extreme penalty".

22.8 The Commission also noted various other decisions of the Apex Court in which observations were made by the Apex Court that sentencing in capital cases has become arbitrary and that the sentencing law of Bachan Singh [supra] has been interpreted in varied ways by different Benches of the Court.

22.9 In the case of Mithu v. State of Punjab [(1983)2 SCC 277], the Apex Court was concerned with mandatory sentence of death under Section 303 of the IPC and it was held to be unconstitutional. Even challenge to the execution by handing in the case of Deenu v. Union of India [(1983)4 SCC 645], the Apex Court found that prisoner / convict cannot be subjected to barbarity, humiliation, torture or degradation before the execution of the sentence.

22.10 That delay and the death penalty was also examined by referring to various decisions and also Constitution Bench decision in the case of Triveniben v. State of Gujarat [(1989)1 SCC 678] in which the Apex Court held that only executive delay and not judicial delay may be considered as relevant in an Article 21 challenge. The court held that no fixed period of delay could be held to make the sentence of death inexecutable. The above view was reaffirmed in the case of Shatrughan Chauhan v. Union of India [(2014)3 SCC1]. Again while upholding the constitutionality of Section 364A of the IPC, which allows for the imposition of the death sentence in cases of kidnapping with ransom, in the case of Vikram Singh @Vicky & Anr. v. Union of India & Ors., Criminal Appeal No.824 of 2013, decided on 21.08.2015. After acknowledging that punishment must be proportionate to the nature and gravity of the offences for which the same are prescribed, it was held

that Section 364A cannot be dubbed as so outrageously disproportionate to the nature of the offence as to call for the same being declared unconstitutional.

22.11 The Commission also considered laws on the death penalty in India, capital offences in IPC, capital offences in other laws and even bills proposing abolition of the death penalty pending in the Rajya Sabha.

22.12 International trends in various countries came to be noticed and found that in 140 countries in the world, death penalty is not in the statute book. The Commission also noticed purposes to be served by death penalty viz. deterrent punishment or is retributive justice or serves an incapacitative goal so noticed by The 35th Report of Law Commission and various research made by authors viz. John Donohue and Justin Wolfers in their book Uses and Abuses of Empirical Evidence in the Death Penalty Debate. Other decisions of the Apex Court on the theory of retribution and need for police reforms.

22.13 Retributive theory / justice and decision in the case of Prakash Singh v. Union of India, [(2006)8 SCC 1] and need for implementation of the Apex Court in the case of Prakash Singh [supra].

22.14 In Chapter-V under the head of Sentencing in Capital Offences, again the Commission referred to cases of Bachan Singh [supra] and other decisions. Subsequently, though guidelines in the case of Bachan Singh [supra] were to lay a road map to minimize the risk of arbitrary imposition of death penalty. In the case of **Machhi Singh v. State of Punjab, (1983) 3 SCC 470**, the Apex Court listed out the following five categories of cases which the death penalty was a suitable

option.

> "I Manner of Commission of Murder: When the murder is committed in an extremely brutal, grotesque, diabolical. revolting, or dastardly manner so as to arouse intense and extreme indignation of the community. For instance, [i] When the house of the victim is set aflame with the end in view to roast him alive in the house. [ii] When the victim is subjected to inhuman acts of torture or cruelty in order to bring about his or her death. [iii] When the body of the victim is cut into pieces or his body is dismembered in a fiendish manner.
>
> II Motive for Commission of murder: When the murder is committed for a motive which evince total depravity and meanness. For instance when (a) a hired assassin commits murder for the sake of money or reward (2) a cold blooded murder is committed with a deliberate design in order to inherit property or to gain control over property of a ward or a person under the control of the murderer or vis-a-vis whom the murderer is in a dominating position or in a position of trust. (c) a murder is committed in the course for betrayal of the motherland.
>
> III Anti Social or Socially abhorrent nature of the crime: (a) When murder of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath. For instance when such a crime is committed in order to terrorize such persons and frighten them into fleeing from a place or in order to deprive them of, or make them with a view to reverse past injustices and in order to restore the social balance. (b) In cases of 'bride burning' and what are known as 'dowry deaths' or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.
>
> IV Magnitude of Crime: When the crime is enormous in proportion. For instance when multiple murders say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.
>
> V Personality of Victim of murder: When the victim of murder is (a) an innocent child who could not have or

> **has not provided even an excuse, much less a provocation, for murder. (b) a helpless woman or a person rendered helpless by old age or infirmity (c) when the victim is a person vis-a vis whom the murderer is in a position of domination or trust (d) when the victim is a public figure generally loved and respected by the community for the services rendered by him and the murder is committed for political or similar reasons other than personal reasons".**

Thus, Bachan Singh [supra] recognized that circumstances are to the crime and criminal are often "so intertwined that it is difficult to give a separate treatment to each of them", the Court held that it was "not desirable to consider circumstances of the criminal in two separate water-tight compartments", Machhi Singh [supra] explained five categories in detail for which the death penalty was a suitable option. The above exercise undertaken by th Commission under the head Doctrinal Frameworks. Further, the above five categories broadly according to the Commission, follow in many cases subsequently which suggest that once a case calls within any of the five categories it becomes a rarest of rare case deserving the death penalty. Once again, Santosh Kumar Satishbhushan Bariyar [supra] was noticed in which it was held that the exclusive focus in the case of Ravji alias Ram Chandra v. State of Rajasthan, (1996) 2 SCC 175, on the crime, rendered the decision per incurium Bachan Singh [supra]. In Santosh Kumar Satishbhushan Bariyar [supra] case, the Apex Court listed a further six cases where case of Ravji [supra] was followed.

22.15 That according to the Commission, the focus in many such cases based on Ravji [supra] was `**crime centric**'.

22.16 **That further category of Shock to the Collective Conscience and Society's Cry for Justice was examined on different**

phrases that `Collective Conscience', `Society Cry' and `Public Abhorrence' which weighed and played an important role in sentencing jurisprudence since Santosh Kumar Satishbhushan Bariyar [supra] questioned the relevance and desirability of factoring in such `public opinion' into rarest of rare analysis inasmuch as firstly it is difficult to precisely define what is `public opinion' on a given matter actually is. Further, people's perception of crime is "neither an objective circumstances relating to crime nor to the criminal" and the courts are governed by the constitutional safeguards that introduce values of institutional propriety, in terms of fairness, unreasonableness and equal treatment challenge with respect to procedure to be invoked by the state in its dealings with people in various capacities, including as a convict.

22.17 **According to the Commission different Judges have understood the requirements of rarest of rare standards differently, resulting in a disparate and "judge-centric" determination of whether or not a case falls within the rarest of rare category. The Commission has found the triple test analysis i.e. crime test, criminal test and rarest of rare test limits the possibility of imposition of death penalty to that very narrow category of cases in which there are no mitigating circumstances whatsoever.**

22.18 **Under the head of factors to be considered either for aggravating or mitigating**, the Commission noticed case of State of U.P. v. Satish, (2005) 3 SCC 114 where accused was convicted for committing rape and murder of a minor, the Court found the case was covered under the category of rarest of rare case and death sentence awarded by the trial court was appropriate. In the above judgment, no discussion was made about aggravating and mitigating circumstances.

The Commission also addressed to various mitigating entries including age of the accused and young age of the accused was either not considered or was deemed irrelevant in many cases. **Even nature of the offence was also aggravating factor**. In case of Sushil Murmu v. State of Jharkhand, (2004) 2 SCC 338 in which the accused were convicted for murdering three children as human sacrifice and that was treated as rarest of rare case in which death sentence was imposed and superstitious motivation are not considered as mitigating factors and death sentence in such case should be the rule with no exception whatsoever, according to the Apex Court. Then, prior criminal record of the offender as an aggravating factor various decisions were considered and the possibility of reform of the convict and decisions were considered and in a given case requirement of addressing the issue that the accused would be a menace to the society and there is no possibility of reformation and rehabilitation.

22.19 **The Commission examined all these five categories and also rules of prudence in the case of Mohd. Farooq Abdul Gafur v. State of Maharashtra, (2010) 14 SCC 641, in a case of circumstantial evidence and conviction is based only upon such circumstantial evidence, the Apex Court in many cases cautioned that the penalty should ordinarily be avoided.**

22.20 Under the `Rules of Prudence', the Commission cautioned that cases based on circumstantial evidence, disagreement on guilt and sentence between the judges, it is prudent to avoid imposing the death penalty. That the Commission noted the cases of Krishna Mochi v. State of Bihar, (2002) 6 SCC 81 and Santosh Kumar Singh v. State, (2010) 9 SCC 747 and other cases.

22.21 Upon scrutiny of imperial data on the imposition of the death penalty, the Commission considered data presented at the National Consolidation and also Data gathered by the National Crimes Record Bureau on death sentences, it was found that 1677 death sentences were imposed by Indian courts during the period from 2000 to 2012. That during the period 2004 to 2012 convictions were recorded by courts in India in 180439 cases involving murder and in the same period, the death sentence was imposed in 1178 cases, i.e., in 0.65% of the cases involving murder convictions.

22.22 The Commission considered the case of Swamy Shraddananda (2) v. State of Karnataka, (2008) 13 SCC 767. The Commission further analyzed "judge centric" Death Penalty Jurisprudence, Geographical Variations in imposing death penalties in various courts. The Commission also examined fallibility of the Criminal Justice System and the Death Penalty in the context of dissenting note of Bhagwati, J. in Bachan Singh case that death penalty is irrevocable and that it cannot be recalled.

22.23 **The Commission also considered list of at least 16 cases decided by the Apex Court in which convicts were imposed death sentences in later decisions in the cases of Shankar Kisanrao Khade [supra], Santosh Kumar Satishbhushan Bariyar [supra], etc. The Commission deliberated on the method of investigation, prosecution witnesses and and mercy jurisdiction with the President of India and Governor of the States and aspect of decreed in deciding mercy petitions from time to time and effect of such decree of execution of the victim of the death penalty and the decisions rendered by the Apex court in this regard viz. delay in deciding execution petition by the authority, as violative of Article 21 of the Constitution of India.**

Table 5.1: List of Cases Doubted in Bariyar,Sangeet, Khade

Sr. No.	Case	No. of persons given the death sentence	Imposition of Death Penalty expressly* held erroneous in
1	Ravji alias Ram Chandra v. State of Rajasthan, (1996) 2 SCC 175	1	Bariyar
2	Shivaji v. State of Maharashtra, AIR 2009 SC 56	1	Bariyar
3	Mohan Anna Chavan v. State of Maharashtra, (2008) 11 SCC 113	1	Bariyar
4	Bantu v. State of UP, (2008) 11 SCC 113	1	Bariyar
5	Dayanidhi Bisoi v. State of Orissa, (2003) 9 SCC 310	1	Bariyar
6	Surja Ram v. State of Rajasthan, (1996) 6 SCC 271	1	Bariyar
7	State of UP v. Sattan, (2009) 4 SCC 736	4	Bariyar
8	Saibanna v. State of Karnataka, (2005) 4 SCC 165	1	Bariyar
9	Shivu v. Registrar General, High Court of Karnataka, (2007) 4 SCC 713	2	Sangeet
10	Rajendra Pralhadrao Wasnik v. State of Maharashtra, (2012) 4 SCC 37	1	Sangeet
11	Mohd. Mannan v. State of Bihar, (2011) 5 SCC 317	1	Sangeet
12	B.A. Umesh v. Registrar General, High Court of Karnataka, (2011) 3 SCC 85	1	Sangeet
13	Sushil Murmu v. State of Jharkhand, (2004) 2 SCC 338	1	Sangeet
14	Gurmukh Singh v. State of Haryana, (2009) 15 SCC 635	1	Shankar Khade
15	Dhananjoy Chatterjee v. State of West Bengal, (1994) 2 SCC 220	1	Shankar Khade
16	Kamta Tiwari v. State of M.P., (1996) 6 SCC 250	1	Shankar Khade

***In many of these cases the Court has pointed out inconsistencies in the application of aggravating and mitigating circumstances. In a judicial system premised on stare decisis, especially in the context of the Court in Bachan Singh clearly mandating that sentencing discretion has to be exercised in light of precedent, these inconsistencies render many such cases per incuriam as well. However, since the Supreme Court has not expressly acknowledged that these cases are per incuriam, they have not been added to the list. See especially, Sangeet and Khade.**

22.24 The constitutionality of the death penalty has to be evaluated in light of the foregoing discussions on its stated justifications, as well as the concerns raised above. **As the Supreme Court cautioned in Bariyar,**

> **[The] right to life is the most fundamental of all rights. Consequently a punishment which aims at taking away life is the gravest punishment. Capital punishment imposes a limitation on the essential content of the fundamental right to life, eliminating it irretrievably. We realize the absolute nature of this right, in the sense that it is a source of all other rights. Other rights may be limited, and may even be withdrawn and then granted again, but their ultimate limit is to be found in the preservation of the right to life. Right to life is the essential content of all rights under the Constitution. If life is taken away all, other rights cease to exist.**

22.25 In view of extent to intrusion of capital punishment into the right to life and the irrevocability of the punishment in the case of Bachan Singh [supra], the Apex Court emphasised as under:

> "5.4.29 In light of the degree of intrusion of capital punishment into the right to life, and the irrevocability of the punishment, the Supreme Court has rightly emphasized that:
> [I]n the context of punishments, the protections emanating

> from Article 14 and Article 21 have to be applied in the strictest possible terms. … In every capital sentence case, it must be borne in mind that the threshold of rarest of rare cases is informed by Article 14 and 21, owing to the inherent nature of death penalty. Post Bachan Singh (supra), capital sentencing has come into the folds of constitutional adjudication. This is by virtue of the safeguards entrenched in Article 14 and 21 of our constitution.
>
> 5.4.30 It is true that Bachan Singh in 1980 held that the death penalty does not violate the Article 21 requirement on this score.
>
> 5.4.31 The Court held that:
>
> by no stretch of imagination can it be said that death penalty under Section 302 of the Penal Code, either per se or because of its execution by hanging, constitutes an unreasonable, cruel or unusual punishment. By reason of the same constitutional postulates, it cannot be said that the framers of the Constitution considered death sentence for murder or the prescribed traditional mode of its execution as a degrading punishment which would defile "the dignity of the individual" within the contemplation of the preamble to the Constitution. On parity of reasoning, it cannot be said that death penalty for the offence of murder violates the basic structure of the Constitution."

22.26 The Commission referred to capital punishment vis-a-vis Articles 14 and 21 of the Constitution of India and that the death penalty does not violate the Article 21 of the Constitution of India as held in the case of Bachan Singh [supra] undertook to study comparative experiences which warn against an approach that focuses on Standardization and categorization. The Commission has taken note of Report of the Royal Commission on Capital Punishment of United Kingdom for recommendation for the abolition of the death penalty in Great Britain earlier and subsequently imposition of a five year legislative moratorium on the death penalty for murder. The South African Constitutional Court in the case of State v. Makwanyane and

Another, Constitutional Court of South Africa struck down the constitutional validity of capital punishment, relying on the arbitrariness and inequality inherent in the punishment, held as under:

> "It cannot be gainsaid that poverty, race and chance play roles in the outcome of capital cases and in the final decision as to who should live and who should die. It is sometimes said that this is understood by the judges, and as far as possible, taken into account by them. But in itself this is no answer to the complaint of arbitrariness; on the contrary, it may introduce an additional factor of arbitrariness that would also have to be taken into account. Some, but not all accused persons may be acquitted because such allowances are made, and others who are convicted, but not all, may for the same reason escape the death sentence"

22.27 The Commission, under Chapter-VI also examined clemency powers and due process issues pertaining to the execution of death sentence in view of reference decision in the case of Shankar Kisanrao Khade [supra] and reverting to Articles 72 and 161 of the Constitution of India and powers to be exercised by the President and the Governor of the State, as the case may be, on the aid and advise of the Council of Ministers after a judicial conviction and sentencing of an offender, the whole record pertaining to the case is scrutinized. Further, a reference was made to the decision in the case of Kehar Singh v. Union of India, (1989)1 SCC 204 by a Constitution Bench and Shatrughan Chauhan v. Union of India, (2014)3 SCC 1 in which certain rules and guidelines were summarized by the Apex Court, which were followed by the Ministry of Home Affairs, Government of India. Such exercise of powers by the President under Article 72 and by the Governor under Article 161 of the Constitution of India is subject to limited form of judicial review, including that of exercising such powers without being advised by the Government and that the Governor / President has transgressed his

jurisdiction, non-application of mind or on the basis of political consideration and the order suffers from arbitrariness and such exercise of power suffers from defect of extraneous or wholly irrelevant considerations and further relevant materials have been kept outside the consideration. The Commission also concluded the data about the details of mercy petitions decided by the President from 1950 onwards.

22.28 After considering advisability of clemency powers of the executives, the Commission concluded as under:

> 6.8.1 The executive's mercy powers cure defects of arbitrary and erroneous death sentences, and provide an additional bulwark against miscarriages of justice. Therefore, cases found unfit for mercy merit capital punishment. Mercy powers are thus a safeguard and necessary precondition for the death penalty.
>
> 6.8.2 When the writ courts in pursuance of judicial review powers, on a relative routine basis, find decisions of the executive to reject mercy petitions to be vitiated by procedural violations, arbitrariness and non-application of mind, the safeguard of mercy powers appears to not be working very well.
>
> 6.8.3 It is also distressing to note that the death row prisoners are routinely subjected to an extraordinary amalgam of excruciating psychological and physical suffering arising out of oppressive conditions of incarceration and long delays in trial, appeal and thereafter executive clemency. Despite repeated attempts by death row prisoners to invoke judicial review remedies to secure commutations on account of penal transgressions by the executive authorities, the practice of solitary confinement and long delays seem to continue unabated. It is the view of the Commission that the death row phenomenon has become an unfortunate and distinctive feature of the death penalty apparatus in India.
>
> 6.8.4 Further, infliction of additional, unwarranted and judicially unsanctioned suffering on death sentence prisoners, breaches the Article 21 barrier against degrading and excessive

punishment. The lingering nature of this suffering is triggered as soon as any court sentences a prisoner to death, and therefore extends beyond the limited number of prisoners who come close to an execution after having lost in the Supreme Court and in the mercy petition phase as well.

6.8.5 The capital punishment enterprise as it operates in India, therefore perpetrates otherwise outlawed punitive practices that inflict pain, agony and torture which is often far beyond the maximum suffering permitted by Article 21. The debilitating effects of this complex phenomenon imposed on prisoners what can only be called a living death. 6.8.6 While the illegalities pertaining to death row phenomenon in a particular case may be addressed by the writ courts commuting the death sentence, the illegal suffering which the convicts have been subjected to while existing on death row casts a long shadow on the administration of penal justice in the country".

22.29 **On overall considerations of various facets of death penalty, following conclusions and recommendations were made by the Commission under Chapter-VIII**:

"7.2.1 The Commission recommends that measures suggested in para 7.1.3 above, which include provisions for police reforms, witness protection scheme and victim compensation scheme should be taken up expeditiously by the government.

7.2.2 The march of our own jurisprudence – from removing the requirement of giving special reasons for imposing life imprisonment instead of death in 1955; to requiring special reasons for imposing the death penalty in 1973; to 1980 when the death penalty was restricted by the Supreme Court to the rarest of rare cases – shows the direction in which we have to head. Informed also by the expanded and deepened contents and horizons of the right to life and strengthened due process requirements in the interactions between the state and the individual, prevailing standards of constitutional morality and human dignity, the Commission feels that time has come for India to move towards abolition of the death penalty.

7.2.3 Although there is no valid penological justification for treating terrorism differently from other crimes, concern is often raised that abolition of death penalty for terrorism

related offences and waging war, will affect national security. However, given the concerns raised by the law makers, the commission does not see any reason to wait any longer to take the first step towards abolition of the death penalty for all offences other than terrorism related offences.

7.2.4 The Commission accordingly recommends that the death penalty be abolished for all crimes other than terrorism related offences and waging war.

7.2.5 The Commission trusts that this Report will contribute to a more rational, principled and informed debate on the abolition of the death penalty for all crimes.

7.2.6 Further, the Commission sincerely hopes that the movement towards absolute abolition will be swift and irreversible".

[emphasis supplied]

23 That reading of the report and conclusions therein, no doubt recommend abolition of death penalty for all crimes other than terrorism related offences and waging war against the State in par 7.2.4 of the report. We are not unmindful of the fact that the above report is a recommendation of Law Commission of India prepared by the Chairman to which other members have divergent views. Of course, in all respects, we are duty bound to follow the law laid down by the Apex Court and having regard to Section 354(3) of the Code, 1973, upon serious deliberations on the issue of death sentence awarded by the trial court to convicts in reference cases to be confirmed or to be annulled or commuted by any other sentence, we are of the opinion that the cases on hand have no genesis in the act of terrorism or waging war against the State. That earlier, opinion of Review Committee constituted under POTA was challenged before this Court by the State of Gujarat, which came to be rejected and against which SLP (Cri.) No.1444 of 2009 is filed before the Apex Court and it is pending. That cumulative and qualitative analysis of evidence surfacing on record, oral as well as

documentary though prove case of prosecution beyond reasonable doubt so as to sustain the conviction under Section 302 of the IPC qua convicts of death sentence, but it falls short of requirement to award death sentence. Intention to commit crime by hatching the conspiracy acting in furtherance of common object thereof, executing the same for which serious consequences of that crime may not have been intended or contemplated by the conspirators as such may not be a consideration while upholding conviction, but the sentence is to be awarded by considering facts and circumstances emerging on record of each case on its own merit.

24 Diverse views qua capital punishment are discernible from the judicial pronouncements above-referred, including The Report No.262 of Law Commission. Death penalties eliminates a person to a point of no return. While considering the question of sentence to death, a duty is cast upon the court to deliberate on various facets of sentence and to immunize itself to avoid branding imposition of death sentence as `judge centric' or `blood thirsty', the court is required to closely scrutinize the evidence with an endeavour to find out the evidence justifying death penalty. A thought occurs in our mind that criteria of a proof beyond reasonable doubt is must to prove guilt of the accused by the prosecution, but in a case of imposition of death penalty, a degree higher than the above viz. Proof beyond any doubt is to be followed so as to rule out any error in concluding about guilt of the accused. In other words, in cases seeking death penalty, the entire evidence must be of sterling quality. That imposition of sentence is not an arithmetic calculation qua number of victims and accused to be punished.

25 Considering judicial pronouncements for imposition of death penalty, reverting to the facts of the case, we could notice at least

two circumstances not justifying the capital punishment being: (I) over-crowdedness of the coach; (ii) more than 100 people could disembarked the train in off-side safely. Though the material evidences, a group-some part of the co-accused and the conspirator, it appears that over-crowdedness in the coach contributed to the enhancement of number of casualties which, in our judgment, might have been far far low in absence of the coach being over-crowded with double the official capacity of the passengers and the luggage. Furthermore, though the accused had ignited the coach on its on-side, about more than 100 people could escape to the off-side suggesting that the accused had the intention to cause death and maximum damage, they did not intend to enhance the number of casualties. Besides, qualitative analysis of the entire evidence though sufficient enough to sustain conviction, do not justify awarding sentence of death and, therefore, we are of the opinion that the death penalty is not warranted in the facts and circumstances of the case by imposing an alternative sentence of rigorous imprisonment for life, all these references are answered accordingly.

26 **In view of the above, in exercise of powers under Section 366 read with Section 368(1)(a) of the Code, 1973, Confirmation Case Nos.1 to 10 of 2011 are answered and disposed of by commuting death sentence / capital sentence `to be hanged by neck till death' to rigorous imprisonment for life in case of each of the convicts referred to in Schedule-A for which sentence / punishment is inflicted of death for conviction under Section 302 read with Sections 120B, 149 of the IPC in Schedule-B of the impugned judgment dated 01.03.2011 rendered by the trial court in Sessions Case Nos.69 of 2009 to 86 of 2009 and Sessions Case No.204 of 2009.**

26.1 Barring the above, conviction recorded by learned trial Judge under Section 302 read with Sections 120B, 149 and other offences of the

IPC qua 11 convicts of Schedule-A of the impugned judgment dated 01.03.2011 for which reference cases are referred is sustained. Accordingly, Confirmation Case Nos.1 to 10 of 2011 are hereby answered to the extent of commuting the death sentence to rigorous life sentence of convicts of Schedule-A of the operative order of the impugned judgment. That convicting and sentencing them in Schedule-B for offences other than Sections 302, 120B, 149 of the IPC and other penal statutes viz. Indian Railways Act and Damage to the Property Act stand confirmed and remain unaltered.

26.2 So far as Criminal Appeal Nos.557 of 11 [8 convicts], Criminal Appeal Nos. 585, 586 and 587 of 2011 filed u/S.374 of the Code, 973 by 11 death convicts of Schedule-A and sentenced for the offences under Schedule-B respectively are partly allowed to the extent of commuting death sentence to rigorous life imprisonment by sustaining conviction under Section 302 read with Sections 120B, 149 and other offences of the IPC, and other offences of The Indian Railway Act, The Damage to Property Act.

26.3 So far as Criminal Appeal Nos.556 [9 convicts], 590 [2 convicts], 591, 592, 593, 628 and 629 [5 convicts] of 2011 filed u/s. 374 of Code, 1973 by 20 convicts at Schedule-C for the offences under Sections 302, 120B, 149 and other offences of the IPC and and Indian Railway Act, Damage to Property Act and sentencing them to rigorous imprisonment for life and other sentences, fine, etc. are hereby dismissed by sustaining their respective conviction as well as sentence imposed by the trial court at Schedule-D.

26.4 Criminal Appeal No.743 of 2011 filed under Section 378 of the Code, 1973 by the State of Gujarat against the acquittal of accused is hereby dismissed.

26.5 Criminal Appeal No.744 of 2011 filed by the State under

Section 377 of Code, 1973 for enhancement of sentence is hereby dismissed.

26.6 Criminal Appeal Nos.713, 717, 718, 727, 728, 729, 732, 733, 798, 831 of 2011 filed u/s. 372 of the Code, 1973 by the victims are partly allowed to the extent of awarding compensation as ordered in Part XV of this judgment and prayer to set aside the judgment of acquittal of the accused or convicting them for higher offences is rejected.

26.7 In view of the above, Criminal Misc. Application No.11376 in Criminal Misc. Application No.17914 of 2011 in Criminal Appeal No.586 of 2011, CR.MA 11629 of 2014 in Criminal Appeal No.713 of 2011 and temporary bail applications being Criminal Misc. Application Nos.3101, 2168, 1665 and 4143 of 2015 in Criminal Appeal Nos.556, 590, 629 and 743 of 2011 are hereby rejected.

26.8 The amount of compensation, as ordered above, be deposited within a period of 6 weeks from the receipt of this judgment and the compensation amount be paid to the legal heirs of the victims within a period of 6 weeks thereafter by the Gujarat State Legal Services Authority or the District Legal Authority, as the case may be. The Registry is directed to forthwith inform about the same to the Secretary, Home Department, State of Gujarat and Secretary, Ministry of Railways, Union of India. Learned Special Public Prosecutor and learned counsel for the SIT shall also inform the respective authorities in this regard.

27 Before parting, we record our sense of gratitude towards learned Special Public Prosecutors appearing for the State of Gujarat, SIT and learned counsels for the defence as well as victims in rendering their valuable assistance during hearing of all these cases and their dignified conduct befitting to their vast knowledge, experience and approach to the court was par excellence.

(ANANT S.DAVE, J.)

(G.R.UDHWANI, J.)

At this stage, Mr. Somnath Vatsa, learned counsel states that A-29 & A-50 of SC No.69/09 [Cri. Appeal No.629/11] and A-40 of SC No.69/09 [Cri. Appeal No.628/11] are on bail pursuant to orders passed by this Court and Apex Court respectively and prays 8 weeks time to surrender to the jail authority. Considering the facts of the case, the prayer is granted qua A-29, A-50 and A-40 or any other convict, who is on bail.

(ANANT S.DAVE, J.)

(G.R.UDHWANI, J.)

pvv