

IN THE SUPREME COURT OF INDIA

N.H.R.C

V

State of Gujarat

(and other related matters).

Note by the Amicus Curiae - 20th March 2007

BACKGROUND

- 1) These transfer petitions and writ petitions seek to raise issues relating to the investigation and trial of criminal offences during the **widespread violence that broke out in** Gujarat in February/March 2002.
- 2) The genesis of these matters is the widespread concern caused by the acquittal of all the accused in the Zahirra Sheikh case, and the allegations that the key eye witnesses (victims who had lost their relatives and property) had retracted their statements in court, and had extra judicially alleged that they had been coerced into doing so. **Issues of high level state level involvement in efforts to obstruct the course of deliverance of justice have also been raised.**
- 3) The NHRC filed an appeal in this Hon'ble Court against the acquittal (since it was uncertain at that time as to whether the State would file an appeal), and also thereafter filed transfer petitions seeking a transfer outside Gujarat of some trials,

relating to incidents in which there had been significant loss of life and property.

- 4) Objections were raised to the locus of the NHRC to file such petitions and appeals.
- 5) This Hon'ble Court decided to treat the SLP filed by the NHRC as a writ petition under Art. 32. The three issues that this Hon'ble Court has been considering
 - a) a direction to CBI or some other agency to reinvestigate some of the incidents, and
 - b) transfer of outside Gujarat of of the ongoing trials,
 - c) giving general directions for witness protection.

6) In the background a group of citizens had, in May 2002, filed a writ petition (criminal) in this Hon'ble Court asking for a transfer of investigation in these 10 trials to the CBI based on the findings and recommendations of the NHRC in it's report of March 2002. (D.N. Pathak petition)

- 6) In the meanwhile a number of writ petitions have been filed in this Hon'ble Court by NGO's and victims relatives alleging that the investigations into these incidents have been deliberately shoddy, statements by victims and eyewitnesses have been either ignored or distorted. It was also alleged that the public prosecutors have been appointed from the cadres and office bearers of certain organizations against whom there were serious allegations of having incited and participated in the violence.
- 7) A note was prepared by the Amicus Curiae and filed in the court, which placed all these allegations before this Hon'ble Court and the responses of the State to these allegations. After hearing the

matter for some time, this Hon'ble Court, by its order dated 23.11.2003, granted a stay of the trials in the ten significant cases, and fixed the case for further hearing from time to time.

- 8) In the meanwhile, a further application was also filed, based on applications filed by an NGO, pointing out that a large number of other cases (other than these 10) had been closed by the police. This Hon'ble Court directed that the closure of these cases be reviewed by a committee constituted. It appears that a very large number of cases have been reopened by the State based upon the review.
- 9) A note was filed by the Amicus on 6th September 2004, paraphrasing the allegations and the responses. Affidavits have been filed from time to time by the NGO'S, which affidavits annex affidavits of victims and others who allege various deficiencies in the investigation including a refusal by the police to take complaints and statements on record. **These complaints and requests for re-investigation have been made consistently with no response from the state police.** Responses to these affidavits have been filed from time to time by the State. In view of the size of the record, this Hon'ble Court appointed a Learned District Judge (from Delhi) to examine the record and place a factual statement that would paraphrase the respective allegations and the responses of the State. A report given by the learned judge is on record (Report).
- 10) The trials that have been stayed relate to incidents in the following areas:
 - i) Gulberg Society (three chargesheets)

- ii) Ode
- iii) Sardarpura
- iv) Naroda Gaon
- v) Patiya.

vi) Godhra mass arson case

- 11) Before going into the details of the incidents, some general issues that have been raised may be mentioned.
- 12) One of the areas over which there has been serious disquiet is the appointment of public prosecutors. It is indisputable that the public prosecutor is not a private lawyer of the State – his position under the Code of Criminal Procedure is that of an independent counsel who is cast with the responsibility of ensuring that justice is done in criminal trials. He is not to take directions from the executive government of the State in abdication of his functions. It is further submitted that considering that the rights of victims of crime to seek justice is now accepted as much as the right of the accused to get a fair trial, as a facet of Art. 21, it becomes incumbent upon the State to appoint as public prosecutors those in relation to whose independence and integrity there is no doubt – and this has to be done keeping in mind the principle that justice not only has to be done, but has to appear to be done.
- 13) In this context, it is submitted that serious allegations have been made by the Citizens for Justice and Peace (CJP) in their affidavits dated 17.10.2003 (Volume D Pg 774-779) to which the State has filed responses (Pg 729). One glaring example was the appointment of Sh. Chetan Shah. (He is not only an office bearer of VHP but had also appeared for some of the accused at the stage

of grant of bail). He was later removed by the State after the matters were filed in this Hon'ble Court.

- 14) It is submitted that the State does not have a significant reply to the allegations that the appointment of public prosecutors was done in a manner inconsistent with the rights of the victims under Art. 21, and in breach of the duty cast upon the State under the Code of Criminal Procedure. Some of the public prosecutors have been replaced – this does not address the principal concern, viz. the absence of a system of checks and balances by which it can be ensured that the right persons are appointed.
- 15) It is submitted that the present cases are those of communal violence. It is indisputable that these cases represent, in the least, a breakdown of the constitutional machinery for preservation of the public order in the State. Besides, this Hon'ble Court would have to take judicial notice of the fact that in cases such as these, where the allegations of communal violence, it does tend, in the short term, to divide communities on communal lines. The preservation of the secular character of the State (now recognised to be part of the basic structure of the Constitution) requires that members of all communities including the minority communities feel a sense of confidence in the constitutional machinery of the State. This casts a greater constitutional responsibility upon the State to ensure that all such steps such as investigation into criminal offences, and prosecution of those found to be guilty of causing harm to lives and property be brought to justice.
- 16) It is further submitted that while preservation of public order may be a State subject, protection and preservation of the

Constitution and its basic structure is as much the duty of the Union of India – the constitution equips the Union with sufficient powers – constitutional, executive and legislative – for this purpose.

- 17) It is further submitted that when there is a large scale failure of the criminal justice system to address offences relating to large scale communal riots, it puts in peril the secular structure of the constitution. If the Union and the State fail to address this failure, remedies of judicial review under Art. 32 for enforcing the constitutional rights under Art. 21 would always be available.
- 18) It is submitted that in relation to the failure of the criminal justice system, it would be necessary for the aggrieved person to establish that on the facts, it appears that justice has not been done. The test is that of a reasonable apprehension of failure of justice – as the test of bias is of a reasonable apprehension of bias. **It may not be is not possible at this stage to establish th**at in fact those against whom the victims make allegations are infact guilty. That is, it is submitted, a matter that would be finally established after a full investigation and trial. At this stage, the test would be to examine whether on the affidavits, it can be said that the allegations make out a case of a reasonable apprehension that the investigation has deliberately not been conducted in a manner free from bias, or that the trial is being conducted in a manner that, applying the reasonable apprehension test – cannot be considered free and fair.

- 19) It is submitted that the facts alleged and the response of the State, as discernible from the affidavits exchanged and from the Report are briefly set out as hereinafter.
- 20) It must also be recorded that in the three and a half years since the trials have been stayed, while the state of Gujarat has continued the investigations into the Godhra mass arson, no further investigations into the post Godhra cases, under consideration of this Court in this matter, have been conducted. This calls upon into question the bonafides of the state to an extent.
- 21) It must also be recorded that most of the accused, especially those close to positions of power in the post Godhra carnage cases have been released by courts in the state of Gujarat within months of these shocking incidents. However the status of accused in the Godhra cases is to the contrary.

Gulberg

- 22) The incident described as the Gulberg Society incident relates to an incident of 28th February 2002 between 7.30 am and 6. Pm. The FIR was lodged on 28th Feb 02. The FIR records that 39 persons were dead and 31 missing (the allegation is that to reduce the numbers, those dead were shown as missing). The FIR is under various provisions of the IPC (principally Section 302, 332, 336 etc) read together with the Arms Act..
- 23) The investigation into these offences was by officers of the Menghaninagar Police Station. They filed three chargesheets, viz.

- a) Session Case No.152/02 -Kailash Dhobhi v/s state of Gujarat dated 01/06/02
 - b) Session Case No.167/03-Sandip & Others (2) v/s State of Gujarat 25/06/02
 - c) Session Case No.79/03 -Sankerlal & Others Suppl. dated 29/08/02
- 24) The principal allegation in this case , made in affidavits of witnesses as well as victims (who survived) that the police have displayed a biased attitude. The allege that the police has refused to record the incidents as reported by these people, have refused to record the allegations against certain persons named, and that have conducted enquiries in a shoddy manner designed to result in acquittals.
- 25) The second issue – that becomes quite apparent from the judicial orders – is that the manner in which the accused were granted bail, and the conduct of the public prosecutor in bail proceedings, is evidence of the bias in the system, which creates serious apprehensions that justice would not be done.
- 26) The report deals with these allegations at pages 19 to 23.
- 27) The notes filed (by the Amicus earlier) that contain a summary of the allegations are in Paperbook A – pages 62-3, 164-6, and 171-174.
- 28) The affidavits filed by the victims and survivors, which are on the record of this Hon'ble Court are as follows;
- a) Rupaben Tanaz Mody
Pages 88-91, Paperbook A;

b) Saiyyed Mohd Ali Sahajad Ali

Affidavit dated 5/9/2003

Page 92-93 of Paperbook 'A'

c) Said Khan Pathan

Page 94-96 Paperbook 'A'

d) Firoz Mohd Gulzar Mohd

Page 97-98 of Paperbook 'A'

e) Zakia Jaffri

Page 104-107 of Paperbook 'A'

f) Tanvir Jaffri

Page 110-113 of Paperbook 'A'

29) Copies of complaints that had been filed by the by 11 Witnesses and Survivors to Commissioner of Police, Ahmedabad and to PI, Megahninagar Police Station on 25-11-2002 accompanied by sworn affidavits (11) alleging the omission of name of key accused and threat to life since they roam the area as at pages 217 to page 249 of Paperbook 'A'.

30) An application under 173(8) of the CRPC before the Sessions Court in trial No 152/2002 (Rupabehn Tanaz Mody v/s State of Gujarat) on 16.4. 2003 is on record. This is accompanied by sworn affidavits of eleven witnesses and survivors included Rupabehn. This application alleges (with details) inter alia that in the police

statements of all the signatory witnesses, names of accused were mentioned, which names have subsequently vanished from investigation records and also do not appear in the chargesheet.

(Page 144- 156 of Paperbook 'A').

The State in its response, principally questions the veracity of these affidavits. It inter alia alleges that these affidavits have been procured by the NGO's who are for some extraneous reason, wanting to cast aspersions on the state and its investigative machinery.

- 31) On record is also a witness complaint dated 18.7.2003 by Mohdali Sajjadali Saiyad after submission of chargesheet stating that accused named by witnesses in police statement had not figured in chargesheet. This also alleges states that some of the accused shown as absconding roam in area and threaten survivors.

(Page 250-254 in Paperbook 'A')

- 32) On record is an Application No 177/2002 made by eyewitness Rupabehn Mody asking for an appointment of a special public prosecutor since Shri Chetan Shah had who was first appointed PP in this case had appeared for the accused in this and the Naroda massacres.

Pages 115-126 of Paperbook 'A'.

- 33) After the Report, further affidavits have been filed, that inter alia allege that an advocate, Mr. Vinod Gajjar was appointed by

the State to appear before Judge Metha. He has appeared for the accused – for which reliance is sought to be placed upon a VAKALATNAMA -- Para 6-9, pages 2,3,4.

34) The further affidavits filed before this Hon'ble Court also seek to place on record some serious allegations relating to the alleged nexus between certain persons involved in the violence and the police officials during the time of the riots. These are, it is submitted, relevant to the allegation that the apprehensions of bias in the investigation are justified. The allegations, in sum, are that Two CDs with more than 5 lakh entries have been lying with the Gujarat police and are now with the Nanavati-Shah riots panel. These CD's, it is alleged, contain records of all cellphone calls made in Ahmedabad over the first five days of the riots which saw the worst incidents. These CDs have been obtained from the Nanavaty Shah Commission. It is alleged that the data on these CD's shows that one Dr Jaideep Patel (an accused in the Naroda Gaon and Patiya massacres) was in touch with other accues, as well as senior police officers, including the Police Commissioner etc at the time of the riots. These CDs, are now in the custody of the Nanavati- Shah Commission. They have been obtained by *The Sunday Express*.

35) It is submitted that this allegation is of relevance on the question of the apprehension of bias, and, it is respectfully submitted, needs to be examined by some agency other than those against whom the allegations are directed. If these are established it would place the matter in a very different light – equally if they are found to be unsubstantiated, it would impinge on the

credibility of those making these allegations, which credibility has already been put in issue by the State.

ODE, NARODA GAON, AND PATIYA

- 36) The allegations follow the same pattern. Particulars of the material on record in relation to these allegations is attached to this note.
- 37) It is submitted that the allegations made are extremely serious in nature. The State has sought to give some explanations, which, it is submitted do not clearly explain away the allegations made. The principal defence of the State itself is that these allegations are motivated. In a manner, the various affidavits placed on record by the NGO's and the petitioners put a question mark upon the credibility of the machinery of the State, and the State in turn questions the credibility of those who make these allegations.
- 38) In all this, the State has been unable to explain away
- a) The appointment of some persons as public prosecutors, one of whom had even appeared for the accused,
 - b) The manner in which bail was granted to those accused of heinous offences, and the approach of the State in the matter. The State had questioned in other cases the grant of bail to those accused in riot related cases.
 - c) The fact that a large number of cases, closed by the police, have been reopened after the Supreme Court order.

Thus whatever may be the credentials of the NGO's, the role of the police in these cases is unquestionably such as would give rise to some questions. In the circumstances, it may serve the ends of justice if the **substantive aspects** of these allegations are examined.

One way could be to have some independent agency examine

- a) the allegations relating to Gulberg Society incident in the first instance, **at least, or all these major cases together are investigated,** so that the veracity of the mutual allegations is established, and/or
- b) the allegations now made in relation to the conduct of the police, based upon the CD's. Alternately, the Union can be asked to give a report to this Hon'ble Court as to these CD's and their contents.