

*JDK/RMA*

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL APPEAL NO. 1020 OF 2009**

- 1. Jaswantbhai Chaturbhai Nai,**  
Age - 50 Years, Occ. - Agriculture,  
Residing at Singwad,  
Taluka - Limkheda,  
District - Dahod,  
State of Gujarat.
- 2. Shailesh Chimanlal Bhatt,**  
Age - 51 Years, Occ. - Social Worker,  
Residing at Singwad,  
Taluka - Limkheda,  
District - Dahod,  
State of Gujarat.
- 3. Ramesh Rupabhai Chandana,**  
Age - 45 Years, Occ. - Service,  
Residing at Singwad,  
Taluka - Limkheda,  
District - Dahod,  
State of Gujarat.

.. Appellants  
(Orig. Accused Nos. 1, 4  
and 12)

**Versus**

- 1. The State of Gujarat**  
(At the instance of CBI  
R.C. No. 1 of 2004)
- 2. The State of Maharashtra** .. Respondents

**WITH  
CRIMINAL APPEAL NO. 1021 OF 2009**

- 1. Rajubhai Babulal Soni,**  
Age - 48 Years, Occ. - Service,  
Residing at Singwad,  
Taluka - Limkheda,  
District - Dahod,  
State of Gujarat.

- 2. Mitesh Chimanlal Bhatt,**  
Age - 47 Years, Occ. - Service,  
Residing at Singwad,  
Taluka - Limkheda,  
District - Dahod,  
State of Gujarat.

.. Appellants  
(Orig. Accused Nos.  
10 and 11)

**Versus**

- 1. The State of Gujarat**  
(At the instance of CBI  
R.C. No. 1 of 2004)
2. The State of Maharashtra .. Respondents

**WITH**  
**CRIMINAL APPEAL NO. 1022 OF 2009**

- 1. Govindbhai Nai,**  
Age - 44 Years, Occ: Service  
Residing at Singwad,  
Taluka - Limkheda,  
District - Dahod,  
State of Gujarat.
- 2. Bipinchand Kanaiyalal Joshi**  
**@ Lala Doctor,**  
Age - 46 Years, Occ. - Service,  
Residing at Singwad,  
Taluka - Limkheda,  
District - Dahod,  
State of Gujarat.
- 3. Somabhai Koyabhai Gori,**  
Age - 46 Years, Occ. - Service,  
Residing at Godhra, Santrampur,  
District Panchmahal,  
State of Gujarat.

.. Appellants  
(Orig. Accused Nos.  
2, 6 & 17)

**Versus**

1. **The State of Gujarat**  
(At the instance of CBI  
R.C. No. 1 of 2004)
2. **The State of Maharashtra** .. Respondents

**WITH**  
**CRIMINAL APPEAL NO. 1023 OF 2009**

1. **Kesharbhai Khimabhai Vohania**  
Age - 43 Years, Occ. - Service,  
Residing at Singwad,  
Taluka - Limkheda,  
District - Dahod,  
State of Gujarat.
2. **Pradip Ramanlal Modhiya,**  
Age - 43 Years, Occ. - Service,  
Residing at Singwad,  
Taluka - Limkheda,  
District - Dahod,  
State of Gujarat.
3. **Bakabhai Khimabhai Vohania**  
Age - 45 Years, Occ. - Service,  
Residing at Singwad,  
Taluka - Limkheda,  
District - Dahod,  
State of Gujarat.

.. Appellants  
(Orig. Accused Nos.  
7, 8 & 9)

**Versus**

1. **The State of Gujarat**  
(At the instance of CBI  
R.C. No. 1 of 2004)
2. **The State of Maharashtra** .. Respondents

**WITH  
CRIMINAL APPEAL NO. 487 OF 2010**

**Mr. Radheshyam Bhagwandas Shah**

Age - 31 Years,  
Residing at Singwad,  
Taluka - Limkheda,  
District - Dahod,  
State of Gujarat.  
(Appellant is presently in  
Judicial Custody)

.. Appellant  
(Orig. Accused No.5)

**Versus**

1. **The State of Gujarat**
2. **The State of Maharashtra**
3. **C.B.I., Mumbai.** .. Respondents

**WITH  
CRIMINAL APPEAL NO. 194 OF 2011**

**Central Bureau of Investigation,**  
Special Crime Branch,  
having office at A-2 Wing, 8th Floor,  
CGO Complex, CBD Belapur,  
Navi Mumbai.

.. Appellant  
(Orig. Complainant)

**Versus**

1. **Narpatsingh Ranchodbhai Patel,**  
Age - 47 Years,  
Residing at Singwad,  
Taluka - Limkheda,  
District - Dahod,  
State of Gujarat.
2. **Idris Abdul Saiyed,**  
Age - 49 Years,  
Residing at Gulabwadi,  
Police Line, PSI, Quarters No. 1,  
Hetharpalia, Junagad.

- 3. Bhikhabai Ramjibhai Patel,**  
Age - 62 Years,  
Residing at C-79,  
Samrajya Society, Near Gadkhol Palia,  
Post Ankleshwar, Dist. Bharuch.
- 4. Ramsingh Mitlibhai Bhabhor,**  
Age - 57 Years,  
Residing at Satyaprakash Society,  
College Road, Santrampur,  
District Panchmahals, Gujarat.
- 5. Somabhai Koyabhai Gori,**  
Age - 42 Years,  
Residing at Gochar,  
Santrampur,  
District Panchmahals, Gujarat.
- 6. R.S. @ Ramabhai Bhagora,**  
Age - 47 Years,  
Residing at Maheru,  
Taluka Bhilad,  
District Sabarkatha, Gujarat.
- 7. Dr. Arunkumar Ramkishan Prasad,**  
Age - 36 Years,  
Residing at Narayan Pipra,  
District Siwan, Bihar.
- 8. Dr. Sangeeta Arunkumar Prasad,**  
Age - 38 Years,  
Residing at Narayan Pipra,  
District Siwan, Bihar.

.. Respondents  
(Orig. Accused Nos.  
13, 14, 15, 16, 17,  
18, 19 & 20)

**WITH**  
**CRIMINAL APPEAL NO. 271 OF 2011**

**Central Bureau of Investigation,**  
Special Crime Branch,  
having office at A-2 Wing, 8th Floor,  
CGO Complex, CBD Belapur,  
Navi Mumbai.

.. Appellant  
(Orig. Complainant)

**Versus****1. Jaswantbhai Chaturbhai Nai.**

Age - 50 Years,  
Residing at Singwad,  
Taluka - Limkheda,  
District - Dahod,  
State of Gujarat.

**2. Govindbhai Nai,**

Age - 40 Years,  
Residing at Singwad,  
Taluka - Limkheda,  
District - Dahod,  
State of Gujarat.

**3. Shailesh Chimanlal Bhatt,**

Age - 47 Years,  
Residing at Singwad,  
Taluka - Limkheda,  
District - Dahod,  
State of Gujarat.

.. Respondents  
(Orig. Accused Nos.  
1, 2 and 4)

**Appearances:**

<i>Mr.H.H.Ponda along with Mr. Gopalsinh Solanki, Mr. Mukesh Modi, Mr. Virendra I. Pajwani, Mrs. Priya A.Ponda i/b Mr. Hitesh P. Shah</i>	<i>Advocate for the Appellants in Cri.Appeal Nos.1020 to 1023 of 2009 and 487 of 2010 and Respondent in Cri. Appeal No. 194 of 2011 and 271 of 2011</i>
<i>Mr. H.S.Venegavkar along with Mr. A.L.Bhise and Mr. Tejas Dhotre</i>	<i>Advocate for C.B.I. in Cri. Appeal Nos.194 of 2011 and 271 of 2011 and Respondent in Cri. Appeal No. 1020 of 2009 to 1023 of 2009 and 487 of 2010</i>
<i>Mr. Arfan Sait</i>	<i>APP for the State</i>
<i>Mr. Vijay Hiremath</i>	<i>Advocate for Intervenor</i>

**CORAM : SMT. V.K. TAHILRAMANI AND  
MRS. MRIDULA BHATKAR, JJ.**

**RESERVED ON : MARCH 17, 2017  
PRONOUNCED ON: : MAY 04, 2017**

**JUDGMENT [PER SMT. V.K. TAHILRAMANI, J.] :**

1 Criminal Appeal No. 1020 of 2009 has been preferred by Jaswantbhai Chaturbhai Nai, Shailesh Chimanlal

Bhatt and Ramesh Rupabhai Chandana who are original accused Nos. 1, 4 and 12. Criminal Appeal No. 1021 of 2009 has been preferred by Rajubhai Babulal Soni and Mitesh Chimanlal Bhatt who are original accused nos. 10 and 11. Criminal Appeal No. 1022 of 2009 has been preferred by Govindbhai Nai, Bipinchand Kanaiyalal Joshi @ Lala Doctor and Somabhai Koyabhai Gori who are original accused nos. 2, 6 and 17. Original accused no. 17 - Somabhai Koyabhai Gori expired during the pendency of the appeal, hence, the appeal stands abated in relation to him. He was convicted for the offence under Sections 217 and 218 of IPC. Criminal Appeal No. 1023 of 2009 is preferred by Kesharbhai Khimabhai Vohania, Pradip Ramanlal Modhiya and Bakabhai Khimabhai Vohania who are original accused nos. 7, 8 and 9. Criminal Appeal No. 487 of 2010 is preferred by Radheshyam Bhagwandas Shah who is original accused no. 5.

2 The appeals have been preferred by accused nos. 1, 2 and 4 to 12 against their conviction and sentence under

Sections 143, 147, 302 read with Section 149, 376(2) (e) & (g) and 376(2)(g) of IPC. It may be stated here that original accused no.3 - Naresh R. Modhiya expired during the pendency of the trial. For the offence under Section 143 of IPC, the accused nos. 1, 2 and 4 to 12 have been sentenced to rigorous imprisonment (R.I.) for six months. For the offence under Section 147 of IPC, they have been sentenced to R.I. for two years. For the offence under Section 302 read with Section 149 of IPC, they have been sentenced to imprisonment for life and fine of Rs.2000/- on each count of murder and in default of payment of fine, to suffer R.I. for a further period of two years. For the offence under Section 376(2)(e) & (g) of IPC, they have been sentenced to life imprisonment and fine of Rs.2000/- each in default to suffer R.I. for a further period of two years for having committed gang-rape on the prosecutrix i.e. Bilkis Yakub Rasul Patel who was pregnant at the time of the incident. For the offence under Section 376(2)(g), they have been sentenced to R.I. for ten years and fine of Rs.2000/- each in default, R.I. for a

further period of two years for having committed gang-rape on Halima Abdul Issa Ghachi and Shamim Musa Patel. In addition, accused No. 1 has assailed his conviction under Section 148 of IPC for which he was sentenced to R.I. for three years. The trial Court directed the sentences of imprisonment to run concurrently.

3 Criminal Appeal No. 271 of 2011 has been preferred by Central Bureau of Investigation (C.B.I.) for enhancement of sentence imposed on original accused no. 1- Jaswantbhai Chaturbhai Nai, accused no. 2- Govindbhai Nai and accused no.4 Shailesh Chimanlal Bhatt. Criminal Appeal No. 194 of 2011 has been preferred by C.B.I. against acquittal under Sections 201, 217 and 218 IPC of original accused nos. 13 to 20 i.e. accused no.13 - Narpatsingh Ranchodbhai Patel, accused no. -14 Idris Abdul Saiyed, accused no. 15- Bhikhabai Ramjibhai Patel, accused no.16 Ramsingh Mitlibhai Bhabhor, accused no. 17- Somabhai Koyabhai Gori, accused no. 18 - R.S. @ Ramabhai Bhagora, accused no. 19 - Dr.

Arunkumar Ramkishan Prasad and accused no.20 - Dr. Sangeeta Arunkumar Prasad. As stated earlier, accused No. 17 expired during pendency of the appeal, hence, the appeal abates as far as he is concerned. As all these appeals have been preferred against the judgment and order dated 21.1.2008 passed by the learned Special Judge, Greater Mumbai in Sessions Case No. 634 of 2004, we have heard all the appeals together and they are being disposed of by this common judgment. For the sake of convenience, the accused are being referred to as they were referred before the trial Court.

4 The prosecution case, briefly stated, is as under:

(1) The accused nos.1 to 12 were all residents of village Randhikpur, District Dahod in the State of Gujarat. Randhikpur is also known as "Singwad". PW 24 Abdul Issa Ghachi was the father of the prosecutrix who is PW 1 Bilkis. Abdul Issa Ghachi was residing with his family at village Randhikpur. He was residing in village Randhikpur along

with his two daughters Munni and Mumtaz, three sons i.e. Iqbal, Irfan (deceased) and Aslam (deceased) and his wife Halima alias Alima (deceased). The prosecutrix was married to Yakub Rasool Patel resident of Baria in District Dahod. She had a minor daughter Saleha who was about 3 and half years of age at the time of the incident. Though after marriage, the prosecutrix started residing with her husband at Devgad Baria as her father PW 24 Abdul Issa Ghachi was dealing in buffalos and dairy, she started residing with her father at village Randhikpur 4 to 5 months after her marriage. Some days prior to the incident, there was "Bakri-Eid", hence, the prosecutrix had gone to her husband's house at Devgad Baria and on the next day, returned back to her father's home in Randhikpur. Her daughter Saleha and her husband came with her to Randhikpur. At that time, She was pregnant.

(II) On 27.2.2002, death of large number of "Hindu Kar Sevaks" took place on account of burning of "Sabarmati Express" at Godhra Railway Station allegedly by members of

the Muslim community. On account of this, large scale riots erupted in the State of Gujarat. A large number of lives were lost in the communal riots which ensued. Randhikpur which is a small village in Taluka Limkheda in Dahod District in Gujarat, also experienced outbreak of riots. There were incidents of arson and looting in village Randhikpur from the morning of 28.2.2002 and consequently, there was exodus of Muslims from the village in search of safety. The prosecutrix along with some members of her family fled from Randhikpur. After leaving Randhikpur, the prosecutrix and others including some of her family members, went from village to village. One of the persons who was in the group of prosecutrix, was her cousin sister Shamim. Shamim was pregnant and about to deliver a child. In the night of 28.2.2002, they stopped at village Kuwajer. There Shamim delivered a baby girl. Next day morning, they left Kuwajer. They stayed in the house of PW 20 Nayak for two days. They were informed that there is danger, hence, on 3.3.2002 early in the morning before sunrise, they started proceeding

towards village Sarjumi via Pannivel. When they were near Pannivel, two white vehicles in which there were about 25 people, came from Chhaparwad side towards Pannivel. When they saw the group of prosecutrix, they stopped their vehicles. They started shouting "Musalmanoko Maro" and ran towards the group of prosecutrix. These persons who came in the two white vehicles, were carrying swords, lathis and sickles in their hands. From the group of persons who attacked them, the prosecutrix identified accused nos.1 to 12. Accused no.4 - Shailesh Chimanlal Bhatt pulled Saleha the daughter of prosecutrix, from her arms and smashed her on the ground due to which Saleha died. Accused no.1 Jaswantbhai Chaturbhai Nai who was holding a sword, was going to assault the prosecutrix with a sword, however, she held out her hand to ward-off the blow, due to which, she received injury on her left hand. Accused nos.1, 2 and 3 forcibly removed the clothes of the prosecutrix and committed rape on her. First she was raped by accused no.1 - Jaswantbhai Chaturbhai Nai, then by accused no. 2 -

Govindbhai Nai and thereafter by accused no.3 Naresh Modhiya. The other accused persons i.e. accused nos. 5 to 12 in the meanwhile, tore off the clothes of the other females in the group and committed rape on them and assaulted the male members in their group. In the meanwhile, on account of rape, the prosecutrix became unconscious. She was unconscious for many hours. When she regained consciousness, she found her relatives lying dead including Shamim's baby. The prosecutrix was totally naked. She found one petticoat (Lengah) nearby. She wore the same and crawled upto the hill-top and hid there. The next day morning, she came down on the other side of the hill. There she met one woman i.e PW 11 Sumaliben who gave her some clothes. The prosecutrix drank water from the hand-pump which was nearby. She saw a jeep with some persons in uniform. Out of them, one was DW 2 Vanraj Dhingra and another was PW 27 Natwar. She immediately ran upto them and requested them to take her to a safe place as she was in danger and her people had been murdered. The prosecutrix

was brought to Limkheda Police Station where her F.I.R. (Exh. 56) was recorded by accused no. 17 who is since deceased. Her F.I.R. was not correctly recorded. The fact that she was raped was not stated in the F.I.R. (Exh.56). It is the prosecution case that though the prosecutrix stated the names of the accused, in the F.I.R., it was stated that she did not know any of the persons who committed rape on them, and murdered her relatives. The offence was registered as C.R. 59 of 2002 of Limkheda Police Station against unknown persons. The prosecutrix was sent for medical examination to CHC Limkheda. Meanwhile on 5.3.2002, the police carried out the inquest panchnama on 7 bodies though according to the prosecution, 14 people died in the incident. Post mortem was carried out at the spot itself by accused Nos. 19 and 20. The spot panchnama Exh. 124 was also drawn on 5.3.2002. The prosecutrix remained in Limkheda Police Station till 5.3.2002. Though the prosecutrix was available, she was not taken to the spot. Investigation was carried out by Limkheda Police. On

5.3.2002, the prosecutrix was taken to Godhra Relief Camp. Godhra Relief / Refugee Camp was visited by District Magistrate and Collector PW 18 Jayanti Ravi along with Executive Magistrate, PW 23 Govindbhai. The prosecutrix narrated what had happened to her and her group on 3.3.2002 to Jayanti Ravi. Jayanti Ravi told PW 23 Govindbhai to record the statement of the prosecutrix. Accordingly, he recorded the statement of the prosecutrix which is at Exh. 277. In her statement Exh. 277 the prosecutrix stated that as mob had started burning houses in Randhikpur on 28<sup>th</sup> she along with others ran from village Randhikpur and reached Chundadi village. They stayed at Kuwajar. The next morning, they started for Khudra and stayed in Khudra village for two days. After that in the morning at 4.00 a.m. they started their onward journey. On the way, there was a kachha road at Panivela village. When they reached at that place, about 20 people came in white cars and attacked them. They stripped her, her sisters, her two aunts, daughters of paternal aunts and raped them. They also

killed some of the persons in the group. She lay on the ground as if she was dead. The attackers thereafter left. When she gained consciousness, she went up the hill and hid. The prosecutrix named accused nos. 1 to 12 as some of the persons from the mob who attacked them.

(III) From Godhra Relief Camp, the prosecutrix was sent for medical examination to Godhra Civil Hospital on 7.3.2002. PW 17 Dr. Rohini Katti examined the prosecutrix at Godhra Civil Hospital on 7.3.2002. She gave history to Dr. Katti that they ran from their village to 2 to 3 villages, thereafter, mob attacked them on kachha road leading to Pannivel. They killed her daughter and relatives and she was raped by three of them from the mob that is accused nos. 1 to 3. Meanwhile PW 18 District Magistrate Jayanti Ravi addressed a letter to the Superintendent of Police Dahod for taking immediate appropriate action in the matter of the prosecutrix. Original statement of the prosecutrix recorded by PW 23 Executive Magistrate was also sent to

Superintendent of Police Dahod along with letter of PW 18 Jayanti Ravi. Pursuant to this, statement of the prosecutrix was recorded by Circle Police Inspector Limkheda on 13.3.2002.

(IV) On 6th November, 2002, accused no. 18 R.S. @ Rambhai Bhagora submitted "A" Summary report stating that the case was true but undetected and the culprits were not found and requested for closure of the case, however, the Court did not accept the closure report and directed to continue investigation. In February, 2003 Limkheda Police resubmitted "A" Summary report requesting for closure of the case which came to be accepted by the Court. Thereafter, the prosecutrix supported by human rights activists filed Criminal Writ Petition No. 118 of 2003 (Exh. 61) before the Supreme Court praying that the order of learned Magistrate accepting "A" summary be set aside and also prayed for transfer of investigation to Central Bureau of Investigation. The Supreme Court allowed the Writ Petition and passed the order of transfer of investigation to C.B.I. on

16.12.2003. Mr. K.N. Sinha, PW 72 the Officer from C.B.I. took charge of the investigation from Gujarat Police on 1.1.2004. The C.B.I. conducted detailed investigation. During investigation, the photographs of the dead bodies at the spot Exhibit 59/1 to 59/17 and the camera (Article 3) were seized under the seizure panchanamas. Photographs Exhs. 59/1 to 59/8 with negatives were seized from PW 28 Bhavin Patel by PW 68 A.S. Tariyad under panchnama Exh. 363. Photographs Exh. 59/9 to 59/17 were seized from PW 10 Soni by PW 72 K.N.Sinha under panchnama Exh. 109. The Camera (Art.3) was seized by PW 68 Tariyad from PW 32 Vinod Prajapati under panchnama Exh. 366. These panchnamas were drawn in the presence of the witnesses PW 28 Bhavin Patel, PW 10 Soni and PW 32 Vinodbhai respectively. The CBI recorded the statements of these witnesses so also a number of witnesses including the prosecutrix. The scene of offence panchnama i.e. spot panchnama Exh. 131 was drawn on 13.3.2004 by CBI in the presence of PW 73 Somabai Chauhan. The bodies were

exhumed between 28.1.2004 to 1.2.2004. Post-mortem was conducted and report of the postmortem and photographs were sent to forensic laboratory for reply on 27.2.2004. Thereafter, the CA report was received on 8.4.2004. After completion of investigation, the CBI filed charge sheet on 19.4.2004.

5 Charge came to be framed against original accused Nos. 1 to 20 under Section 120B of IPC. Further charge came to be framed against accused Nos. 1 to 12 and other unknown persons under Sections 143, 147, 148, 302 r/w 34 alternatively under Section 302 r/w 149 of IPC; 376(2) (e) & (g) and 376 (2)(g) of IPC. Further charge came to be framed against accused Nos. 13 to 20 and other unknown persons under Section 201 r/w 34 of IPC. Further charge came to be framed against accused Nos. 13 to 20 under Sections 217 and 218 r/w 34 of IPC. All the accused pleaded not guilty to the said charge and claimed to be tried. The defence of the accused is that of total denial and false

implication. After going through the evidence adduced in the present case, the learned Sessions Judge convicted and sentenced some of the accused and acquitted some of the accused as stated in the earlier paragraphs.

6 We have heard the learned counsel for the respective parties. After giving our anxious consideration to the facts and circumstances of the case, arguments advanced by the learned counsel for the parties, the judgment delivered by the learned Judge and the evidence on record, for the below mentioned reasons, we are of the opinion that in so far as accused nos. 1, 2 and 4 to 12 is concerned, no interference is called for as far as their conviction and sentence as imposed by the learned Trial Judge is concerned. Accused no.3 had expired pending trial, hence, the case against him stood abated. The case against accused no.17 also stands abated. As far as accused nos. 13 to 16 and 18 to 20 are concerned, for below mentioned reasons, we are of the considered opinion that their acquittal under Sections 201

and 218 IPC deserves to be set aside.

**EVIDENCE OF THE PROSECUTRIX:**

7 Evidence of the prosecutrix (PW 1) is the heart of the case, though PW 8 Saddam is examined to corroborate the fact of attack and assault, however, the prosecutrix is the only witness on whose evidence the entire case of the prosecution stands. There are many aspects to her evidence. Her evidence emerges with number of facets which require detailed scrutiny. The case in fact suffers at the starting point with the first major flaw of dishonest investigation. First we would like to discuss the evidence of the prosecutrix.

8 The prosecutrix in her evidence has stated that 5 to 6 years prior to the incident, she was married with Yakub Rasool Patel, a resident of Devgad Bariya. At the time of Godhra riot, she was staying with her father at Randhikpur along with her parents, sisters and brothers. Saleha 3½ year old daughter of the prosecutrix was also staying with

her at Randhikpur. The prosecutrix was 5 months pregnant at the time of the incident. On the next day of Godhra incident, arson and looting took place in village Randhikpur and she was informed by her maternal aunt Bibi to leave the village. So she left her village along with her relatives and went to house of Kadkiyabhai, the village Sarpanch. However, they found it unsafe there and so they moved to village Chundadi. There Bijalbhai Damor (PW 33) provided them food and water. Thereafter she along with her group went to Kuwajer the same night i.e., on 28.2.2002. There, her cousin Shamim delivered a baby girl at the house of mid-wife PW 6 Zaitoon Atila. Thereafter, in the noon, on the next day, i.e., on 1<sup>st</sup> March, they went to village Khudra. There they stayed for two days with PW 20 Nanjibhai Nayak. Then, according to the prosecutrix including new born baby of Shamim, they were 17 persons. Then, while going to Sarjumi, via village Chapparwad, they took kachha road leading to Panivel. At that time, 2 white vehicles arrived there from Chapparwad side. Nearly 25 to 30 male persons

were in the vehicles. They were armed with weapons like sword, sickle and sticks. They were giving slogans against Muslims and they attacked this group of 17 persons. She has stated that they were from Randhikpur and she identified some of them. She took names of the accused Nos.1 to 12 as the assailants. She stated that Shailesh Bhatt (accused No.4) snatched her daughter Saleha and smashed her on the rocky ground. Accused No.1 Jaswantbhai Chaturbhai Nai, accused No.2 Govindbhai Nai and accused No.3 Nareshkumar Ramanlal Modhiya caught her & took her beneath a tree. Jaswant Nai was carrying sword. When he was about to hit her, she tried to ward off the blow due to which she received injury on her left hand. Thereafter she was raped by the three accused i.e. accused nos. 1 to 3. She became unconscious. When she regained consciousness, she found dead bodies of her family members. She found her petticoat, wore it and then climbed the hillock. She spent that day and night on the hillock and next day morning i.e., on 4<sup>th</sup>, she went to other side of hill and descended the

same. She met one Adivasi lady PW 11 Sumaliben. However, she was hostile to the prosecutrix and wanted to assault her. So the prosecutrix told her not to assault and requested to provide some clothes. According to the evidence of the prosecutrix, the lady provided blouse and odni to her. The prosecutrix went and drank water from hand pump. At that time, she saw a person (DW 2 Vanrajsingh Dhingra) standing in police uniform near one vehicle on kachha road. So, she went to him and requested him to save her. She told that her family members and her daughter was killed and she was raped. He took her to Limkheda police station in the vehicle. One more person was in the vehicle i.e., Natwarbhai Bamnia, Homeguard (PW 27). At the police station, she met PW 7 Madina Patel & PW 19 Firoz Abdul Sattar Ghachi. She informed the police at Limkheda police station that her family members including daughter were killed and she and the ladies with her were raped. She told the names of the offenders i.e. accused nos. 1 to 12. It is the case of PW 1 prosecutrix that when she

disclosed the names of the offenders, the police objected to the disclosure of the names and also threatened that she would be given a poisonous injection at the hospital if she speaks out the names and she was warned to keep mum. The police took down her statement but it was not read over to her. The police forcibly obtained her thumb impression. Then, she was taken for examination to civil hospital along with PW 7 Madina and one lady constable i.e., Ushaben Kishori (DW 7). She narrated the facts to the medical officer i.e, PW 9 Dr.Rakeshkumar Mahato. Thereafter, when she came back to the police station from the hospital, she met Abdul Sattar Ghachi, who had been taken to the spot of offence and he informed that all her family members were dead. The next day, she was removed to Godhra Refugee Camp. There, she met her aunt Sugra Issa (PW 3) and also two social workers, namely, Lateefaben and PW 5 Sharifa Abdul Razzak Umarjee. She had handed over the clothes worn by her to her aunt Sugra as she was wearing the clothes given to her at the Camp. Then, she was taken to

Godhra hospital on 7.3.2002 where she was examined by PW 17 Dr. Rohini Katti. She disclosed to Dr. Rohini that she was raped by accused Nos.1, 2 and 3. Dr. Rohini Katti noted it down in the case paper which is at Exh. 138. In the said Exhibit, it is mentioned that alleged history of rape five days back by three persons viz. Jaswantbhai Nai, Govindbhai Nai and Naresh Modhiya (accused nos. 1 to 3), patient was at her residence at Randhikpur on 28.2.2002, she along with her family members ran away from Randhikpur to Chapparwad village and then to Kuwajar village and then finally reached Panivel. On the way to Panivel, a mob killed her relatives and raped her. After one day, police came and rescued her. She has further stated that there was no progress in her case, hence, one Mukhtiyarbai, who was an activist made an application for her to the Supreme Court that the investigation be transferred to CBI. She has deposed that her statements were subsequently recorded by CBI.

9 Accused Nos.1 to 12 are the residents of

Randhikpur. Accused Nos.13 to 18 are the police personnel from Limkheda police station. Accused No.19 and 20 are the Doctors, who performed the post-mortem on the 7 dead bodies. Whether the accused Nos.1 to 12 were the assailants or not will be tested on the basis of truthfulness and credence of the evidence of the prosecutrix.

**IDENTIFICATION OF ACCUSED NOS. 1 TO 12 BY THE PROSECUTRIX:**

10 On identification of the accused, the prosecutrix has stated in examination in chief that she knew the accused nos. 1 to 12 as they are the residents of Randhikpur. In paragraph 123 in the cross, she has deposed that she knew father of accused no. 5 Lala Vakil and accused no. 6 Lala doctor.

11 Specific defence was taken by the accused in paragraphs 339 to 350 in the cross-examination of the prosecutrix. It was stated that her father was having the business of timber and her father did not pay the amount to accused nos. 1 and 2. Specific suggestion was made about

each accused that there was some grudge or grievance against these accused in the mind of the prosecutrix and her family members and, therefore, she took opportunity to settle the score.

12 A suggestion was given that accused no.3 Nareshkumar Ramanlal Modhiya was running hotel and drainage water of the hotel was running into the courtyard of the house of her father. Though the prosecutrix has denied the fact of flowing of drainage water, she expressed that she had knowledge that accused no. 3 was having a hotel at Randhikpur. Accused no. 4 has raised defence that he had taken initiative in demolishing the illegal structures of the shops which belonged to some Muslims and therefore, he is falsely implicated. Similarly, accused no.12 Ramesh Chandana took the defence that in the elections he worked in rival group against Kadkiyabhai. In paragraph 345 suggestion was given that accused nos. 4 and 11 had house near Randhikpur mosque.

13 In paragraphs 346 and 347, she admitted that her father was a patient of accused Lala doctor. It was suggested that her father did not make payment of medicines. Suggestion was given that Lala doctor is handicapped since 1993 which she has rejected. Suggestion was given regarding accused no.8 Pradip Ramanlal Modhiya that he was running shop at Mosque, however, he had to close down the shop.

14 From the examination in chief of prosecutrix, it is found that she knew the accused Nos.1 to 12 by face as they all were residents of her village Randhikpur. From the questions put and the suggestions given in the cross-examination of the prosecutrix, it can be gathered that the fact of identification of these accused persons by the prosecutrix was not an issue of challenge.

15 As regards the other accused i.e., accused Nos.13 to 18 being police personnel and the charges they are facing,

there is no question of identification of these accused by the prosecutrix. Same is the case with accused Nos.19 and 20, i.e. the Doctor couple who had signed the post-mortem report Exhs. 411A and B to Exh. 417 A & B and who were admittedly present on 5.3.2002 on the spot and conducted the post-mortem.

#### **THE FIR (EXHIBIT 56)**

16 Mr.Ponda, the learned Counsel for the appellants, submitted that the prosecutrix did not take the names of accused Nos.1 to 12 in the FIR Exhibit 56 when her FIR was recorded at Limkheda police station. She did not say anything about the killing of her daughter while giving the FIR. So also she has not stated anything about rape on her by accused nos. 1 to 3 in her FIR. As per the case of the prosecution, the prosecutrix and the accused nos. 1 to 12 are the residents of village Randhikpur and she knew them. The incident took place on 3<sup>rd</sup> March, 2002 yet she did not say a word about them on 4.3.2002 when her FIR was

recorded. She was sent for medical examination to Doctor Mahato (PW 9) on the next day i.e. 5.3.2002 where also she kept mum. Thereafter on 6.3.2002, her statement Exhibit 277 was recorded at Godhra Relief Camp by PW 23 Govindbhai Patel, Mamlatdar, wherein for the first time, she has stated the names of accused nos. 1 to 12 and stated that she and her female relations were raped and some of her relatives were killed by them. He submitted that this conduct of the prosecutrix is very unnatural and doubtful. If at all, she was raped and if her 3 year old daughter was killed, she would have said it when she gave the FIR. Mr. Ponda further submitted that according to the prosecutrix, when she was sent to the Doctor on 5.3.2002 with a lady constable (DW 7 Ushaben Kishori), she told everything to Ushaben. However, Ushaben was not examined by the prosecution and, therefore, the defence examined her as DW 7, who deposed that nothing was narrated to her by the prosecutrix. Neither the fact of rape nor the names of the rapists and assailants were disclosed to the Doctor PW 9

Dr.Mahato who examined the prosecutrix on 5.3.2002 at CHC Limkheda. Mr. Ponda submitted that this falsifies her evidence.

17 Mr. Ponda further pointed out that on 7.3.2002, the prosecutrix sent a fax (Exhibit 57) to Collector of Dahod and gave different names regarding the persons who raped her and stated that she was raped by accused Nos. 2, 4, 5 & 6. She was examined by PW 17 Dr.Rohini at Godhra hospital on 7.3.2002 and for the first time, she mentioned that she was raped by accused Nos.1, 2 and 3. The learned Counsel thus, argued that the evidence of the prosecutrix is very shaky and cannot be believed.

18 Mr. Ponda pointed out that the timing of recording of FIR (Exhibit 56) was 10.45 a.m. to 11.15 a.m. on 4.3.2002. Learned counsel Mr. Ponda relied on the register of the FIR i.e., Article 17 wherein the timing is mentioned. He submitted that there was no delay in recording the

statement of the prosecutrix i.e., FIR by Limkheda police. As per the evidence of the prosecutrix, she reached Limkheda police station at around 10.00 a.m. and immediately, her FIR was recorded by accused No.17 and also two other police constables, who were examined by the defence one of them is DW 1 Budhsingh Patel, who is the scribe of Exhibit 56 and the other is DW 6 Chandubhai Tariyad. The learned defence Counsel argued that the procedure of recording of FIR in Gujarat, is brought on record in the evidence of PW 72 K.N. Sinha, the Investigating Officer. Three persons are involved in recording of the FIR. Accused No.17, DW 1 Budhsingh and DW 6 Chandubhai Tariyad, the police of Limkheda police station were involved in recording the FIR. He submitted that there was no time for the police at Limkheda to manipulate the case of the prosecutrix and create imaginary and manipulated story of mob of 500 persons attacking them. Whatever was narrated by her was recorded *ad-verbatim* in the FIR. In this FIR, she did not mention anything about rape on her, so also she did not mention

about the murder of her daughter Saleha by accused No.4. She also did not mention the names of three persons, who raped her. She did not mention the assailants were from Randhikpur and she knew them. Therefore, her evidence before the Court is completely false and is not to be believed.

19 Mr. Ponda pointed out that DW 1 Budhsingh, DW 6 Chandubhai Tariyad, and accused No.17 Somabhai Koyabhai Gori, are the police personnel, who recorded the FIR. He submitted that three people could not have stated incorrect facts. As far as this contention is concerned, it is seen from the evidence of DW 1 that accused no. 17 Somabhai was loudly reading out the material which was being recorded simultaneously by accused no.17, DW 1 and DW 6, hence, the same contents appear in all 3 copies of the FIR. Mr. Ponda then argued that the statements of DW 2 were recorded on three occasions i.e., on 23.3.2002 by accused No.16, on 14.9.2003 and on 27.9.2003 by PW 52 Inspector, CID, Godhra yet he was not examined by the prosecution

because they did not want the true story to come up before the Court. Mr. Ponda stated that hence, the defence examined him to bring the true story before the Court. Mr.Ponda relied on the evidence of DW 2 as well as evidence of DW 6 Tariyad. Relying on the evidence of these defence witnesses, he argued that the evidence of the prosecutrix was full of omissions and contradictions, if it is compared with the evidence of police officers of Limkheda. The evidence of DW 2 shows that there was a mob of 500 persons. The copies of FIR scribed by DW 1 and DW 6 also show that there was a mob of 500 persons. The prosecutrix did not state therein about rape on her by accused nos. 1 to 3 or the fact that she identified accused Nos. 1 to 12 as the assailants. She has also not mentioned about killing of her daughter Saleha by accused no.4.

20 Mr.Venegavkar while meeting the point has submitted that the prosecutrix in her evidence has stated that her FIR was not recorded as per her narration. Her thumb

impression was obtained forcibly and she was threatened when she disclosed the names of the accused. She was threatened that a poisonous injection would be administered to her when she was taken to the hospital for check-up. He submitted that though the prosecution has produced the FIR, he has admitted that the contents in the FIR are different than her evidence before the Court. He further submitted that the main person who recorded the FIR i.e., accused No. 17 Somabhai is made an accused and other persons, who were writers i.e., DW 1 and DW 6, did not support the prosecution and have stepped in the box as defence witnesses.

### **ASSESSMENT**

21 The prosecutrix has deposed that the contents in the FIR Exh. 56 are not true and correct. In the examination in chief as well as in the cross-examination, she has specifically stated that the contents in Exhibit 56 are not true and correct. From the evidence of the prosecutrix it is found that

she was not only illiterate but was from a remote village and was a rustic lady. In the cross-examination, she has stated in paragraph 79 that she cannot read time from the watch and also cannot understand the date, month and year from the Calendar. In paragraph 104 of the cross-examination, she has deposed that she did not understand direction. In paragraph 144 she has stated that she did not know that advocates wear black coats and for the first time she came to know this when she appeared in the Court. All this shows that she was a simple illiterate villager, therefore, her evidence has to be appreciated keeping this in mind.

22 The entire case is mainly based on a single witness, i.e. the prosecutrix (PW 1). Her examination-in-chief is 14 pages and her cross-examination runs into nearly 129 pages. PW8 Saddam Hussain Adambhai is also examined by the prosecution on the point of actual assault which took place on 3<sup>rd</sup> March, 2002. However, the entire edifice of the prosecution case stands on the sole evidence of PW 1.

Therefore, her evidence is crucial. It is mixed with omissions and contradictions, hence needs careful scrutiny. There are some inherent and *inter se* omissions and contradictions. The learned defence counsel after comparing the evidence of other witnesses with the evidence of PW 1 has highlighted these omissions and contradictions to dislodge evidence of PW 1. In all 72 witnesses are examined by the prosecution and the defence has tendered evidence of 10 witnesses. Out of the prosecution witnesses PW 34 to PW 44 and PW 48 to PW 72 are the police personnel or the Government officials who gave sanction or made inquiries and investigated the matter. We have classified the prosecution witnesses i.e. PW 1 to PW 73 for the purpose of assessing the evidence of the prosecutrix into four categories - (1) Group of 9 witnesses who are from village Randhikpur and they have deposed about the riots which took place on 28<sup>th</sup> February, 2002 at Randhikpur, (2) The witnesses the prosecutrix met before the incident; (3) The witnesses who she met immediately after the incident on the next day, i.e., 4<sup>th</sup> March, 2002; (4) The

witnesses who met her thereafter i.e., on 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> March, 2002 which also includes medical evidence.

23 The entire evidence of the prosecutrix is to be read on the background of the riots and anti-muslim atmosphere at Godhra, Limkheda, Randhikpur and the villages in the vicinity. Her evidence cannot be read without taking into account her fear of death and instinct of survival. In the case like the prosecutrix, we need to look through the evidence, sift the evidence minutely and carefully, as the truth lies beyond the layers of omissions and contradictions and dishonest, callous investigation. In all, eight statements of the prosecutrix were recorded and chronologically, they are as follows:

24 The first statement of the prosecutrix was recorded by the police at Limkheda on 4<sup>th</sup> March, 2002 at around 10.45 a.m., which FIR is marked Exhibit 56. This was recorded in triplicate and the other two copies are marked at Exhibit 56A and 56B. The offence was registered at C.R. No. 59 of 2002

at Limkheda Police Station against unknown persons. Thereafter her statement was recorded on 6<sup>th</sup> March, 2002 by PW 23 Govindbhai Patel and the said statement is marked as Exhibit 277 collectively, because it was not recorded by the police under section 161 of Cr. P.C. Exhibit 57 is a fax supposedly sent by her on 7<sup>th</sup> March, 2002 which is brought on record as her previous statement by the defence. However, the prosecutrix has denied that she has ever sent fax to the police which is marked as Exhibit 57. At different times, questions were put to her on the contents in Exhibit 57, however, she has denied throughout that she had ever sent fax Exhibit 57 to the District Magistrate. On 7<sup>th</sup> March, 2002 PW 42 Mr.Pawar, who is from Godhra Police Station, recorded her statement. On 13<sup>th</sup> March, accused No.16 inspector of Limkheda police station had recorded her statement. The CBI after taking charge of the investigation, recorded her four statements in the year 2004. Thus, the span of investigation is from 4<sup>th</sup> March, 2002 till April, 2004.

25 The first statement of the prosecutrix is her FIR. Her

FIR is marked at Exhibit 56 which was recorded at 10.45 a.m. by Limkheda police station by accused No.17. As per the evidence of the prosecutrix, when she was narrating the FIR to the police, Abdul Sattar Ghachi, PW 7 Madina & PW 19 Firoz Ghachi were present. Out of these three persons, Madina and Firoz were examined by the prosecution. Abdul Sattar who was the father of PW 19 had expired when the evidence was recorded hence, he could not be examined. It is the case of the prosecution that accused no. 17 recorded FIR Exh. 56 and as per the procedure followed in Gujarat, FIR is recorded in triplicate and therefore, it is marked Exhibits 56, 56A and 56B. The person who scribed the FIR Exh. 56 on the say of accused no. 17 is DW 1 Budhsingh Mathurbhai Patel who is a constable in Limkheda police station. DW 6 Chandubhai Tariyad, a police constable, was also present when Exhibit 56 was prepared and he scribed one of copies (Exh.56A) of Exh. 56.

26 It is to be noted that the police from Limkheda police

station did not support the prosecution. At the cost of repetition the contents in the statements of the prosecutrix which are at Exhs. 56 and 277 are reproduced to get a clear idea of variance and manipulation. In Exhibit 56, she has stated that along with her sisters Mumtaz and Munni, brothers Aslam and Irfan, daughter Saleha, father Abdul Issa, mother Alima and uncles Majidbhai & Yusuf Musa, aunt Akila, Aminaben, cousins Shamimben and Mumtazben and Madinaben, 3 years old son Hussainbhai of Shamim, left Randhikpur and went to Chundadi. She has stated that on 3.3.2002, when she was going to Panivel, at 11 O'clock, a mob of 500 persons armed with sticks attacked them. Her two sisters Shamim and Mumtaz were raped. They wanted to rape her. However, when she informed she was pregnant, they left her. She fainted and when she regained consciousness, she found dead bodies of the people from her group around her. Then she spent night on the hillock. The next day, she came down and drank water at a hand pump when she saw a jeep where a police officer was there and on

her request, she was dropped at Limkheda police station.

27 After going through the contents of Exhibit 56 and her evidence, we find that her evidence is different than the contents in the FIR (Exh. 56). In the cross-examination, this fact was brought on record and was highlighted elaborately by the learned Counsel Mr.Ponda. There are many contradictions in her evidence and her FIR.

28 Significantly, all the police personnel from Limkheda, who were present on 4/5/6<sup>th</sup> March, 2002 and who attended the prosecutrix on those days, were either accused or were examined by the defence as defence witnesses and none of them supported the case of the prosecution. On the contrary, some police officers like accused Nos.13, 15, 16 and 17 were prosecuted by the CBI. Accused 17 who took down the F.I.R. has been convicted under Sections 217 and 218 IPC. All these facts need to be given due weightage against the accused and the credential of these defence witnesses is to

be assessed on this background.

29 There is variance to a great extent in the contents in the FIR (Exh. 56) and the examination-in-chief of PW 1 the prosecutrix. The contents in the FIR Exh. 56 are not admitted by the prosecutrix. She has stated that when she went to Limkheda police station on 4.3.2002 she informed about the incident of killing of her relatives and rape on her and the ladies in her group. That the FIR was recorded and offence was registered under section 302 and 376 of Indian Penal Code is an important fact, which is proved by the prosecution on the basis of Exh. 56. This information has set the criminal law in motion. However, it appears that the investigation did not take place immediately as it was expected. Her evidence that her group was attacked at Panivel on 3.3.2002 and many of her family members were killed and ladies were raped is corroborated by Exhibit 56. In this case, the truth and falsehood are mixed up in such a manner that at every stage of the evidence, the truth is hidden under layers of

intentional laxity, omissions, contradictions and falsehood and the truth is required to be unearthed. As per the inquest panchanama at Exhibit 123, 7 corpses were found in jungle of Kesharpur on 5.3.2002. This physical fact of finding of dead bodies of relatives of the prosecutrix is the most important corroboration to the evidence of the prosecutrix.

30 It also cannot be lost sight of that as the investigation by Gujarat police was not proper, the prosecutrix approached the Supreme Court and the Supreme Court transferred the investigation to CBI. Looking to all these facts, we hold that the FIR Exh. 56 was not correctly recorded and facts have been suppressed and twisted therein.

**STATEMENT OF THE PROSECUTRIX DATED 6.3.2002 (EXH. 277) TO PW 18 DISTRICT MAGISTRATE JAYANTI RAVI:**

31 Mr. Venegavkar relied on Exh. 277 which is a statement given by the prosecutrix on 6.3.2002. He submitted that this statement corroborates the evidence of the prosecutrix. This statement was recorded by PW 23 Mamlatdar / Executive

Magistrate Govindbhai on directions of PW 18 Jayanti Ravi who was the Collector and District Magistrate Godhra. In the statement Exh. 277 dated 6.3.2002, the prosecutrix has stated that mob started burning houses in Randhikpur Village, hence, they left the village. She has given a narration of her journey from Randhikpur along with persons from her group and she said that 20 persons came in two white vehicles and attacked them at 12 noon. They stripped the females in the group including her and raped them. They killed some persons in the group. When she gained consciousness, she went up the hill and hid herself. Thereafter, she reached Limkheda in police jeep. The prosecutrix disclosed the names of the 12 accused as assailants i.e accused Nos. 1 to 12. This statement was given three days after the incident. The names of the assailants i.e accused Nos. 1 to 12 are coming on record for the first time after the incident in Exh. 277. In Exh. 277 the prosecutrix has mentioned that she and other females were raped and her relatives were killed by a group of 20 persons, who arrived on

the spot in two white vehicles. We consider it as an immediate disclosure of the names of accused and what was not recorded in FIR exhibit 56 is stated in this statement, i.e., exhibit 277.

32 The statement Exh. 277 was recorded on 6.3.2002 by PW 23 Govindbhai Patel under the direction of Collector Jayanti Ravi (PW18). Jayanti Ravi visited the Godhra Relief Camp on 6.3.2002. Jayanti Ravi has stated that she came across several complaints, one of them was of the prosecutrix. Jayanti Ravi learnt from the prosecutrix that while she and her relations were escaping from violence they were attacked by a mob. The prosecutrix mentioned the names of the attackers, hence, Jayanti Ravi directed PW 23 Govindbhai Patel to record the statement of the prosecutrix, pursuant to which the said statement was recorded.

**SECTION 157 OF THE EVIDENCE ACT VIS-A-VIS EXH.277:**

33 At this stage, it is necessary to deal with the question of

law raised by Mr.Ponda in relation to this statement (Exh. 277). This statement is marked Exhibit 277 by the trial Court. However, Mr.Ponda argued that this statement cannot be used by the prosecution for the purpose of corroboration under section 157 of the Evidence Act but it can be used only for the purpose of contradiction by the defence. He submitted that admittedly PW 23 Patel is not a police person, he was working as an Executive Magistrate. Mr. Ponda submitted that hence, he cannot be said to be an authority legally competent to investigate and moreover the statement was not recorded immediately after the incident, hence, it cannot be looked into. Mr.Ponda has objected to its admissibility on two grounds : (i) the statement was not recorded by an authority legally competent to investigate and (ii) the statement was not recorded at or about the time, the incident took place. Thereafter, Mr. Ponda objected to admissibility of Exh. 277 on the ground that exhibit 277 is not the original document as it is a photocopy of the original statement of the prosecutrix. Mr. Ponda reiterated that in view of these facts

the statement Exh. 277 of the prosecutrix cannot be relied on by the prosecution for corroboration.

34 Mr. Ponda further submitted that this statement cannot be considered for corroboration because it is neither immediate disclosure by the prosecutrix nor it is recorded by an authority who is competent to investigate. So he submitted that the statement can be used by the defence only for the purpose of omissions and contradictions which disclose that the prosecutrix has left out important material facts which took place at the time of incident. This, according to Mr. Ponda, shows that the prosecutrix was not present at the time of the incident.

35 Mr.Ponda has relied on the cross-examination of PW23 Govindbhai Patel in relation to the said statement marked Exhibit 277. He relied on the omissions which are brought on record in paragraph 19 of the evidence of PW 23 Govindbhai Patel in respect of the said statement Exh. 277 which is dated

6.3.2002. He also submitted that out of omissions, omission Nos.4, 7 and 8 are important. They are thus:

Omission No.4 - Shamim was about to deliver;

Omission No.7 - Saleha was smashed by accused No.4;

Omission No.8 - accused Nos.1, 2 and 3 who raped her were from Randhikpur.

36 As far as the above omissions are concerned, it is noticed that this statement of the prosecutrix is very brief. The prosecutrix has briefly stated about her journey from Randhikpur to the kachcha road and about the incident itself. She may not have stated that Shamim was about to deliver but she has stated about rape on them & that her relations were murdered which included her daughter. She may not have mentioned that accused no. 4 smashed her daughter but she has stated that her relations were murdered. Her daughter also fell in the category of relations. Thus this omission is not material. As far as not stating that accused

nos. 1 to 3 were from Randhikpur on perusal of Exh. 277, we find that she has categorically stated that all 12 accused i.e. including accused nos.1 to 3 were from Randhikpur. Thus, there was no basis, to raise this contention.

37 On section 157, Mr.Ponda has submitted that the statement has to be recorded by the authority which is competent to investigate. The powers of investigation are to be allotted to that authority otherwise the statement cannot be taken into consideration. In order to substantiate his submissions on this point, he relied on the following judgments:

**i) Kumaramuthu Pillai and others vs. Emperor, AIR 1919 MADRAS 487.**

**ii) Tubarak Mandal vs. The King (AIR 36 1949 Calcutta 629.**

**iii) Thakurji Bhai Budhsen and anr vs. Parmeshwar Dayal & Ors. AIR 1960 All 339.**

**iv)** While arguing on the first part of the section especially

on the phrase 'at or about the time" that is a statement can be taken into consideration only if it is made at or about the time of occurrence of the fact, he relied on **Rameshwar vs. State of Rajasthan, AIR 1952 SC 54.**

(v) **Nathuni Yadav and anr. vs. State of Bihar and anr., reported in AIR 1997 SC 1808.**

(vi) **Ramashray Yadav & Ors. vs. State of Bihar AIR 2006 SC 201.**

38 Mr. Ponda pointed out that in the case of **Kumaramuthu Pillai and others vs. Emperor (supra)**, it is held that 'legally competent to investigate' means having power under some law, statutory or otherwise. A bank authority, if holding enquiry cannot be considered as legally competent to investigate. In the said decision, a report about a fact was made 24 hours after it took place and therefore, it was not considered at or about the time of the occurrence of the fact, hence, it was not taken into consideration.

39 In the case of ***Tubarak Mandal vs. The King (supra)***, a statement was made by a victim girl 10 days after the occurrence and so it was held that it cannot be held admissible in evidence to corroborate under section 157 of the Act and if that would have been made before the authority which is legally competent to investigate, then it would be admissible.

40 The Division Bench of Allahabad High Court in the case of ***Thakurji Bhai Budhsen (supra)***, took the view that the corroborative value of the previous statement depends upon the fulfillment of the conditions laid down in section 157 and it is of a varying character depending upon the circumstances of each case.

41 The Supreme Court in the judgment in the case of ***Rameshwar (supra)*** which is authored by Justice Vivian Bose, has discussed the issue as follows:

“26. That the evidence is legally admissible as evidence of

conduct is indisputable because of Illustration (j) to S.8, Evidence Act which is in these terms:

'The question is, whether A was ravished. The facts that, shortly after the alleged rape she made a complaint relating to the crime, the circumstances under which, and the terms in which the complaint was made are relevant.'

But that is not the whole problem, for we are concerned here not only with its legal admissibility and relevancy as to conduct but as to its admissibility for a particular purpose, namely, *corroboration*. The answer to that is to be found in S 157, Evidence Act, which lays down the law for India."

The Supreme Court observed that the words "at or about the time" in section 157 must receive a pragmatic and liberal construction. It held thus:

"The principle is that the time interval between the incident and the utterance of the statement should not be such as to afford occasion for reflection or even contemplation".

42 The case of Rameshwar was relied on in the ***State of Tamil Nadu vs. Suresh and anr., AIR 1998 Cr. L.J. 1416.***

In the case of ***Suresh (supra)***, in relation to "at or about the time" the Court has taken a view that -

"at or about the time when the fact took place, section 157 of the Act should be understood in the context according to the facts and circumstances of each case".

For the said purpose, the ratio laid down in **Rameshwar vs. State of Rajasthan** is relied on.

43 Mr. Ponda placed reliance on the decision of the Supreme Court in the case of **Nathuni Yadav (supra)**. He placed reliance on paragraphs 13 and 14 thereof which are as under:-

13. The words 'at or about the time' in Section 157 of the evidence Act are the crucial words to judge the time when the statement was made. Whether the statement was made at or about the time of the incident can be decided on the facts of each case. No hard and fast rule can be laid down for it. However, those words 'at or about the time' in Section 157 must receive a pragmatic and liberal construction. The principle is that the time interval between the incident and the utterance of the statement should not be such as to afford occasion for reflection or even contemplation. If the time interval was so short as between the two that the mind of the witness who made the statement was well connected with the incident without anything more seeping into it, such statement has a credence, and hence can be used, though not as substantive evidence, as corroborating evidence, on the principle adumbrated in Section 157 of the Evidence Act.

14. Vivian Bose J. has observed in Rameshwar v. State of

Rajasthan : 1952 Cri L.J. 547 that “there can be no hard and fast rule about 'at or about' condition in Section 157. The main test is whether the statement was made as early as can reasonably be expected in the circumstances of the case and before there was opportunity for tutoring or concoction”. We respectfully follow the aforesaid observation.

**[ Emphasis Supplied ]**

44           Thereafter, Mr. Ponda placed reliance on the decision of the Supreme Court in the case of **Ramashray Yadav & Ors. Vs State of Bihar (supra)**. He placed reliance on paragraphs 8 and 9 thereof which read as under:-

"8.    Section 157 of the Evidence Act reads as under :

157. 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 competent to investigate the fact, may be proved.'

The import of this Section was examined and explained in considerable detail in State of Tamil Nadu v. Suresh and Anr. : 1998 Cri L.J. 1416 and paragraphs 26 to 28 of the reports are being reproduced below :

'26. The section envisages two categories of statements of witnesses which can be used for corroboration. First is the statement made by a witness to any person 'at or about the time when the fact took place'. The second is the statement made by him to any authority legally

bound to investigate the fact. We notice that if the statement is made to an authority competent to investigate the fact such statement gains admissibility, no matter that it was made long after the incident. But if the statement was made to a non-authority it loses its probative value due to lapse of time. Then the question is, within how much time the statement should have been made. If it was made contemporaneous with the occurrence the statement has a greater value as *res gestae* and then it is substantive evidence. But if it was made only after some interval of time the statement loses its probative utility as *res gestae*, still it is usable, though only for a lesser use.

27. What is meant by the expression 'at or about the time when the fact took place'? There can be a narrow view that unless such a statement was made soon after the occurrence it cannot be used for corroboration. A broader view is that even if such statement was made within a reasonable proximity of time still such statement can be used for corroboration. The legislature would not have intended to limit the time factor to close proximity though a long distance of time would deprive it of its utility even for corroboration purposes.

28. We think that the expression 'at or about the time when the fact took place' in Section 157 of the Evidence Act should be understood in the context according to the facts and circumstances of each case. The mere fact that there was an intervening period of a few days, in a given case, may not be sufficient to exclude the statement from the use envisaged in Section 157 of the Act. The test to be adopted, therefore, is that : Did the witness have the opportunity to concoct or to have been tutored.

In this context the observation of Vivian Bose, J. in Rameshwar v. State of Rajasthan AIR 1852 SC 54 is apposite :

'There can be no hard and fast rule about the 'at or about' condition in Section 157. The main test is whether the statement was made as early as can reasonably be expected in the circumstances of the case and before there was opportunity for tutoring or concoction.'

(emphasis supplied)'

9. In Smt. Chander Kala v. Ram Kishan and Anr. : 1985 Cri.LJ 1490, an incident which took place on 10th March was narrated by the victim to some of her colleagues on 11th March and it was held that the testimony of her colleagues was admissible under Section 157 of the Evidence act and could be used for the purpose of seeking corroboration to the testimony of the victim. Thus, the testimony of PW.5 Arjun Prasad who had reached immediately after the incident had happened and to whom PW.12 Sidheshwar Prasad had narrated the incident and the role played by the three appellants in causing the death of his brother by firing upon him lends complete corroboration to the testimony of PW.12 Sidheshwar Prasad."

45 Mr. Ponda pointed out that in the case of Ramashray, the statement was treated as corroboration as the statement under Section 157 was recorded on the next day of the incident. Mr. Ponda pointed out that in the present

case, the incident has occurred on 3.2.2002 and the statement of the prosecutrix which is stated to be under Section 157 of the Evidence Act was recorded on 6.2.2006. He submitted that the gap of time between the incident and the recording of statement being a number of days, the statement cannot be regarded as one under Section 157 of the Evidence Act.

46 Mr.Venegavkar, the learned Prosecutor, opposed these submissions and submitted that while considering the scope of section 157, this statement which is recorded by PW 23 who is an Executive Magistrate / Mamlatdar is admissible and can be considered under section 157 of the Evidence Act.

47 Mr.Venegavkar on the point of admissibility of Exh. 277 recorded by PW23 Govindbhai Patel, has submitted that the prosecutrix narrated the facts to District Magistrate / Collector PW 18 Jayanti Ravi and Jayanti Ravi told PW 23 Govindbhai to record the statement of the prosecutrix. He

submitted that thus, it is a statement which is recorded by PW 18 District Magistrate Jayanti Ravi, thus this statement is recorded by the person who was legally competent to investigate a fact. He relied on section 17 of the Gujarat Police Act wherein a District Collector has overall power to supervise the police. He argued that PW 18 Jayanti Ravi was the District Magistrate and Collector of Godhra and PW 23 was the Mamlatdar and Executive Magistrate working under PW 18. Though it is mentioned that the statement was recorded by PW 23, it is seen from the evidence that PW 23 was only a scribe. In fact, the statement was made before Jayanti Ravi and it was recorded by PW 23 Govindbhai at her instance and as per section 17 of the Gujarat Police Act, PW 18 Jayanti Ravi was legally competent to investigate a fact.

Section 17 of Gujarat Police Act reads thus:

17. Control of District magistrate over Police Force in district:

(1) The District Superintendent and the Police Force of a district shall be under the control of the District Magistrate.

(2) In exercising such control the District Magistrate

shall be governed by such rules and orders as the State Government may make in this behalf.

Mr. Venegavkar submitted that the word 'investigation' is to be construed in liberal sense. It is not restricted to police investigation but it may be an investigation of a fact but not restricted to an offence and, therefore, the statement recorded by Jayanti Ravi can be admitted in the evidence. He further submitted that the said statement was made at or about the time of the occurrence of the fact. The incident of assault had taken place on 3.3.2002 and thereafter, the prosecutrix made this statement on 6.3.2002 i.e., at the first opportunity she disclosed the names of the accused. He argued that her FIR (exhibit 56) dated 4.3.2002 is not the FIR in true sense and the prosecutrix has deposed accordingly. She was in Limkheda Police Station till 5.3.2002. During this period, the Limkheda Police did not take down a true account of the incident, hence, she was helpless. She was sent to Godhra Relief Camp on 5.3.2002, hence, when the District Magistrate met her on 6.3.2002, it was the first opportunity for her to give

true account of the incident. Taking into account the sequence of events, making a statement by the prosecutrix on 6.3.2002 can be said to be at or about the time of the incident.

48 Mr. Venegavkar further submitted that in Exh. 277, there is no omission pertaining to rape but there is omission regarding killing of the daughter, however, she has stated that some of her group were killed. This shows that there is a mention of basic important facts, though the details are not mentioned. Thus, credence and reliability of the evidence of the prosecutrix can be tested if the said statement dated 6.3.2002 recorded by PW23 Patel, as a whole, is made admissible in evidence. Section 157 states which statement can be made admissible and can be used for the purpose of corroboration. Section 157 reads as follows:

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 competent to investigate the fact, may be proved.

[ Emphasis supplied ]

49 Section 157 is in two parts. The principle behind the rule of corroboration is that he who is consistent, deserves to be believed and therefore, if at all a person has made any statement at or about the time of the occurrence of the fact, then, the said immediate disclosure is truthful and carries weightage in the evidence. It is assumed that when a person discloses or narrates facts immediately after the occurrence, then there is no time for manipulation or concoction. Therefore, statement can be considered for corroboration, if the fact stated in the said statement, is the same fact stated before the Court. The disclosure by the person may be written or oral. However, he has something to say about the fact that either he has experienced himself or he has witnessed the incident or he is a party to that particular act. Under Section 157 even if the statement is recorded by an authority who is competent to investigate, then, that statement is considered admissible in the evidence

and can render corroboration. The time of disclosure of the fact is a factor which is made into two categories of the statements u/s 157 of the Evidence Act i.e 'at' or 'about' the time when the fact took place. There is no requirement of the recording of the said fact by authority competent to investigate if the statement is recorded 'at' or 'about' the time the fact took place i.e. at or about the time of the incident. From the decisions cited above, it is clear that for a statement to be admissible under Section 157, it is not necessary that the statement has to be recorded on the day of the incident, however, if a statement is made after much delay, then it becomes admissible only if it is recorded by a person who is competent to investigate.

50 As far as the contention in relation to Section 157 and statement of the prosecutrix Exh. 277 is concerned, in the very decision on which Mr. Ponda placed reliance i.e **Nathuni**, it is stated that there can be no hard and fast rule about the "at or about" condition in Section 157 and the

words “at or about” must receive a pragmatic and liberal construction. In **Ramashray**, it is observed that 'The mere fact that there was an intervening period of a few days in a given case, may not be sufficient to exclude the statement from the use envisaged in section 157 of the Act'. It is further observed that 'The main test is whether the statement was made as early as can reasonably be expected in the circumstances of the case'. Thus the main test is whether the statement was made as early as can be reasonably be expected in the circumstances of the case. It was further observed in **Ramashray** that the legislature would not have intended to limit the time factor to close proximity though a long distance of time would deprive it of its utility even for the purpose of corroboration. The prosecutrix was in Limkheda Police Station on 4th and 5th March, 2002. Thereafter she was taken to Godhra Relief Camp. In the camp, on 6.3.2002, PW 18 District Magistrate and Collector Jayanti Ravi met the prosecutrix. When the prosecutrix narrated the incident to her, Jayanti Ravi directed PW 23

Executive Magistrate / Mamlatdar Govindbhai to record the statement of the prosecutrix. The atmosphere in Limkheda Police Station was hostile to the prosecutrix, hence, there was no occasion on 4.3.2002 and 5.3.2002 for the prosecutrix to record her statement giving true and correct facts. The moment, the prosecutrix was in a free and fair atmosphere at the Godhra Relief Camp, she immediately narrated the incident to PW 18 District Magistrate and Collector Jayanti Ravi which statement is at Exh. 277.

51 In the present case, PW 23 Govindbhai Patel who recorded the statement of the prosecutrix on 6<sup>th</sup> March, 2002, was an Executive Magistrate, who accompanied PW18 Jayanti Ravi, the District Magistrate, Godhra to the Godhra Relief Camp on 6.3.2002 and on direction of Jayanti Ravi, PW23 Patel recorded the statement of the prosecutrix. He was not a person competent to investigate but PW 18 Jayanti Ravi in view of Section 17 of the Gujarat Police Act had control over the police force which is an investigating agency. Moreover,

we are not agreeable to the contention that the disclosure was not at or about the time of the occurrence of the fact. The incident of killing and rape has taken place on 3.3.2002 in the morning. The prosecutrix remained on the hillock overnight out of fear as her relatives were massacred in broad daylight. She went to Limkheda police station on 4.3.2002 and as per her case, the police did not support her but they threatened her and tried to suppress her case. Thereafter, she was sent for medical examination on 5.3.2002 where a male Doctor examined her. This Doctor i.e. PW 9 Dr. Mahto did not understand Gujarati and the prosecutrix did not understand Hindi, hence, there was a communication gap between them. Thereafter the prosecutrix was sent to Godhra relief camp. There, she met other ladies and as she was crying, they enquired and she disclosed this fact of killing of her relatives and the rape committed on her and other females in the group. Undoubtedly, the trauma of sudden attack and murder of her relatives and of the rape was so horrifying that the delay of

two days in the disclosure of the true facts by the prosecutrix cannot be said to be late. The disclosure was definitely proximate to the fact of occurrence. In any event, the sequence of events was such that the prosecutrix could not narrate the true facts till 6.3.2002.

52           Section 162 controls section 157 of the Code of Criminal Procedure. The statements recorded by the police or the investigating agencies who are competent to investigate are under section 161 of the Code of Criminal Procedure and therefore, those statements though recorded immediately after the offence cannot be used under section 157 of the Evidence Act for corroboration though police are competent to record the statements, but can be used only for contradicting the witness who made the statement. The statements which can be used for corroboration recorded by the competent authority are necessarily not the statements recorded under section 161 but they are otherwise recorded by the authority competent to record under other provisions

of the Act or Code. For example, a statement recorded by an authority competent to investigate under section 164 of the Code of Criminal Procedure or under section 9 of the Evidence Act i.e., by the Executive Magistrate at the identification parade or by a Magistrate authorized to record the dying declaration are the statements admissible under section 157 of the Evidence Act, which can be used for corroboration. In our opinion, the statement Exh. 277 is covered by Section 157 of the Evidence Act, hence, it can be used as corroboration.

53           Thereafter Mr. Ponda objected to admissibility of Exh. 277 on the ground that Exh. 277 is not the original document as it is a photocopy of the original statement of the prosecutrix. Learned Counsel Mr. Venegavkar while arguing the admissibility of secondary evidence of the statement (exh.277) pointed out how CBI inspite of their best efforts could not procure the original document hence, office copy of the statement is produced. The prosecution examined

witnesses and relied on correspondence to establish the fact that the original document i.e., statement dated 6.3.2002 was not traced in spite of bonafide endeavour of the investigating agency. The said statement of the prosecutrix dated 6.3.2002, recorded by Executive Magistrate PW23 Govindbhai was submitted by him to PW 18 District Magistrate Jayanti Ravi and then, PW 18 along with a covering letter sent that statement on the next day i.e., 7.3.2002 to SP, Dahod, who further sent that letter to Dy.S.P., Limkheda, accused No.18. The entries to that effect were made in the outward and inward register of Dahod and Limkheda police station. The prosecution brought the said entries on record by examining the police constables i.e., PW 48 Rameshbhai Walabhai Babhor and PW 50 Ganpatsingh D. Khant, the constable at Limkheda police station. Thus original statement dated 6.3.2002 was sent from Dahod to Limkheda police station. Thereafter, in the year 2004, all the papers of investigation were taken over by CBI under panchanama dated 5.1.2004 (Exh. 267) and 20.1.2004

(Exh.268) which is brought on record through PW 52 Kalubhai Vohaniya and the said statement of the prosecutrix dated 6.3.2002 was not found in those papers and therefore, the prosecution relied on and tendered the secondary evidence i.e., the office copy of the statement preserved by the District Collector, Godhra, which is on record, i.e., Exh. 277.

54 PW 52 Kalubhai Vohania has stated that he was PI, CID, Godhra. He stated that he handed over investigation in the present case to PW 72 Deputy Supdt. of Police K.N.Sinha of CBI. They collected the papers from CID, Godhra, who were investigating the matter. The case papers of the investigation were handed over to CBI by panchanama dated 5.1.2004 marked Exhibit 267 and muddemal articles were also handed over to CBI under memorandum of seizure (Exh. 268) dt. 20.1.2004. In the evidence of PW 23 Govindbhai, he has specifically stated that the original of the said statement was sent to SP, Dahod and in para 9 of this evidence, he has specifically mentioned that despite efforts, the original

statement of the prosecutrix dated 6.3.2002 was not traced. However, he identified the office copy of the said statement. Thus, we are of the view that CBI has made bonafide and genuine efforts to get the original statement but their efforts failed and therefore, secondary evidence of the photocopy i.e office copy of original of Exh. 277 is allowed. In view of the evidence on record, we are of the opinion that this copy Exh. 277 can be taken into consideration and relied on. Thus, prosecution has sufficiently explained the reasons that why original of Exh. 277 was not with CBI hence this photocopy which was an office copy was tendered.

55 At this juncture, we asked a question to ourselves as to whether the names of the assailants mentioned in the statement dated 6.3.2002 (Exhibit 277) was a manipulation by the prosecutrix. On 4<sup>th</sup> March 2002 after 10.45 a.m. she stayed at Limkheda police station. The evidence of PW 35 Ranjeetsingh Patel shows that the prosecutrix on 4.3.2002 stayed overnight at Limkheda Police Station. On 5<sup>th</sup> March,

also she was at the police station thereafter, she was shifted to Godhra Relief Camp. There was no opportunity to tutor her at Limkheda Police Station. Moreover, it was not possible for anyone to take her outside the police station on 4<sup>th</sup> and 5<sup>th</sup> to tutor her. Almost all in the group of the prosecutrix were killed. The situation outside the police station was totally fraught with danger, in such case, it is not possible that the prosecutrix would leave the police station with some unrelated person to enable them to tutor her. The only time that the prosecutrix left the police station between 4<sup>th</sup> and 5<sup>th</sup> March was when she was taken to Community Health Centre (CHC) Limkheda for checkup. At that time, DW 7 Police Constable Ushaben accompanied her, therefore, there was no scope for tutoring. District Magistrate PW 18 Jayanti Ravi alongwith PW 23 Govindbhai Patel visited the Godhra Relief Camp on 6.3.2002 and there, PW 18 directed PW 23 Govindbhai Patel to record statement of the prosecutrix i.e., the statement which is at Exhibit 277. Thus, the defence has unsuccessfully tried to create a cloud of suspicion that on the

night of 4<sup>th</sup> or 5<sup>th</sup> March the prosecutrix was not at Limkheda police station and she was tutored by social workers and NGOs and to that effect, questions were put to her. However, the movements and stay of the prosecutrix at Limkheda police station and Godhra Relief Camp cannot be doubted. Moreover, it cannot be said without any foundation that the names given by the prosecutrix in the statement dated 6.3.2002 (Exh. 277) were imaginary or false.

56 The statement (Exh. 277) recorded by PW 23 Executive Magistrate Govindbhai on the instructions of District Magistrate & Collector PW 18 Jayanti Ravi was made by the prosecutrix as early as can reasonably be expected in the facts and circumstances of this case. Thus, the statement is admissible in evidence as it was made at or about the time the fact occurred, so it can be used for the purpose of corroboration under section 157 of the Evidence Act. Thus, we have no hesitation in relying on the same.

57 It is the consistent case of the prosecutrix that at the time of recording of FIR Exh.56, she informed that she was raped by accused nos.1 to 3, the ladies in her group were raped by the mob of 20-25 persons and her relations including daughter was killed. She had specifically named accused nos.1 to 12 from Randhikpur as being part of that mob. However, she was threatened that she will be given a poisonous injection when she gave the names of accused and her FIR was not correctly recorded. The prosecutrix was in Limkheda Police Station till she was taken to Godhra Relief Camp. In the hostile atmosphere which was prevailing at Limkheda Police Station the prosecutrix could not do anything further as she was helpless. However, when the prosecutrix was taken to Godhra Relief Camp on 6<sup>th</sup>, she met PW 18 District Magistrate Jayanti Ravi to whom she disclosed all these facts which were recorded in her statement Exh. 277. The prosecutrix stated that as mob had started burning houses in Randhikpur on 28<sup>th</sup> she along with others ran from village Randhikpur and reached Chundadi village. They

stayed at Kuwajar. The next morning, they started for Khudra and stayed in Khudra village for two days. After that in the morning at 4.00 a.m. they started their onward journey. On the way, there was a kachha road at Panivela village. When they reached on the spot, about 20 people came in white cars and attacked them. They stripped her, her sisters, her two aunts, daughters of paternal aunts and raped them. They also killed some of the persons in the group. She lay on the ground as if she was dead. The attackers thereafter left. When she gained consciousness, she went up the hill and hid. She named accused nos. 1 to 12 as some of the persons from the mob who attacked them. This shows that as soon as the prosecutrix was in a free and fair atmosphere and was not under threat or fear, she disclosed the names of accused nos. 1 to 12 and that they raped her and the ladies in her group and murdered the persons in her group. Thus her statement Exh. 277 is a most important document. PW 18 District Magistrate Jayanti Ravi and PW 23 Executive Magistrate Govindbhai have deposed about Exh. 277. We

have dealt with it in detail. Suffice to say that PW 18 District Magistrate Jayanti Ravi and PW 23 Executive Magistrate Govindbhai are independent persons, hence, we see no reason to disbelieve their evidence.

**FAX (EXHIBIT 57)**

58           Thereafter Mr. Ponda contended that entirely inconsistent and discrepant versions are given by the prosecutrix from time to time. In the FIR Exh. 56 she has stated that a mob of 500 persons attacked them. In the FIR, she neither makes any mention of rape on her nor about knowing any of the attackers. However, in her statement Exh. 277 recorded on 6.3.2003 by PW 23 executive Magistrate, she mentions that about 20 persons came and raped her and her sisters, aunts and cousins and that accused Nos. 1 to 12 who are residents of Randhikpur were among the attackers. Mr. Ponda submitted that it is the case of the prosecutrix that 20-25 persons attacked them, out of them, she knew accused Nos. 1 to 12 and accused Nos. 1 to 3

committed rape on her. Mr. Ponda stated that the prosecutrix sent a fax Exh. 57 on 7.3.2002 to District Magistrate, Dahod in which entirely different story was given by the prosecutrix. In this fax, she stated that accused Nos. 2, 4, 5 & 6 raped her and she makes no mention of accused Nos. 3, 8, 11 & 12 as being part of the mob. Mr. Ponda submitted that the prosecutrix tried to deny this document i.e Fax Exh. 57. However, according to Mr. Ponda, the Fax was actually sent by her. Mr. Ponda submitted that there is reference to Fax Exh. 57 in W.P.No. 118 of 2003 (Exh. 61) which was preferred by the prosecutrix before the Supreme Court assailing the faulty investigation in her case. He submitted that reference is made to this Fax in para 4(vi) of the Writ Petition. The family status of the prosecutrix is mentioned and there is reference to Godhra riots and that she and total 17 persons left Randhikpur to save themselves. On the point of incident, it was mentioned that when they were passing between 2 hills, 30-40 people from Randhikpur and Chapparwad came in two white cars. The names of accused nos. 1, 2, 4 to 7, 9 and

10 is mentioned and that they were holding swords, knives, sticks, etc. It is mentioned that they were shouting to beat, kill them. They tore clothes and raped the women including her and killed the family members including her 3½ year old daughter. The names of the persons, who raped her were given as accused no.2 Govind, accused No.4 Shailesh Bhatt, accused No.5 Lala Vakil (Radheshyam Shah) and accused No.6 Lala Doctor (Bipinchandra Kanaiyalal Joshi). Then she mentioned that she spent the night on the hill. Thereafter the police arrived there. They saw her. They provided her clothes and took her to Limkheda and thereafter to Relief Camp.

59 Mr.Ponda has argued that the said document i.e Exh. 57 was relied upon by the prosecutrix in her Writ Petition (criminal) No. 118 of 2003 preferred before the Supreme Court. The prosecutrix in her evidence has admitted that she has filed the Writ Petition. Mr. Ponda pointed out that Exhibit 57 was one of the annexures to the

said petition. He submitted that in ground No.4(vi) of the writ petition, she referred to this fax and she herself has annexed a copy of the Fax (Exhibit 57) at Annexure P4 to the Writ Petition. He submitted that as these annexures were admitted and relied by her in the writ petition, which was filed before the Supreme Court, then, it is to be considered as an admission on the part of the prosecutrix that she has sent the Fax and she herself is the author of the Fax Exhibit 57.

60 Mr. Ponda further submitted that in Exhibit 57, she gave altogether different version of the assailants. She did not tell that accused nos. 1 and 3 raped her but she has stated that the accused nos.2, 4, 5 and 6 had raped her. In her statement first in time, i.e., FIR Exhibit 56 she is completely silent about the incident of rape on her and killing of her daughter. He argued that though PW1 has denied continuously that she did not send fax (Exhibit 57), her evidence is false. She has been telling lies throughout before the Court because she herself has annexed and relied on this

fax (Exhibit 57) in the Writ Petition (Exhibit 61) filed by her before the Supreme Court. In paragraph 4(vi) of Exhibit 61, she has mentioned that she relied on the annexures and referred to this statement of hers dated 7<sup>th</sup> March, 2002. Thus, she is the author of Exhibit 57 and she cannot now deny the contents of the Fax.

61 As far as the above submission is concerned, in para 4(vi) of the Writ Petition, we find that she has mentioned that her another complaint was filed before "Godhra police station" on 7.3.2002, whereas the Fax is sent to "District Magistrate Dahod". On going through the Writ Petition Exh. 61, we find that there is no reference at all to the Fax dated 7.3.2002. In fact, there is a statement given by her to Godhra police station dated 7.3.2002 which is part of Exh. 232 colly. which is recorded by PW 42 Pawar. It was probably to this statement to which she made a reference in para 4(vi) of the Writ Petition. In the entire Writ Petition, there is no reference to the Fax.

62 Mr. Ponda argued that FIR Exhibit-56, Fax Exhibit 57 and her other statement recorded on 6<sup>th</sup> March, 2003 (Exh. 277) by PW 23 Executive Magistrate Govindbhai are completely inconsistent and differ in details in respect of culprits. He further submitted that a letter was sent by PW 72. He referred to the evidence of PW 72 I.O. Mr. Sinha who speaks about the letter dated 8<sup>th</sup> March, 2002 (Exhibit D-87) being sent by Dist. Collector, Dahod to S.P. Dahod, forwarding the fax dated 7.3.2002. He also referred to the letter dated 16th February, 2004 (Exhibit 447) sent by District Magistrate, Dahod to Police Inspector, Dahod and the letter dated 17th February, 2004 which is reply by District Magistrate, Dahod to CBI. To this reply, Dist. Magistrate, Dahod annexed copy of Fax (Ex. 57) along with two other documents. He submitted that original fax was to be brought on record for the purpose of verifying thumb impression of the prosecutrix which was purposely not done. It is to be noted that Fax Exh. 57, FIR Exh. 56 and specimen thumb impression of the

prosecutrix were sent to the finger print expert. The report of the finger print expert is marked as Exhibit 445-B which is inconclusive as far as the finger print on Fax Exh. 57 is concerned.

63 Mr.Venegavkar, per contra, has submitted that this document i.e. Fax Ex. 57 was never sent by the prosecutrix and it was never relied upon by the prosecution and in fact, the prosecutrix has categorically denied it. He submitted that she is an illiterate woman. She has given her FIR (Exh. 56) on 4.3.2002. On 4.3.2002 and 5.3.2002 the prosecutrix was in Limkheda police station. The prosecutrix was sent for medical examination to CHC Limkheda on 5.3.2002. Then she was sent to Godhra Relief Camp on 5.3.2002. On 6.3.2002, her statement Exh. 277 was recorded by PW 23 Govindbhai G. Patel, Mamlatdar (Executive Magistrate), wherein she has specifically mentioned that a group of 20 - 25 persons attacked her and her group. She has given the names of 12 accused persons therein i.e. accused nos. 1 to

12. Fax (Exh. 57) was received on 7.3.2002 at 5.56 p.m. in the office of District Magistrate, Dahod by DW 10 Mr. Shamjibhai Kunjadia who was P.A. to District Magistrate Dahod. In this Fax, the names of the persons who raped the prosecutrix is mentioned as accused nos. 2, 4, 5 and 6. Mr. Venegavkar submitted that there was no opportunity for the prosecutrix to send this fax, hence, the prosecutrix cannot be the author of Fax. Exh. 57.

64 The incident occurred on 3.3.2002. After the incident, the prosecutrix climbed up the hill and hid there till the next morning. On the next morning, she came down from the hill where she met DW 2 Vanrajsingh Dhingra. The evidence of DW 2 Vanrajsingh Dhingra shows that he met the prosecutrix on 4.3.2002 and thereafter he took her to Limkheda police station. She was in Limkheda police station on 4.3.2002. The evidence of PW 35 Ranjeetsingh shows that on 4.3.2003, the prosecutrix stayed overnight at the police station. On 5.3.2002 the prosecutrix was sent to CHC

Limkheda (Community Health Centre Limkheda). She was accompanied by DW 7 Ushaben who was the police constable who took the prosecutrix to CHC Limkheda. This is clear from the evidence of DW 7 Ushaben. Ushaben has stated that CHC Limkheda was at a distance of about 200 feet from the police station. Ushaben has specifically stated that when she and the prosecutrix were walking, nothing happened on the way. Ushaben has stated that they were at CHC Limkheda for 1½ hour. Ushaben has stated that she was with the prosecutrix at CHC Limkheda. Thereafter, they returned to Limkheda police station. Thus, it is seen that on 4.3.2002 and 5.3.2002 the prosecutrix had no opportunity to prepare the Fax (Exh.57) and thereafter send to District Magistrate Dahod. Thereafter, the prosecutrix was sent from Limkheda police station to Godhra Relief Camp at Godhra. She was in Godhra Relief Camp on 6<sup>th</sup> and 7<sup>th</sup> March, 2002. On 6.3.2002 the prosecutrix met District Magistrate Godhra (PW 18) Jayanti Ravi and PW 23 Mamlatdar / Executive Magistrate Govindbhai Patel in Godhra Relief Camp. PW 23 Govindbhai

recorded the statement of the prosecutrix on the say of PW 18 Jayanti Ravi. This statement is at Exh. 277. In this statement, the prosecutrix has implicated accused nos.1 to 12. The evidence of PW 17 Dr. Katti shows that on 7.3.2002 at about 6.45 p.m. the prosecutrix was brought to the hospital. Exh. 138-A which are the medical case papers relating to the prosecutrix, show that she was examined on 7.3.2002 around 7.00 p.m. The prosecutrix gave history to PW 17 Dr. Katti that she was raped by accused nos. 1 to 3. This is seen from the case papers Exh. 138A & 143. Thus, it is not possible that on the very same day at 5.56 p.m. the prosecutrix would send the Fax (Exh.57) giving entirely different story. The history which is reflected in Exhibits 138-A and Exh. 143 shows that accused nos.1 to 3 raped the prosecutrix. It is seen that the Fax (Exh.57) is in English. The Fax (Exh.57) is a neatly typed document. The prosecutrix is an illiterate villager. Moreover, the prosecutrix was penniless which is seen from the fact that she was stripped naked after the incident. Thereafter she found one

petticoat nearby her. She wore the said petticoat as she had no clothes on her person. This shows that she had no money with her, hence, it would not have been possible for the prosecutrix to get her statement typed and then sent by Fax to District Magistrate Dahod. From the sequence of events, it is clear that the prosecutrix had no opportunity till the evening of 7.3.2002 to prepare and send the Fax, hence, it would not have been possible for her to send this Fax that too in English to the District Magistrate Dahod on 7.3.2002.

65 The evidence of PW 72 I.O. K.N. Sinha shows that despite his best efforts he could not get the original Fax (Exh.57). There is only thumb impression affixed to the Fax (Exh. 57) which as per the Expert's opinion, was not proved to be that of the prosecutrix as it was blurred. Thus, it is seen that on 4<sup>th</sup> and 5<sup>th</sup> she was at Limkheda police station. On 5<sup>th</sup> she was taken from Limkheda police station to Godhra Relief Camp. On 6<sup>th</sup> her statement (Exh.277) was recorded by PW 23 Govindbhai. This shows that she hardly had any time to prepare this Fax (Exh.57) or any opportunity to do so. On

7.3.2002 the prosecutrix was in Godhra Relief Camp. It was not possible for her to prepare the Fax and send it to District Magistrate Dahod by 5.56 p.m. of 7.3.2002. Moreover, it is hardly possible that the prosecutrix within a span of about one hour would give entirely different story before PW 17 Dr. Katti and in the Fax Exh. 57. Because, in the Fax, it is stated that the prosecutrix was raped by accused nos.2, 4, 5 & 6. Dr.Katti has specifically stated that the prosecutrix was brought to the hospital on 7.3.2002 at 6.45 p.m. and she narrated to her history of rape by accused nos. 1 to 3. Dr. Katti has not been shaken on this aspect in the cross examination. Thus it is not possible that the prosecutrix would give two absolutely different versions in a span of less than one hour. This also shows that the Fax was not sent by her. Moreover, there is no witness who states that the Fax Exh. 57 was sent by the prosecutrix except the defence witness DW 10 Shamjibhai Kunjadia who states that one Fax was received on 7.3.2002 at 5.56 p.m. He has no personal knowledge about who actually sent this fax.

66 Fax (Exh. 57) dated 7.3.2002, shows that it was addressed to the District Magistrate and Collector, Dahod. This fax was not relied on by the prosecution but it was brought on record by the defence in the cross-examination of the prosecutrix. She has denied the authorship of the said fax and also refuted that she was the sender of the said Fax. However, this Fax was in the police record as a copy of this Fax was sent by the Collector, Dahod to S.P.Dahod. DW 10 Mr. Shamjibhai Kunjadia i.e., P.A. to Collector, Dahod, has stated that he has received fax at 5.56 pm on 7.3.2002. Then, by letter dated 8.3.2002 (Exh.446 colly), that fax was forwarded to S.P., Dahod by District Magistrate, Dahod. Thereafter one R.V. Wankhede, P.I., CBI by letter dated 16.2.2004 (Exh. 447) asked for the said fax. The said fax was sent for the opinion of the CFSL regarding thumb impression of the prosecutrix appearing at the bottom of the Fax. Exhibit 445B is the inconclusive report of CFSL dated 19.4.2004, wherein it was opined that the fingerprint is blurred and unfit for comparison, hence, it was inconclusive. Exhibit 446

collectively is a letter dated 8.3.2002 sent by Dist. Magistrate, Dahod to police SP, Dahod and along with that, he sent a copy of the Fax. Exhibit 447 is a letter dated 16.2.2004. It was written by Mr.Wankhede, PI, CBI, to the District Magistrate, Dahod, Gujarat. A copy of the Fax message dated 7.3.2002 purportedly received from the prosecutrix addressed to the DM / Collector, Dahod and so also letter dated 8.3.2002 addressed to the SP, Dahod along with the letter dated 1.5.2002 written by Dr.Amarjeet Singh, IAS, Commissioner, which is marked at Exh. 446A was asked to be handed over to the CBI for fresh investigation and pursuant to that, a copy of Fax was sent to CBI. Thus, there is no merit in the submission that the original of Fax Exh. 57 was purposely not collected. The evidence shows that genuine efforts were made by CBI to get the Fax Exh. 57.

67           The contents of Exhibit 57 are different than the other statements of the prosecutrix dated 4.3.2002 (FIR Exh. 56) and statement dated 6.3.2002 (Exhibit 277) recorded by PW 23 Mr. Patel, Mamlatdar / Executive Magistrate on

directions of PW 18 District Magistrate Jayanti Ravi. Though the prosecutrix has admitted the fact of giving of complaint (exhibit 56) to Limkheda police station and has admitted her thumb impression thereon, she has specifically stated before the Court that whatever she has narrated to the police including the disclosure of the names of the accused as perpetrators of crime, nothing was taken down but major part of what she told was suppressed and some false statements were inserted. FIR Exh. 56 was recorded on 4.3.2002. Thereafter, her statement Exh. 277 was recorded on 6.3.2002 by non-police person i.e., Mamlatdar PW 23 Mr.Patel at the instance of the Collector & District Magistrate Jayanti Ravi (PW18) and thereafter this Fax (Exhibit 57) in the name of the prosecutrix was prepared. It is advantageous for the defence to fix the authorship of the FIR and the Fax on the prosecutrix because of the variance in the contents of these documents. The statement dated 6.3.2002 (Exh. 277) is more proximate to the date of the offence i.e., 3.3.2002 than Fax Exh. 57 dated 7.3.2002.

68 It is to be noted that this fax dated 7.3.2002 was not addressed to the police at Godhra but it was addressed to the District Magistrate and Collector, Dahod District. In Writ Petition, she has mentioned that she “filed FIR on 7.3.2002 at Godhra police station” and a copy is annexed therewith. On 7.3.2002, her statement in fact was recorded by Godhra police station i.e., by PW 42 Shivaji Pawar. In view of FIR Exh. 56, her said statement dated 7.3.2002 recorded by PW 42 cannot be treated as FIR but can only be a supplementary statement recorded under section 161 of the Code of Criminal Procedure but not under section 154 of the Code of Criminal Procedure as investigation had started on 5.3.2002. The contradictions and omissions in the supplementary statement dated 7.3.2002 recorded by PW 42 are proved and taken on record in the evidence of the prosecutrix and PW 42 which are collectively marked at Exhibit 232. As stated earlier, the prosecutrix in her writ petition, has not stated anywhere that she had sent a Fax. It is to be noted that her writ petition is in English. It was preferred through a social

worker working for human rights. A person who signs or puts the thumb impression below the contents is presumed to be the author of the contents, however, it is always subject to rebuttal if contrary facts of authorship are brought on record. The prosecutrix was illiterate. She used to put her thumb impression. The manner in which Fax Exhibit 57 is written is not her expression. The prosecutrix is definitely not the author of the said Fax. Though it is true that the names of the rapists appearing in the Fax (Exhibit 57) are of accused Nos.2, 4, 5 and 6, the prosecutrix has maintained her stand throughout that she was raped by accused Nos.1, 2 and 3. A question was put to her in the cross-examination that whether she was raped by accused Nos.4, 5 & 6, she refused the suggestion and stuck to the three names consistently of accused Nos.1, 2 and 3 as the persons, who raped her. So, though reference of statement dated 7.3.2002 is made in Writ Petition Exh. 61 it can be seen that the prosecutrix was not referring to the Fax Exh. 57 dated 7.3.2002 though its copy was annexed to the writ petition but she was referring

to statement dated 7.3.2002 recorded by PW 42 Pawar who was attached to Godhra Police Station. Therefore, we consider it as a fax which might have been sent by some well wisher of the prosecutrix or a human rights activist, who was confused about some names and therefore, wrong names of the rapists and other incorrect details were possibly mentioned in Fax Exh. 57.

### **EXHIBIT-61**

69 Exhibit 61 is a Writ petition filed by the prosecutrix before the Supreme Court. The prosecutrix being illiterate, the Writ Petition was filed by some activist on her behalf. At this stage, we would like to deal with the submissions of Mr.Ponda that many activists, social workers were involved in this case and they tutored the prosecutrix and hence, the accused were falsely implicated at the instance of those social workers. Mr. Ponda relied on paragraphs 170 to 180 of the evidence of the prosecutrix and argued that the prosecutrix was tutored by many persons. Many social workers met her in the Godhra Relief camp and thereafter

she came with this concocted version and has falsely implicated the accused. Specific questions were asked about Farha and Umaben who attended the press conference and Advocate Sheela Bhat, Malini Ghosh and NGO persons Muktabai and they were the persons who pushed her to lodge the complaint.

70 Questions in respect of the social worker Lateefaben who admittedly met her at Godhra Relief Camp, were put to her. Thereafter, the names of one Huma Khan and Farha Naqvi are also put to the prosecutrix. Farha Naqvi was present when the prosecutrix was taken to show the spot of offence on 13.3.2004. The prosecutrix has admitted that she was contacted by members of the human rights commission. The involvement of the social workers or NGOs in such matters is obvious and it cannot always be looked with jaundiced eyes. It is true that occasionally, they are over-enthusiastic and witnesses are encouraged to state exaggerated or false statements and tender evidence

accordingly. However, it is also true that these social workers sometimes are responsible to unearth the suppressed material and do a good job towards justice system. Thus, mere presence and active participation to certain extent of these social workers in the investigation cannot make the evidence of the witnesses doubtful. The prosecutrix was asked about many social workers and leaders, however, she has flatly denied that she was tutored by these persons. In some paras, suggestions were given to her that she had received compensation from Government for making such complaint and for being sexually assaulted, she has received compensation from Gujarat State. She has specifically denied such suggestions. She made statement that compensation is to be given to the victim of sexual assault, however she has not received any amount. She has admitted that she was approached by National Human Rights Commission at Godhra. Thus, Exhibit 61, the writ petition, must have been filed through some activists and Fax Exhibit 57 was annexed to that. However, we cannot say that it is

the same annexure i.e., statement dated 7.3.2002 which was relied upon by the prosecutrix. This statement dated 7.3.2002 is different from Fax Exh. 57. Statement of the prosecutrix dated 7.3.2002 was recorded by Godhra Police which is part of Exh. 232 colly. and which is recorded by PW 42 Pawar. The prosecutrix has made a reference to this statement and not to Fax Exh. 57 in her Writ Petition before the Supreme Court. Moreover, a petitioner relies on the documents to point out positive and negative facts also, to show that how a document supports him or also to show that a document is false to discredit his or her case and, therefore, it cannot be held that though Fax Exhibit 57 was annexed to Writ Petition Exhibit 61, the prosecutrix has accepted authorship of Exh. 57 and also the contents therein. In view of the evidence on record, we are of the opinion that the Fax (Exh. 57) was not sent by the prosecutrix.

**SCENE OF OFFENCE:**

71 Mr. Ponda then submitted that according to the

prosecutrix the incident took place on kachha road leading to Panivel whereas the incident actually took place in a ravine which was not accessible by vehicles, which proves that the entire story of the prosecutrix that about 25 persons came in two vehicles and thereafter attacked them is false. Thus, on the point of scene of offence, the learned counsel Mr.Ponda has argued that the scene of offence is ravine which is 2 kms. away from kachha road leading to Panivel and the kachha road itself is not the place where the actual incident had allegedly occurred. Mr. Ponda submitted that the bodies were found buried in the ravine hence, the incident took place in the ravine. He further submitted that it has come on record that no vehicle can reach the ravine hence, the entire prosecution case is false.

72           The learned counsel Mr. Ponda further submitted that PW 13 Mukeshbhai Kalubhai Harijan who dug the pits to bury the dead bodies and PW 15 Baria Ramsingh Nayaka, panch to Inquest Panchnama Exh.123 were examined and

they have stated that the distance between the kachha road and ravine was 2 kms. Mr.Ponda has relied on the evidence of PW 13 Mukeshbhai, who dug the pit for the burial of dead bodies, who gave admission that from kachha road, towards the hill, the entire team walked about 2 kms, where the bodies were lying. Thus, Mr. Ponda tried to knock out the evidence of the prosecutrix.

73 The learned counsel Mr. Ponda further argued that on 10<sup>th</sup> January, 2004 the scene of offence panchanama was drawn by CBI which is at Exh. 352 and 352A. Mr. Ponda pointed out that in this panchnama spot shown is ravine. Mr. Ponda drew our attention to spot panchanama which was also drawn by CBI on 13<sup>th</sup> March, 2004 which is marked at Exhibit 131. This panchnama was drawn after the prosecutrix showed the spot. Mr. Ponda submitted in both these panchanamas, spot shown is different. Thus, evidence of the prosecutrix and the spot shown in spot panchanama 124 drawn by Limkheda Police Station and Exh. 352 & 352A did

not match, hence, the prosecutrix was not speaking the truth.

74 It is to be noted that spot mentioned in spot panchnama Exh. 124 drawn by Limkheda police is not the spot of offence according to the prosecution or the prosecutrix. So also spot shown in panchnama Exh. 352 and 352A is not the actual spot of incident. It is noticed that the panchnama Exh. 352 & 352A is of the spot where the dead bodies were lying and were photographed by PW 10 Soni. According to the prosecution and the prosecutrix the spot of offence is not ravine but Kachha road leading to Panivel. Till 4<sup>th</sup> March, 2002 the police did not know about the incident and where it had taken place. Surprisingly, though the prosecutrix was available in Limkheda Police Station itself on 4.3.2002 and 5.3.2002, the police at Limkheda did not take her to the spot, to identify the correct spot. This also speaks volumes about the tainted investigation. As far as panchnamas Exh. 352 and 352A drawn by CBI is concerned it is of the spot where dead bodies

were seen lying. It does not necessarily mean that the incident took place at that spot.

75 Mr.Venegavkar, learned Prosecutor for CBI has submitted that prosecution has tendered sufficient evidence to prove that the spot of offence was near kachha road and not the ravine and there is no confusion on the point of spot of offence. He submitted that the evidence of the prosecutrix is a direct evidence, which is corroborated by the documentary evidence. The fact of injuries on the prosecutrix itself is an inbuilt assurance of the occurrence of the incident. Mr. Venegavkar drew our attention to the evidence of PW 17 Dr. Katti who has examined the prosecutrix on 7.3.2002. Dr. Katti noticed injuries on the hand, back and breast of the prosecutrix. Dr. Katti has specifically mentioned about scab formation on the injuries and that injuries found on the prosecutrix were 4 to 5 days old. Mr. Venegavkar relied on two case law on the point of appreciation of evidence of an injured witness.

- ***Vishnu vs. State of Rajasthan***, reported in **2009 (10) SCC 477**.
- ***Abdul Sayeed vs. State of Madhya Pradesh*** reported in **2010 (10) SCC 259**.

In ***Vishnu***, the Supreme Court has observed that when a person receives injuries in the course of occurrence, there can be hardly any doubt regarding his presence at the spot. Further, injured witnesses would not spare the real assailants and falsely involve innocent persons.

In ***Abdul Sayeed***, the Supreme Court in relation to injured witness observed thus:-

" 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 in-built 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."

76 Mr. Venegavkar submitted that the defence has relied only on the circumstantial evidence for shifting place of

occurrence from one spot to the other spot i.e. from kachha road to ravine. Apart from the evidence of the prosecutrix, Mr. Venegavkar relied on the evidence of PW 19 Firoz Abdul Satar Ghachi, who has stated that at the time of recording of FIR of the prosecutrix on 4.3.2002, he was present at the police station and he had heard whatever the prosecutrix has stated and she stated that the offence had taken place at kachha road leading to Panivela. He also relied on the evidence of Mamlatdar (Executive Magistrate) PW 23 Mr. Govindbhai Patel, who has recorded the statement of the prosecutrix (Exhibit 277) on 6<sup>th</sup> March, 2002. He pointed out that in the statement Exhibit 277 she has mentioned about kachha road. He relied on the medical case papers of the prosecutrix Exhibit 143 which is prepared by PW 17 Dr. Rohini Katti. In the history, the doctor has mentioned that the incident has taken place at Panivel. The learned Prosecutor further submitted that the dead bodies were lying at Kottar, i.e., ravine and they were not found at kachha road, because they were shifted from kachha road or spot of occurrence to

Kottar. He submitted that the police at Limkheda had knowledge of such incident of assault prior to lodging of FIR of the prosecutrix at 10.45 a.m. on 4.3.2002. He relied on the evidence of PW 8 Saddam who has stated that on 3<sup>rd</sup> March, 2002 he was assaulted and became unconscious & when he regained consciousness, he saw a boy of 4 years crying there. Then they both started walking and one gentleman came and took them to Limkheda police station on the same day which means 3.3.2002. He further argued that the fact that who had shifted and when the dead bodies were shifted from one spot to other is entirely within the knowledge of accused nos. 1 to 12 & or accused nos. 13, 14 & 16 i.e. Narpatsingh, Saiyed and Ramsingh, who were then attached to Limkheda Police Station and were investigating the offence. He submitted that prosecution relies on section 106 of the Evidence Act that the fact of shifting of bodies by whom and when is within the special knowledge of accused nos.1 to 14 and 16 and therefore, as the prosecution has proved that murders have taken place, then burden is on

these accused to show about shifting of the dead bodies. He relied on the following judgments of the Supreme Court:

**(i) *Balram Prasad Agarwal vs. State of Bihar & Ors.*, reported in *AIR 1997 SC 1830*.**

**(ii) *State of Punjab vs. Karnail Singh*, reported in *2003(11) SCC 271*.**

In ***Balram Prasad Agarwal (supra)***, the deceased had died by jumping in the well and death was due to drowning. On that night, only the victim and accused were in the house and, therefore, the Supreme Court held that the burden is on the prosecution to prove the case beyond reasonable doubt. But once the prosecution has proved that accused were guilty of persistent conduct of cruelty qua deceased, then the burden shifts on the accused whether there is a personal knowledge in respect of what happened on that night. The decision being entirely different on facts than the present case, it cannot be made applicable to this case. However, fact remains that the evidence of the prosecutrix shows that accused nos. 1 to 12 were part of the mob who killed her

relatives and admittedly accused no.13, 14 & 16 were present at time of inquest and spot panchnama Exh. 123 & 124. In such case, it would be for them to explain how the bodies reached the ravine. In the case of **Karnail Singh**, the legality of the acquittal of Karnail Singh was questioned before the Supreme Court. While dealing with this, the Hon'ble Supreme Court set aside the judgment of acquittal and observed that the prosecution is not required to meet any and every hypothesis put forward by the accused.

77 At the outset, it is to be stated that the spot panchanama at Exhibit 124 drawn by Limkheda Police Station was not produced by the prosecution but is brought on record by the defence. On the point of the spot of incident, we consider the evidence of the prosecutrix. Her evidence is direct evidence. She along with her relatives left Randhikpur on 28.2.2002 and travelled to different places i.e., village Chundadi and Kuwajer on the same day. They stayed that night at Kuwajer. Shamim, as per the evidence of the

prosecutrix, delivered a baby girl at Kuwajer and then, on 1.3.2002 they left Kuwajer and went to village Khudra on foot. She along with others, stayed at village Khudra in the house of PW 20 Nayak for two days. On 3.3.2002, they moved from Khudra to go to village Sarjumi and when they were proceeding via Chapparwad, they took one kachha road leading to village Panivel. She has stated that kachha road was running through agricultural fields on one side and on the other side there was a jungle and hillocks. After walking a certain distance, two vehicles came from village Chapparwad side and the incident took place. Naturally, the dead bodies should have been found or ought to have been found on kachha road leading to Panivel, however, as per the case of the prosecution, the dead bodies were not found on kachha road but 7 bodies were found in the ravine which is nearly 2 kms. away from kachha road. Two panchanamas i.e. inquest panchanama at Exhibit 123 and spot panchanama at Exhibit 124 disclose the place where the bodies were lying was not kachha road but a ravine. On the basis of these

discrepancies, the learned Counsel for the defence made his emphatic submissions that the spot of offence which is brought on record by the prosecution as kachha road, is false version given by the prosecutrix. Mr. Ponda pointed out that the evidence shows that the ravine (Kottar) was not accessible by vehicle so the case of the prosecutrix of the assailants coming in two vehicles cannot be accepted. These submissions of the learned Counsel are not convincing as we assessed the entire evidence of the relevant witnesses and the documents. In this case, the texture of evidence is different due to the acts of omission by the Investigating Officers who were subsequently made accused which speaks in volumes about the nature of the case and the investigation and therefore, to be appreciated in proper perspective.

78           The prosecutrix gave information to Limkheda police station on 4.3.2002. The time of the FIR is recorded as 10.45 a.m. Thus, the recording of the FIR could have taken at the most 1 hour and thus, at around 12 noon the police of

Limkheda police station, were expected to take action. It was a case of murder and rape which was reported to the police station by the prosecutrix (Exhibit 56), yet, the police did not draw spot panchanama or inquest panchnama on 4.3.2002. However, they went to the spot on the same day and took photographs of the dead bodies with the help of PW 28 Bhavinkumar. He turned hostile. On 5.3.2002, the police went to the spot at 9.45 a.m. where the corpses were lying and inquest panchanama (Exh. 123) was scribed by PW 34 Amrutsingh Khant for which PW 15 Ramsingh Baria was panch. This panchnama Exh. 123 was scribed by PW 34 on the dictation of accused nos. 13 and 14 and it was signed by accused No.13 Narpatsingh Ranchodbhai Patel and accused No.14 Idris Abdul Saiyed. PW 10 Rameshchandra Soni who went with the police on 5.3.2002 took photographs of the dead bodies. PW 10 turned hostile. The panchanama was made at the spot at Panivel Kesharpur jungle where corpses were found lying. PW 34 Amrutsingh Khant has stated that photographs of the corpses were not taken, however, the said

witness PW 34 Khant was cross-examined as he did not further support the prosecution. However, the evidence of PW 34 shows that he was a police constable and he was on duty from 28<sup>th</sup> February, 2002 till 4<sup>th</sup> March, 2002. He has stated that corpses of 4 ladies, one girl and two boys, i.e., total 7 corpses were found. PW 35 Ranjeetsingh Patel also went to Kesharpur jungle along with accused nos.13, 14 & 16 and PW 34 and they found 7 corpses i.e., 4 female and 3 children, who were aged 14, 10 and 7 years. It is the prosecution case that the 7 dead bodies were of Haleema i.e. mother of the prosecutrix, Munni- sister of the prosecutrix, Sugra - aunt of the prosecutrix, Amina - aunt of the prosecutrix, Shamim - cousin of the prosecutrix and Aslam and Irfan who were brothers of the prosecutrix which is not disputed by defence. PW 15 Baria has signed inquest panchanama Exh.123 and spot panchanama at Exh.124. These two panchanamas were drawn on 5.3.2002. PW 15 Baria did not support the prosecution on certain points and therefore, he was cross-examined by the prosecution. He admitted that Exh.123 was

inquest panchanama of the 7 corpses. However, the spot panchnama Exh. 124 drawn by Limkheda police was not brought on record by the prosecution. The spot panchnama Exhibit 124 is brought on record by the defence in the cross-examination of PW 15 Baria who has admitted the drawing of the spot panchnama on 5.3.2002 between 1.00 p.m. to 2.00 p.m. This panchnama is of the spot where the bodies were lying. In Exh.124 i.e. spot panchnama description of the mango trees, hillocks and other trees is mentioned. Neither of the two documents i.e., Exh. 123 or Exh. 124 say a word about kachha road leading to Panivel. Thus, the spot of kachha road is completely disconnected from the place where the corpses were found. After going through these documents and the evidence, mainly of PW 15 Baria and PW 34 Khant, who turned hostile, the main question which arose in our mind is why the prosecutrix was not taken to the spot to show the spot of the offence on 4<sup>th</sup> or 5<sup>th</sup> of March, 2002?. It was very logical and obvious for the police of Limkheda police station, to take the complainant i.e. prosecutrix to

show the spot of offence, where the assault had taken place as she was an eye witness. The prosecutrix was very much available to the police as she stayed at Limkheda police station from 10.45 a.m. on 4.3.2002 till 5.3.2002. Mr.Venegavkar has rightly pointed out that in spot panchanama Exhibit 124 name of one Mayurbhai Dhirsing Baria is mentioned, that he showed the place of occurrence. We fail to understand who was this Mayurbhai Baria and why he showed the place. However, the prosecutrix was not taken to the spot because the police did not want her to show the right spot. Though police accused 13, 14 & 16 visited the spot on the day of recording the FIR on 4.3.2002 along with photographer, the question remains unanswered as to why they did not draw the spot panchanama on the same day. The explanation coming forward from the defence that it was night time and therefore they could not draw the spot panchanama, is lame and unsatisfactory. The photographs of the dead bodies were taken on 4.3.2002. The police did not go to the spot on 4.3.2002 at night. Therefore, when it was

possible for them to take photographs what prevented the Investigating Officer to draw the scene of offence panchanama on that day?

79 It was submitted on behalf of the defence that the police wanted to take the order of Magistrate to carry out inquest panchanama and therefore on 5.3.2002 morning, they obtained orders from the Magistrate marked at Exhibit 244, granting permission to carry out panchanama and therefore, they did not draw the inquest panchanama at Exhibit 123 on 4.3.2002. This explanation is also not satisfactory. It is the duty of the police to carry out the investigation when cognizable offence like murder is registered. Irrespective of the permission of the Magistrate, a spot panchanama is drawn routinely as it is an essential part of the investigation of such type of offence.

80 The spot of offence was changed by the police officers of Limkheda from Kachha road to ravine. In this connection we would like to refer to the evidence of PW 56

Abhijeet Rudra, who is a forensic expert. In the evidence of PW 56 Abhijit Rudra it is stated that the bodies found on 5<sup>th</sup> March were at a different place than the place of offence claimed by witnesses. In paragraph 55 PW 56 Mr. Rudra has stated that in photograph A5 which is the photograph of a young girl, the front of the body appeared to be partially wet and the clothes appeared to be partially wet. This is not consistent with the surrounding area which is dry. Mr. Rudra in paragraph 60 has stated that judging from the condition of the bodies seen in the photographs Set-A & B and the injuries recorded in the post-mortem examination reports, the spot where the photographs were taken, would be unlikely to be the spot of actual violence. In photographs A1 to A4 reddish stains were seen running downwards from left corner of mouth and left nostril but no reddish material or stain is apparently visible on the ground. In photographs A1 to A4 and B1 staining and soiling of the body is visible, however, the 'Salwar' on the body is relatively clean. In photograph A5 the front of the body appeared partially wet and reddish

stains were visible over right side of face but no reddish stain or material is visible on the ground or over surrounding area. In photograph B2 the position of the arm does not match the current position of the body hence, the position having been changed after the onset of rigor mortis in some other position cannot be ruled out. In paragraph 62, Mr. Rudra has stated that in photographs A6 and A7 fracture of skull is seen. The brain matter is seen coming out but the surrounding area does not show any reddish material or brain tissue or any other stains. In paragraph 63 Mr. Rudra has stated that judging from the surrounding area, there does not appear to be any disturbance of the leaves and other material on the ground which are indicative of a struggle having taken place there. In paragraph 65 he has stated that there are no signs of struggle visible in the area around the body which is seen in photographs B8 and B9. Mr. Rudra has stated that all these photographs indicate that the possibility of the person having died at some other spot, cannot be ruled out. This observation of Mr. Rudra is in consonance with the

prosecution case. This shows that the incident took place elsewhere i.e. on kachha road and the bodies were thereafter thrown in the ravine.

81 We need to construe the incident on the basis of evidence of the prosecutrix and the documentary evidence of panchanamas Exhibits 131, 124 and 123. The panchanama of spot of offence (Exh. 131) recorded by CBI on 4.1.2004 is considered as correct. Arrival of the vehicles on the road was the starting point of assault, which was at kachha road. Naturally, the members in the group started running so all of them could not be caught and assaulted at one place but some were assaulted on the road, some towards the hillock or jungle. Thereafter, the bodies were shifted to the spot where 7 bodies were found. Other 7 bodies were not found at all. Thus, the incident has commenced at kachha road, however, it continued and the rape and killing had taken place at different places near the kachha road. Thus, the spot was not static. Similarly, it was definitely not 2 kms.

away i.e., at ravine where the spot of offence and inquest panchanamas (Exh. 124 and Exh. 123) were prepared on 5.3.2002 by the Limkheda police. Thus, omission of the Investigating Officer on three major counts i.e., firstly, not taking the prosecutrix to identify the dead bodies, secondly not taking the prosecutrix along with them to show the spot either on 4<sup>th</sup> or 5<sup>th</sup> March, 2002 and thirdly, not drawing the spot panchanama on the same day i.e., 4.3.2002, compel us to draw inference that the accused persons have changed the spot of offence & the bodies were shifted from kachha road to ravine to make the story of the prosecutrix unbelievable right from the point of spot of offence. It is also possible that the accused nos. 1 to 12 threw the bodies in the ravine, because it was a place which was not easily accessible due to which the offence they committed would not come to light. It is further pertinent to note that when the bodies were exhumed not a single skull was found. This shows that the accused did not want the bodies to be identified, hence, the heads may have been cut-off.

82 We would also like to consider the evidence of PW 72 Mr.K.N. Sinha, the Investigating Officer of the CBI. He took over the charge of the investigation on 1.1.2004 and thereafter, he found the prosecutrix on 9.1.2004. He has stated in his examination-in-chief that she was in an advanced stage of pregnancy and therefore, she was unable to come with the police to show the spot of offence. However, it appears that the police did not leave that issue there but PW 72 Mr.Sinha again contacted the prosecutrix and on 13.3.2004 along with the prosecutrix proceeded to the spot. He drew spot panchanama, which is marked at Exhibit 131 dated 13.3.2004. The photographs of the prosecutrix showing the place and the actual kachha road and the hill were taken which are marked at Exhibits 135 (1) to 135(15) collectively. A C.D. was also produced. We have seen those photographs. In the photographs, hillock is seen and the place the prosecutrix hid between the boulders on top of the hill is also seen. The photographs of hand-pump is

also produced by CBI which further corroborates her case. The prosecutrix in her FIR Exh. 56 had made a reference to hand-pump. Though Limkheda police did not bother to take any photographs of the hand-pump, the CBI took the effort to take photographs of the hand-pump. The prosecutrix has identified the same. If the prosecutrix had not been to this spot, she would not out of the blue, make a reference to hand-pump. She was not familiar with that area, for her to make a reference to the hand-pump or for that matter the kacha road.

83 It is to be noted that the statement of the prosecutrix was recorded by an independent authority i.e. PW 18 District Magistrate Jayanti Ravi on 6<sup>th</sup> March 2002. The said statement is at Exh. 277. The prosecutrix was thoroughly cross-examined on the point of shifting of spot of offence. However, her evidence is found consistent with her statement Exh. 277 on the point of spot of offence. Thus, we are convinced that the incident took place at the kachha road

leading to Panivel and not in the ravine as contended by Mr. Ponda.

**PHOTOGRAPHS & EXHUMATION:**

84 The photographs of the dead bodies taken on 4th and 5th March, 2002 and also by CBI in Jan / Feb. 2004 at the time of exhumation of the dead bodies is very valuable evidence tendered by the prosecution.

When the bodies were exhumed, the bones of 7 human bodies were found, however, while reading the evidence, it was shocking to note that the skull of none of the persons was found. So it appears that at some point the heads were cut off.

85 The learned Counsel Mr. Ponda has submitted that the learned trial Judge has erred in accepting and believing the photographs (Exhs. 59/1 to 59/17). These documents ought not to have been exhibited as they are not proved

properly. These are the photographs of seven dead bodies. He argued that though the prosecution has claimed that 14 persons were killed, only 7 bodies were found. Secondly, Saleha's body i.e., the daughter of the prosecutrix was not found. He argued that the prosecution has examined witnesses to prove the photographs and the postmortem notes and CA report. He pointed out that PW 10 Ramesh Chandra Soni was examined on the point of taking photographs on 5<sup>th</sup> March, 2002, however, he did not support the prosecution. Similarly, PW28 Bhavinkumar Patel, who according to the prosecution, took photographs on 4.3.2002, turned hostile. According to prosecution, PW 30 Vasudeo Laxmidas Pandit had developed the photographs & PW 32 Vinodbhai Prajapati is the one who lent the camera (article 3) to PW 28 to take out photographs, however, none of these witnesses supported the prosecution. Mr. Ponda pointed out that in the inquest panchanama, 7 bodies were found, out of which 5 were female and two were male i.e. 2 boys of 11 and 13 years of age. Out of 5 female bodies, the age of the

females were 42, 40, 35, 20 and 9 years. He pointed out panchanama which is marked as Exh 363 of the seizure of the photographs on 31.1.2004 wherein it is mentioned that the photographs of one lady of 40 years, one girl of 3 years, another girl of 10 years and three boys were taken. Mr. Ponda pointed out the letter dated 17.2.2004 (Exh 322) sent by Director of Central Bureau of Investigation to Forensic department for analysis of photographs and other articles with a questionnaire consisting 34 questions. It was further submitted that thereafter CA sent reply and the report to the questionnaire of CBI is marked Exh 324. In the said reply, in item 4, there is a reference to 10 photographs. He pointed out that the letter dated 27.2.2004 (Exh 428) was written by CBI to CA. The learned Counsel has argued that exhumation tallies with the post-mortem notes but it does not tally with seizure memo (Exh. 363) of photographs in which there is reference to body of a 3 year old girl.

86 Mr. Ponda argued that a photograph which is

claimed to be Saleha's (Exh 59/4) is in fact not of Saleha. This is supposed to be photograph A-10. He relied on chemical analyzer report (Volume 8 Page 2034) i.e Exh 324 H of forensic expert PW 56 Rudra that after analyzing photograph A-10, the Chemical Analyzer Expert opined that it does not appear to match any of the sets of bones which were found during exhumation. He pointed out that the chemical analyzer's opinion shows that the body of Saleha was not recovered during exhumation. Mr. Ponda submitted that in fact, Saleha was not killed in the incident, therefore, there is no body of Saleha. Her body was not amongst the 7 bodies and thus, the prosecution could not tender any evidence on the *corpus delicti* of Saleha, so the death of Saleha itself is not proved.

87 The prosecution examined PW 10 R.K. Soni to prove photographs Exhs. 59(1) to 59(8) and PW 28 Bhavin Patel was examined to prove photographs Exh. 59(9) to 59(17). The prosecution also examined other witnesses,

namely, PW 29 Balubhai Vohania, PW 30 Vasudev Pandit and PW 32 Vinodbhai Prajapati, but none of them supported the prosecution. So, neither the negatives nor the photographs were proved by the prosecution. PW 10 and PW 28 who had clicked the photographs took complete U-turn, and therefore the admissibility of these photographs was challenged by the defence.

88 Mr. Venegavkar argued that though the photographs 59/1 to 59/8 were taken by PW 28 Bhavin Patel on 4<sup>th</sup> March, 2002 and photographs 59/9 to 59/17 were taken by PW 10 Ramesh Chandra Soni on 5<sup>th</sup> March, 2002, these witnesses did not support and turned hostile. The other witnesses, i.e., PW 29 Babubhai Vohaniya, who was present at the time of taking photographs, PW 30 Vasudev Pandit who was running "Scanner Colour Lab" in Godhra and developed the photographs Exhs 59/1 to 59/17 in his lab and PW 32 Vinodbhai Prajapati who gave his camera (Article 3) to PW 28 Bhavin to click photographs & Camera Article 3

was seized from PW 32 Vinodbhai on 31<sup>st</sup> January, 2004 were relied upon by the prosecution for corroboration, however, they all turned hostile. He submitted that these photographs were taken on two dates i.e 4.3.2002 & 5.3.2002. Photographs Exhs 59/1 to 59/8 were seized by CBI Officer PW 68 Tariyal from PW 28 Bhavin Patel under seizure memo Exh 363 on 30<sup>th</sup> January, 2004 and photographs Exh. 59/9 to 59/17 were seized by CBI Investigating Officer PW 72 Sinha from PW 10 Soni on 7.1.2004 vide seizure memo Exh. 109. He submitted that so far as evidence of these witnesses i.e PW 10, 28, 29, 30 and 32 are concerned, they did not tell the truth before the Court in order to prove that photographs were in fact taken. The negatives were also produced by PW 10 which were seized vide seizure memo Exh 109 dated 7<sup>th</sup> January, 2004. Mr. Venegavkar pointed out that PW 10 Soni has admitted that he knows Scanner Colour Lab and he used to develop photos in scanner colour lab. Mr. Venegavkar further submitted that copies of 7 photographs of 7 bodies were handed over to accused nos. 19 and 20 who conducted

postmortem, which is marked at Exhs 411A to 417 A & B. He further submitted that PW 28 took 8 photographs on 4<sup>th</sup> March, 2002 and produced 10 negatives, they were seized from him and his signatures are seen on the photographs Exhs. 59/1 to 59/8 on the backside. PW 28 has admitted that he signed on the back of these photos.

89 Mr. Venegavkar, on the point of proof and admissibility of the photographs Exhs. 59/1 to 59/17 has submitted that it is not necessary for the documents like photographs to be proved through direct evidence but it can be proved through circumstantial evidence. Mr. Venegavkar submitted that production of photographs 59/1 to 59/17 produced before us itself show that they exist and the question is only about who clicked the photographs.

90 Mr. Venegavkar relied on cross-examination of PW 10 Soni and PW 28 Bhavin Patel. He submitted that the negatives and photographs were seized from PW 10 Soni and

PW 28 Bhavin Patel. He relied on the evidence of PW 52 Kalubhai Vohania, who recorded the statement of PW 10 and also on the evidence of PW 68, the police officer Mr. Tariyal, who recorded the statement of PW 28 Bhavin Patel. He argued that the police have prepared the memorandum of seizure of the negatives and the photographs which were seized from these two witnesses. Therefore, the prosecution has proved the photographs and are to be read and relied in the evidence.

91 Mr. Venegavkar relied on the case of **Rayappa Asari** reported in **1972 Cr.L.J. 1226**, in which one document (Exh P4) written by Rayappa was disputed on the point of its admissibility. At that time, the Supreme Court relied on Section 3 of the Evidence Act and held that it is not necessary that proof must be direct. The circumstances of the case and the contents of the document are to be considered the proof of document itself.

92 The prosecution has tendered many photographs besides the photographs of the dead bodies. Most of the photographs were taken in Jan/Feb. 2004 when CBI started investigation and visited the spot for exhumation and inspection. Those photographs are proved through the Investigating Officer and by producing negatives of the photographs. However, 17 photographs of the dead bodies taken on 4<sup>th</sup> and 5<sup>th</sup> March, 2002 which are marked at Exh. 59/1 to 59/17 are disputed on the ground of admissibility. The photographs which were taken on 4<sup>th</sup> March, 2002 are numbered as A and the photographs which were clicked on 5<sup>th</sup> March, 2002 are numbered as B. The total photographs and the identification of the bodies from the photographs is analyzed as follows:

<b>No. of photographs</b>	<b>Names of the persons</b>	<b>Exhibit No.</b>	<b>Photograph no.</b>
5	Haleema	324A (Coll.)	A-1 to A-4 & B-1
2	Munni 13 years old	324B (Coll.)	A-5 and B-2
3	Aslam 15 years old	324C (Coll.)	A-6, A-7 & B-3
3	Irfan 10 years old boy	324D	A-8 & B-4

1	Shamin 20 years old	324E	B-5
2	Sugra 35 years old female and aunt of the prosecutrix	324F	B-6 & B-7
2	3 year female Saleha	Appendix H	A-10

93 Reliance was placed by Mr. Ponda on a decision of the Supreme Court in **Kartar Singh Vs. State of Punjab** reported in **1994 SCC (3) 569** wherein the identification of the accused on the basis of photographs and the identification of the accused at the time of Test Identification Parade was concerned. It was held that such identification of the accused on the basis of the photograph is to be proved under proper procedure of Test Identification Parade prescribed under the law. However, in the present case, we are concerned with identification of the corpse, the contents in the photograph is the dead body, so the decision in the case of Kartar Singh is not applicable.

94 Let's advert to the law on the point of proof of document contemplated under sections 61 and 63 of the

Indian Evidence Act. Section 61 states about the proof of contents of the documents which can be proved either by primary or secondary evidence. Section 63 describes what is meant by secondary evidence and section 63 is necessarily to be read alongwith section 65 under which the instances wherein the secondary evidence relating to the documents can be tendered. A document generally can be proved through the author who writes the document or the person in whose presence the document is written or who knows the signature and hand-writing of the author. The contents of the document and truthfulness of the contents of the document are two aspects. The author of the document may be aware of the contents and also the truthfulness of the contents. A person, who knows or passed an order or who writes a letter is supposed to be the best and competent witness on the contents and truthfulness of those documents. However, there may be a case where the author of the document is aware only of the contents of the document but is not aware about the truthfulness of the contents of the document.

95 We rely on the landmark judgment of the Supreme Court in **Mobarik Ali Ahmed vs. State of Bombay** reported in **AIR 1957 SC 857**.

“....The proof of the genuineness of a document is proof of the authorship of the document and is proof of a fact like that of any other fact. The evidence relating thereto may be direct or circumstantial. It may consist of direct evidence of a person who saw the document being written or the signature being affixed. It may be proof of the handwriting of the contents, or of the signature, by one of the modes provided in ss. 45 and 47 of the Indian Evidence Act. It may also be proved by internal evidence afforded by the contents of the document. This last mode of proof by the contents may be of considerable value where the disputed document purports to be a link in a chain of correspondence, some links in which are proved to the satisfaction of the court. In such a situation the person who is the recipient of the document, be it either a letter or a telegram, would be in a reasonably good position both with reference to his prior knowledge of the writing or the signature of the alleged sender, limited though it may be, as also his knowledge of the subject matter of the chain of

correspondence, to speak to its authorship. In an appropriate case the court may also be in a position to judge whether the document constitutes a genuine link in the chain of correspondence and thus to determine its authorship. We are unable, therefore, to say that the approach adopted by the courts below in arriving at the conclusion that the letters are genuine is open to any serious legal objection. The question, if any, can only be as to the adequacy of the material on which the conclusion as to the genuineness of the letters is arrived at. That however is a matter which we cannot permit to be canvassed before us. A few of the letters said to have been received from the appellant, as stated above, do not bear his signatures. These were held to have been proved by the circumstantial evidence as pointed out and we see no objection thereto.”

**(Emphasis Added)**

Thus, in short, we say that when the document speaks for itself, then, the contents of the document itself is the proof of the document and that document is to be believed.

96           Though Mr. Ponda relied on **Mobarak Ali**, he submitted that the ratio relied on by Mr. Venegavkar in

the case of **Mobarik Ali Ahmed** cannot be attracted to the facts of the present case. The photographer and the other persons did not support the case of the prosecution and in view of the fact that as the photographers did not say that they took the photographs, the printout of the photographs are not admissible in the evidence. On this point, he relied on **Ziyauddin Bukhari Vs. Brijmohan R. Mehra** reported in **(1976) 2 SCC 17** and **Tukaram Vs. Manikrao** reported in **AIR 2010 SC 965**. He further relied on the reports of the forensic expert in respect of the photographs of Saleha which is on page No. 2034 of the paperbook and marked as Exh 324/H colly. He pointed out that the reports disclose that the body seen in the photographs purportedly of Saleha was not found during the exhumation. The learned counsel submitted that when the body of Saleha was not found at all, and the photographer has refused the fact of taking photographs, the prosecution has miserably failed to prove the photographs and therefore, these photographs cannot be read in evidence and relied upon.

97 In the case of Mubarik Ali (*supra*), the appellant was convicted under Section 420 r/w 34 of the IPC. In the said case, there was exchange of letters sent by the accused and the complainant from Karachi and Goa. The various telegrams relied upon by the prosecution were held to have been proved as legally admissible material as they were written by the appellant. However, it may be noted that in this case, the Supreme Court observed that a document can also be proved on the basis of circumstantial evidence.

98 In the case of **Ziyauddin Bukhari (*supra*)**, the Supreme Court held that tape-recorded speeches are also documents under Section 3 of the Evidence Act and it was further held that they did not stand on different footing than photographs. In the case of Ziyauddin, the judgment and order of the High Court of Bombay setting aside the election of the appellant Bukhari to the Maharashtra State Legislative Assembly was challenged. In

the said case, the evidence of tape recorded speeches and admissibility of the said speeches was the issue before the Supreme Court. The Supreme Court upheld the order of the High Court and dismissed the appeal. The Supreme Court referred and relied on the observations deduced by the High Court from the case of **R. Vs. Maksad Ali** reported in **(1965)**

**2 ALL E.R. 464.** It held thus:-

".....

(a) The voice of the person alleged to be speaking must be duly identified by the maker of the record or by others who knew it.

(b) Accuracy of what was actually recorded had to be proved by the maker of the record and satisfactory evidence, direct or circumstantial, had to be there so as to rule out possibilities of tampering with the record.

(c) The subject matter recorded had to be shown to be relevant according to rules of relevancy found in the Evidence Act."

99 We have gone through the decisions and the nature of the circumstances brought before the Court in

respect of the photographs and if tested on the yardstick of the three principles laid down in **Ziyauddin Bukhari's case**, then, the photographs are in fact very much admissible.

100 In the case of **Tukaram Vs. Manikrao (supra)**, the issue was again proof of tape recorded audio video cassettes. In the said case, the Supreme Court referred to the principles laid down in **Ziyauddin Bukhari's case** which we have already dealt with.

101 A person may write a report about the things which have taken place or whatever he has seen. Factually, he may be aware of the contents but he may not be aware of the truthfulness of the documents. A scribe who takes down the FIR falls in this category because he is aware of the contents but not the truthfulness of the contents. However, a Judge has to find out the truth and therefore, he has to accept only the truthful contents and discard the contents which are false in the process of scrutiny of evidence.

102 Thus, mere proof of hand-writing of a document is not a proof of all the contents or the facts stated in the document. A party who wants to prove the document, is required to lead evidence to that extent and apart from the authorship of the document. Under section 61, the original document can be presented before the Court through the author, who created the document and it can be proved. So, the contents of the document also can be proved by leading primary evidence. However, when primary evidence is not available, then, the document can be proved by tendering secondary evidence. When the contents of the document is the issue, then, it can be proved by admissible evidence i.e., through a person, who has a personal knowledge about the contents of the document or the facts therein, which should inspire confidence in the mind of a Judge about the truthfulness of the document or also by other means.

103 It is necessary for the document to pass the first

test of admissibility as contemplated under section 61, for its proof before getting tested for its genuineness of contents. If original document i.e primary evidence, is not available, then, the secondary evidence can be tendered under section 63 read with section 65 of the Evidence Act. As per section 63(2), copies can be made from original by mechanical processes which in themselves ensure the accuracy of the copy and copies compared with such copies.

Section 63 reads thus:

63. Secondary evidence.—Secondary evidence means and includes—

(1) ...

(2) copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies;

(3) ....

(4) ....

(5) oral accounts of the contents of a document given by some person who has himself seen it.

Illustrations

(a) ...

(b) ....

(c) ...

(d) Neither an oral account of a copy compared with the original, nor an oral account of a photograph or machine-copy of the original, is secondary evidence of the original.

104 In the present case, the documents are photographs. Under section 61, these photographs are required to be proved through a photographer who took the photographs and by producing the negatives and the printouts. When a letter is written or a contract is created, the idea, concept, decision, emotion or intention are communicated or actualised through the document. Thus, the basic fact which is to be proved is what was to be communicated or expressed. Evidence is a process of reproduction and collection. Thus, it is created, expressed, manifested or reproduced in the document. However, in the case of a photograph which is also a document, what is captured is not only intention or decision but, an object, expressing mood or showing a physical fact or status. It is a picture. That particular object is the original fact which exists or existed at the time when it was photographed. When a photograph of a cheque is taken and produced, then

the cheque is the original object and its photograph alongwith negative is to be considered as a secondary evidence; a photograph of a house is taken, then, the house is a primary fact or primary evidence and negatives or original printouts are in fact secondary evidence. Similar is the situation in the present case, as these are the photographs of the dead bodies of March, 2002 which cannot be produced before the Court. The description of the dead bodies is narrated through the witnesses or can be brought on record through inquest panchanama (Exh 123) which can be a circumstantial evidence to prove the existence of the object in the photographs. To bring the photographs of the dead bodies on record is the only best and available mode of evidence, which is adopted by the prosecution.

105 Thus, the photographer is a person, whose role in fact is like a scribe who writes FIR. If the photographer is not available or he does not support the prosecution, then, naturally, the negatives which is a primary evidence will not

come on record because production of the photographs is bound to go against the interest of the photographer. Under such circumstances, when the printouts i.e., photographs are produced, it is secondary evidence of the contents of the original, under section 63 r/w 65 of the Evidence Act and these photographs can be admitted. The original negatives if not brought on record, if it is not possible for a party to prove the original document, when it is out of reach due to satisfactory reasons, then, secondary evidence is admissible and can be tendered.

106 Thus, by production itself, the document can be admitted in evidence. In the present case, the witnesses PW 10 and PW 28 did not support the prosecution and did not admit that they took the photographs and therefore, we will discuss the evidence relating to photographs.

107 We have gone through the evidence of the 4 relevant witnesses i.e., PW 10 Soni, PW 28 Bhavin Patel, who

are on the point of taking photographs of the dead bodies on 5.3.2002 and 4.3.2002 respectively and PW 30 Vasudeo Pandit and PW 32 Vinodbhai Prajapati. We have also carefully read the evidence of PW 52 Vohaniya and PW 68 A.S. Tariyal, the police officers, who have recorded statements of PW 10 and 28 respectively. The learned Prosecutor for the CBI had cross-examined PW 10 and PW 28 at length and had contradicted both the witnesses on the basis of their respective statements recorded by the police officers. PW 10 Soni did not state and has refused that he took photographs (Exhs. 59/9 to 59/17) on 5.3.2002. PW 28 Bhavin Patel has also denied that he took photographs (Exhs. 59/1 to 59/8) on 4.3.2002. The omissions from their evidence are brought on record. PW 10 Soni has stated that his statements were recorded on 5.3.2002, 14.3.2003 and 23.9.2003. PW 10 has stated that he did not recollect whether his two statements were recorded on 14.3.2003 and 23.9.2003.

108 In 2003, the matter was investigated by the Godhra police and it was not transferred to the CBI. PW 52 Vohaniya who was a police officer from Godhra police has stated that he has recorded the portion marked A from statement dated 14.3.2003 of PW 10 Soni and also the portion marked A and B from the statements dated 23.9.2003 of PW 10 Soni. It shows that at the behest of Limkheda Police, Soni took photographs of 7 dead bodies including a small girl in Kesharpur jungle on 5.3.2002.

109 In the evidence of PW 28 Bhavin Patel, the prosecution has proved the omission through PW 68, Mr.Tariyal. The statement of PW 28 was recorded by CBI on 30.1.2004 and it is marked as Exh 365 through CBI Officer Mr.Tariyal. His entire statement dated 30.1.2004 recorded by CBI is taken on record by way of omission in the cross-examination and the said big portion is marked as B of Exh. 365. All these omissions in the evidence of PW 28 is a significant circumstance. These omissions show that on

4.3.2002, he was taken to Pannivel jungle to take out photographs of dead bodies of Muslims from Randhikpur. This clearly shows that the witnesses PW 10 and PW 28 were lying before the Court and tried to suppress the truth, though they went to the spot on respective dates and took the photographs.

110 We are aware that we cannot seriously take these omissions into consideration however, we can certainly take into consideration the seizure memo of the photographs dated 30.1.2004 which is marked Exh 363. The CBI Officer i.e PW 68 Tariyal has seized these photographs Exhs. 59/9 to 59/17 from PW 28 Bhavin Patel along with negatives under seizure memo Exh.363 dated 30.1.2004. Investigating Officer PW 72 Sinha seized from PW 10 Soni 9 photographs Exh. 59/1 to 59/8 of the dead bodies along with negatives under the memorandum of seizure dated 7.1.2004 marked Exh 109. There is also one more memorandum i.e of scene of crime dated 6.1.2004 (Exh 348) that is drawn by PW 52

Vohaniya in which PW 10 R.K. Soni professional photographer is seen as witness. In addition PW 68 Tariyal has stated that PW 10 R.K.Soni led them to where the bodies were found. If as per PW 10 Soni he had never been to the spot to photograph the dead bodies, how he could lead the police to the spot in the jungle.

111 The camera i.e., Article 3, which was used for the purpose of taking photographs was seized from PW 32 Vinodbhai under memorandum, which is marked Exh 366. In addition, there is evidence of two police officers i.e. PW 72 Investigating Officer and PW 68 Tariyal specifically stating that PW 10 Soni and PW 28 Bhavin handed over the photographs [Exh. 59(1) to 59(17)] alongwith negatives to them. We see no reason to disbelieve these two witnesses. Just because they are policemen that is no reason to discard their testimony.

112 In this connection, useful reference may be made

to a decision of the Supreme Court in the case of **State of Kerala Vs M.M. Mathew**, reported in **(1978) 4 SCC 65 : 1978 SCC (Cri) 503** wherein it has observed that prima facie public servants must be presumed to act honestly and conscientiously and their evidence has to be assessed on its intrinsic worth and cannot be discarded merely on the ground that being public servants, they are interested in the success of their case. Similar view was taken by the Supreme Court in **Dharmsingh Vs. State of Himachal Pradesh**, reported in **2003 Cri.L.J. 2914**.

113 In the case of **Modan Singh Vs. State of Rajasthan** reported in **(1978) 4 SCC 435 : 1979 SCC (Cri) 56**, the Supreme Court has observed that where the evidence of the investigating officer who recovered the material objects is convincing, the evidence need not be rejected on the ground that witnesses did not support the prosecution version. Similar view was expressed by the Supreme Court in the case of **Mohd. Aslam Vs. State of Maharashtra** reported in

**(2001) 9 SCC 362 : 2002 SCC (Cri) 1024.**

114 In relation to witness turning hostile, the Supreme Court in the case of **Anter Singh Vs. State of Rajasthan** reported in **(2004) 10 SCC 657 : 2005 SCC (Cri) 597** has observed that even if witness turned hostile, which happens very often in criminal cases, the evidence of the person who effected the recovery would not stand vitiated.

115 In the case of **Rameshbhai Mohanbhai Koli & Ors Vs State of Gujarat** reported in **(2011) 11 SCC 111**, the Supreme Court in paragraph 23 has observed thus:

" .....This Court in **State of U.P. Vs. Krishna Gopal & Anr.**, (1988) 4 SCC 302 has held that Courts of law have to judge the evidence before them by applying the well recognized test of basic human probabilities. Prima facie, public servants must be presumed to act honestly and conscientiously and their evidence has to be assessed on its intrinsic worth and cannot be discarded merely on the ground that being public servants they are interested in the success of their

case....."

116 In relation to the evidence of PW Nos. 10, 28, 30 and 32, Mr. Venegavkar placed reliance on the decision in the case of **State of U.P. Vs. Ramesh Prasad Misra and Anr.** reported in **AIR 1996 SC 2766.** In this case, the Supreme Court held that evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. A similar view has been reiterated by the Supreme Court in **Balu Sonba Shinde Vs. State of Maharashtra** reported in **(2002) 7 SCC 543**, **Gagan Kanojia & Anr. Vs State of Punjab** reported in **(2006) 13 SCC 516**; **Radha Mohan Singh @ Lal Saheb & Ors. Vs. State of U.P.** reported in **AIR 2006 SC 951**; **Sarvesh Naraiian Shukla Vs. Daroga Singh & Ors.** reported in **AIR 2008 SC 320** and **Subbu Singh Vs. State** reported in **(2009) 6 SCC 462.**

117 Mr. Venegavkar stated that it is the prosecution case that the photographs Exhs. 59/1 to 59/8 were taken by PW 28 and photographs Exhs. 59/9 to 59/17 were taken by PW 10 and these photographs were developed in Scanner Colour Lab run by PW 30 Vasudev Pandit. Mr. Venegavkar pointed out that PW 10 Soni has admitted that he knows Scanner Colour Lab and he used to develop photos there. Mr. Venegavkar further submitted that the photographs were developed in Lab of PW 30 Vasudeo is seen from the fact that the polythene of the negatives bore the words Scanner Colour Lab, Godhra on it. This is admitted by PW 28 Bhavinkumar though he may have turned hostile. It is to be noted that PW 30 Vasudeo had stated that he is running Scanner Colour Lab in Godhra and the polythene jackets of negatives (of photos Exhs. 59/1 to 59/8) belong to his colour lab. This is in paragraph 3 of his evidence. In paragraph 7, this witness had admitted that in Godhra, there is no other Colour Lab named Scanner Colour Lab. From this, an inference can definitely be drawn that the photographs were

developed in his lab.

118           The evidence of PW 28 Bhavin shows that he was present at the spot when the photographs were taken. This can be seen from the fact that in paragraph 8 of his evidence, he has stated that, "It is not true that I did not see blood lying at the place. It is not true that the policemen had brought petromax lantern at the said place." This shows that he was present on 5.3.2002. He is not a panch witness, in such circumstances, there was no occasion for him to remain present at a far away spot in the jungle on 5.3.2002 except for the fact that he had gone there to take out photographs. It is also pertinent to note that photographs Exh. 59/1 to 59/8 were seized by PW 68 CBI Officer Tariyal from PW 28 Bhavin Patel on 31.1.2004 vide seizure memo Exh. 363. PW 28 Bhavin has also admitted that his dated signatures are there at the back of the photos Exh. 59/1 to 59/8 and the seizure memo bears his signature. He has also stated that the seizure memo bears the signature of Vinodbhai Prajapati (PW

32) who is his father and his father was present when he signed on seizure memo. If he did not take out photographs Exh. 59/1 to 59/8 then in what circumstances, he came in possession of these photographs and negatives is not explained by him. The evidence of PW 68 Tariyal shows they were seized from PW 28. We see no reason to disbelieve the evidence of PW 68.

119 As far as PW 10 Soni is concerned, according to the prosecution, photographs Exh. 59/9 to 59/17 were clicked by him at the behest of Limkheda Police Station. Though, he has turned hostile, he has admitted that Limkheda Police Station used to call him for taking photos. At this stage, we would like to refer to the documentary evidence relied upon by Mr. Venegavkar i.e. a bill dated 14<sup>th</sup> March, 2002 (Exh. 292A) issued by PW 10 Soni of Rs.270/- for 18 copies of photographs and thereafter a letter Exh. 292 sent by P.I. Limkheda on 19<sup>th</sup> March, 2002 to the higher authority regarding payment against this bill. Mr. Venegavkar

submitted that this bill Exh. 292 shows that PW 10 had taken the photographs of corpses on 5.3.2002. These photographs were seized under the seizure memo on 7<sup>th</sup> January, 2004 by PW 72 Sinha. The investigating officer PW 72 Sinha has stated that Photographs Exh. 59/9 to 59/17 were seized from PW 10 Soni under seizure memo Exh. 109 dated 7.1.2004. PW 10 Soni has admitted his signature on the seizure memo Exh. 109. He has also admitted that his signature is there on the back of these photographs. The evidence of PW 72 Sinha shows that these photographs were seized from PW 10 Soni. Soni is a photographer and Limkheda Police Station used to call him to take photos. Soni had even issued a bill to Limkheda Police Station in respect of taking photographs. All these facts point out that he clicked the photographs. PW 10 has not explained in what circumstances he came in possession of these photographs and negatives. In any event, we see no reason to disbelieve the evidence of PW 72 Sinha who has stated that the said photographs Exh. 59/9 to 59/17 were seized from PW 10 Soni.

120 In paragraph 25 of her evidence, the prosecutrix has identified bodies in the photographs and stated that these bodies were of Haleema, 2 brothers of the prosecutrix, her sister Munni, aunt Sugra, Saleha (daughter) and Shamim (cousin of the prosecutrix). The incident has taken place on 3<sup>rd</sup> March, 2002 and bodies were buried on 5<sup>th</sup> March, 2002. Considering the evidence discussed above and the evidence of PW 68 Tariyal and PW 72 Sinha, we believe that some photographs were taken on 4<sup>th</sup> March, 2002 and some on 5<sup>th</sup> March, 2002. On the point of burial, we rely on the evidence of PW 73 Somabhai Chauhan, a panch to inquest panchanama Exh 123. He is the husband of PW 55 Kampaben, who was Sarpanch of Randhikpur. Somabhai has stated that on 5<sup>th</sup> March, 2002 the work of burial was done. PW 13 Mukeshbhai Harijan has dug the pit to bury bodies on 5<sup>th</sup> March, 2002 and PW 15 Baria Ramsingh Nayaka has supported the prosecution to certain extent on the point of inquest, as he is the second panch to inquest panchnama.

Baria has said that one old man who was present at the time of inquest on 5<sup>th</sup> March, 2002 has identified the dead body of a woman as Haleema.

**OTHER PHOTOGRAPHS:**

121 In the evidence, many photographs are brought on record. The main photographs i.e., 17 photographs marked at Exh 59/1 to 59/17 are the photographs of the dead bodies. Some of the other photographs are copies of these photographs. They are marked as Exh 324/a to 324/g. Similarly, Exh 411/a and 411/b to 417/a and 417/b are the copies of Exh 59.

122 There are four photographs marked exhibit 58/1 to 58/4. These are the photographs of the white colour jeep (article 2) bearing registration No.GJ-20-A-3123, which stands in the name of the wife of the accused No.12 Ramesh Rupabhai Chandana.

123 The other photographs Exh 135(1) to 135/15 were taken on 13.3.2004 when the prosecutrix showed the spot to CBI team.

124 Exh 320/1 to 320/18 are the photographs of only clothes and the bones which were taken separately at the time of drawing panchanama of exhumation of bodies during the combing operations by CBI in 2004.

125 The photographs at Exh 337(1) to 337(39) are of Panivela village road besides river bed, during the combing operations by the CBI which took place on 29<sup>th</sup> Jan. 2004 and 30<sup>th</sup> Jan. 2004. Exh 337/40 to 337/75 are also the photographs of the same combing operations by the CBI on 29/30.1.2004. Photographs Exh 337/76 to 337/115 are about exhumation of the bodies (bones) from a pit and they are photographs of clothes and bones. Exh 337/116 to 337/119 are also photographs of combing operations by CBI. Exh. 351/1 to 351/9 are the photographs of the places where

the bodies (bones) were found.

126 There are some enlarged copies of the original photographs at Exh 59/1 to 59/8. These photographs are taken and marked at Exh 324/a to 324/h. These photographs were sent to forensic department for the purpose of comparison and opinion. There are also photographs at Exh 323/a collectively which are the additional copies of the photographs of Exh 320/1 to 320/8 of the clothes which were also sent to forensic department for comparison.

127 There is also Exh 309 collectively which are the photographs of (Article 3) camera and also photographs of the dead bodies which were also sent to CFSL. The admissibility of the photographs of the spot which was shown by the prosecutrix at the time of combing operation by CBI and are marked Exh 337 is not disputed. The photographs which were taken by combing team of the CBI between 28.1.2004 to 1.2.2004 are brought on record through the

Investigating Officer and the photographer.

128 Mr. Ponda submitted that the photographs of the body of Saleha is a false fact brought before the Court and Saleha was not part of the group and did not die in the incident.

129 The prosecution has relied on the evidence of forensic expert. The C.A. (PW 56 Rudra) has proved reports in respect of exhumation and the photographs. While giving report, the forensic department has referred the postmortem report of each body which is shown in the photograph and after examining and comparing with the bones found in exhumation and the postmortem notes and the photographs, the opinion is given by the forensic expert whether there is a co-relation between the photograph and the bones recovered in exhumation. The description of the photograph No. 10, appearing on page 2034 of the paperbook is mentioned as "body of the deceased i.e a girl was not recovered during

the exhumation." Mr. Ponda relied on the relevant portion of the forensic report Exh. 324/11 colly. which reads thus:-

"Photograph of 4.03.02

Photograph numbered A-10 shows the body of a young girl child, dressed in a green frock and mauve shorts. Reddish stains are visible over the right side of the face. There appears to be an injury near the right eye. Cause of death is not apparent from the photograph.

Co-relation with bones recovered in exhumation.

Probability of matching: **Does not appear to match any of the sets recovered.**

Co-relation with clothing recovered in exhumation

None of the items of clothing recovered during exhumation match those seen in the photograph.

Opinion

The body of the deceased was not recovered during exhumation."

130 The finding is not helpful to the defence but on the contrary fortifies the case of the prosecution that Saleha's

body was missing. It confirms that the body of Saleha was there and the photographs by the first investigating team of Limkheda Police Station who visited the spot on 4.3.2002 and took the photographs. However, on 5.3.2002, the body was not found and there is no photograph of Saleha on the next day. Her body was not buried along with 7 bodies and therefore, her bones were not exhumed. These are very important circumstances which show that the finding of Saleha's body and subsequent missing of Saleha's body is itself evidence against the accused. The Limkheda Police made no effort to guard the dead bodies. It is possible that the body being of a small child was carried away by wild animals. It is pertinent to note that no suggestion is put to the prosecutrix that she did not have a three year old daughter by name Saleeha. The medical case papers of the prosecutrix Exh. 138A when she was examined by PW 17 Dr. Katti at Godhra Civil Hospital, show that the prosecutrix had lost her minor daughter in the riots. The case paper Exh. 138A of the prosecutrix states that one full term normal

delivery female died in riot. Moreover, the prosecutrix was from Randhikpur village i.e. the same village as accused nos.1 to 12 therefore, if Saleha the daughter of the prosecutrix had died prior to the riots, the accused would have produced such evidence or proved it by examining some witness from the village. If Saleha did not die and was still alive the accused would have produced evidence to that effect. Thus, we find no merit in the submission of Mr. Ponda that just because the body of Saleha was not found, Saleha had not died in the incident.

### **CORPUS DELICTI**

131 On the point of not finding of dead body of Saleha or even the dead body of new born baby of Shamim, we would like to rely on a decision of the Supreme Court in the case of ***Ram Gulam Chaudhary and others Vs. State of Bihar***, reported in ***2001 Cri.L.J. 4632***. In the said decision, it is observed that it is not at all necessary for a conviction for murder that the *corpus delicti* be found. In the case of

**Brijesh Kumar Vs. State**, reported in **AIR 1958 All 514**, it was held that the failure on the part of the prosecution to recover dead body will not indicate that there was no murder. In the case of **Rama Nand Vs. State of Himachal Pradesh**, reported in **(1981) 2 SCR 444**, it was held that even though the *corpus delicti* was not found still an inference of guilt could be drawn when the other circumstances established on record were sufficient to lead to the conclusion that within all human probability the victim was murdered by the accused. In **Sevaka Perumal Vs. State of Tamil Nadu**, reported in **(1991) 3 SCC 471**, it was held that it is not necessary or essential to establish *corpus delicti*. Thus, even if the dead body of Saleha or dead body of new born baby of Shamim was not found, in the light of the evidence of the prosecutrix it has to be held that the accused no.4 committed the murder of Saleha and all the accused with the aid of Section 149 of IPC, were liable for the death of Saleha and new born baby of Shamim.

**APPRECIATION OF EVIDENCE OF THE PROSECUTRIX  
ALONGWITH THE EVIDENCE OF OTHER WITNESSES:**

132 The prosecutrix has taken the names of number of persons whom she met before and after the incident. Her evidence flows along parallel rivulets of those witnesses. Whether the prosecutrix is a liar or a reliable witness, which evidence is to be believed and which is to be discarded from her evidence can be assessed on the touchstone of the depositions of these witnesses. This case is different from the other cases of murders and rape basically due to manipulations, suppressions by the investigating team of Limkheda police station and Gujarat Police due to which the investigation was transferred by the Supreme Court to CBI.

133 The incident of murder and rape took place on 3.3.2002. The prosecutrix was along with her relatives and was going on foot via Panivel to Sarjumi on kachha road. She has stated that two jeeps arrived in which there were 25 to 30 persons, who alighted and they were armed with sharp

edged weapons like sword, sickles and sticks. They started assaulting them. They were shouting "*Aa Raye Musalmano. Emne Maro, Kapo*" its verbatim translation is that "See these are Muslims, assault them, cut them". She stated that those persons were from village Randhikpur and she identified them by name as accused Nos.1 Jaswantbhai Chaturbhai Nai, accused No.2 Govindbhai Nai, accused No.3 Nareshkumar Ramanlal Modhiya, accused No.4 Shailesh Chimanlal Bhatt, accused No.5 Radheshyam Bhagwandas Shah @ Lala Vakil, accused No.6 Bipinchandra Kanaiyalal Joshi @ Lala Doctor, accused No.7 Kesharbhai Khimabhai Vohania, accused No.8 Pradip Ramanlal Modhiya, accused No.9 Bakabhai Khimabhai Vohania, accused No.10 Rajubhai Babulal Soni, accused No.11 Mitesh Chimanlal Bhatt and accused No.12 Ramesh Rupabhai Chandana. Apart from these 12 accused, there were also others and she stated that she might be able to identify others. Thereafter, the prosecutrix and other persons in her group started running. Saleha, her 3½ year old daughter was with her. According to her, Shailesh Bhatt

(accused No.4), snatched Saleha and smashed her on the rocky ground. Thereafter, accused No.1 Jaswant Nai, accused No.2 Govindbhai Nai and accused No.3 Nareshkumar Ramanlal Modhiya caught her. They tore her clothes. They took her beneath a tree. Jaswant Nai was carrying a sword. He hit her but she tried to ward off the blow of sword due to which she got injury on her left palm. Govind Nai and Naresh Modhiya caught hold of her hands and Govind Nai was about to put his leg on her neck. At that time, she found that nobody was there to save her because her family members were being assaulted. Their clothes were torn off. At that time, she was pregnant. She pleaded to leave her as she was pregnant. However, accused Nos.1, 2 and 3 raped her. She became unconscious and when she became conscious, she found that she was naked and the dead bodies of her family members were lying around. She was scared. She found one petticoat, which she wore. Then, she climbed the hill in squatting position. She did not try to know whose dead bodies were lying there as she was scared. She spent the

entire day and night hiding herself on the hillock. The next morning, she was thirsty and hence, she descended the hillock from the other side. There was a hand pump. At that time, she met an adivasi lady i.e., PW 11 Sumaliben. Thereafter the prosecutrix met DW 2 Vanraj and PW 27 Natwarbhai (Homeguards). She sought help from them and they took her to Limkheda Police Station.

134 This is the core of the evidence of the prosecutrix. Whether the prosecutrix is to be believed or not is the central issue of this case. The defence has tried to assail the evidence of the prosecutrix in every possible way, especially by pointing out each and every omission and contradiction in the statements of the witnesses whom she met first in the initial days prior to the incident and after the incident, by pointing out the contradictions and omissions from the deposition of the prosecutrix in the Court and in relation to the other witnesses and thus, we now proceed to analyse her evidence and her previous statements along with the

evidence of other witnesses. Out of the witnesses, who were examined, some of them did not support the prosecution and many were examined as defence witnesses. For the sake of convenience, we deal with the evidence of both the prosecution and defence witnesses together as there is a logical sequence in the chain of persons whom the prosecutrix met. Thus, these witnesses can be categorized as follows:

<b>Group 1 (9 persons from Randhikpur who corroborated that arson and looting took place in Randhikpur)</b>	<b>Group 2 (Prior to the assault)</b>	<b>Group 3 (on 4.3.2002;)</b>	<b>Group 4 (whom the prosecutrix met on 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> March, 2002)</b>
PW2 Faruqbhai Pinjara PW4 Salim Ghanchi PW19 Feroz Ghachi PW25 Siraj Ghachi PW26 Imtiyaz Ghachi PW31 Rasool Umer PW45 Sayed Salam PW46 Salim Ghanchi PW47 Sattar Ghanchi	The persons whom the prosecutrix met, when she was moving with her group prior to the assault:  i) PW33 Bijalbai Damor  ii) PW6 Zaitoon Atila  iii) PW21 Salim Rampuria  iv) PW20 Nayak	The persons whom the prosecutrix met after the assault:  <b>a) prior to going to Limkheda police stn.</b>  i) PW11 Sumaliben Jasubhai Patel  ii) DW2 Vanrajsingh Raibhansingh Dhingra  iii) PW27 Natwarbhai Kikabhai Bamnia  <b>b) At Limkheda police stn:</b>	<b>a) 5.3.2002:</b> i) PW9 Dr.Mahato ii) DW7 Ushaben Kishori iii)PW3 Sugra Issa iv) PW5 Sharifa  <b>b) 6.3.2002:</b> i) PW18 Jayanti Ravi ii) PW23 Govindbhai Patel  <b>c) 7.3.2002:</b> i) PW 17 Dr.Rohini Katti ii) DW 3 Dr. Geeta Pisagar

		i) DW1 Budhsingh Mathurbhai Patel  ii) DW5 Jaisinghbhai Hirabhai Patel,  iii) DW6 Chandubhai Tariyad  iv) PW7 Madina Siraj Patel  v) PW19 Firoz Abdul Sattar Ghachi,	
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**GROUP 1:**

135 It is the case of the prosecutrix that next day, after Godhra incident, there was arson and looting in their village, hence, they all left their residence and started running. She saw houses being burnt. This was the reason for the prosecutrix to leave village Randhikpur. That arson and looting took place is corroborated by the evidence of PW 2 Pinjara, PW 4 Salim Ghachi, PW 19 Phiroz Ghachi, PW 25 Siraj Ghachi, PW 26 Imtiyaz Ghachi, PW 31 Rasul Umer, PW 45 Sayyad Salam, PW 46 Salim Ghanchi and PW 47 Sattar Ghanchi.

136 The first set of witnesses speak about riots taking

place in village Randhikpur on the next day of the Godhra train burning incident due to which Muslim people from village Randhikpur fled from the village. PW 2 Faruqbhai and PW 4 Salim state about riots which took place on the next day of Godhra train burning incident. They also speak about people running away from the village.

137 PW 19 Phiroz Ghachi has stated that he was a resident of Randhikpur. He has stated that the next day after Godhra riots at around 10.30 a.m., there was stone throwing on his residence. He noticed accused No. 8 Pradipbhai Modhiya in the mob (identification of the accused is not disputed by the defence). He also mentioned that there were other persons in the mob who were throwing stones. On account of this, he and his family fled from their residence. They fled to the jungle and stayed there for two days. Thereafter, they were taken to Limkheda Police Station.

138 PW 25 Siraj Ghachi has stated that he and his family were residing at village Randhikpur. On the next day of Godhra train burning incident, at about 10.15 a.m., mob was giving slogans in Gujrati, 'Cut Muslims, kill Muslims'. He saw accused No. 4 Shailesh Bhat and accused No. 9 Bakabhai Vohania in the mob. On seeing this, he ran away from his residence with his family to village Chundadi. At Chundadi, they boarded police van and were taken to Police Station and thereafter to Godhra Relief Camp. He has further stated that his house at village Randhikpur was burnt down and his belongings were looted.

139 PW 26 Imtiyaz Ghachi has stated that he was residing in Randhikpur. Next day following the Godhra train burning incident, mob came to their village. He saw accused No. 3 Naresh Modhiya, accused No. 8 Pradeep Modhiya and others in the mob (identification is not disputed). Some of the people in the mob were shouting, "Kill", hence, he along with his mother and sister fled from their residence. They

stayed in the residence of one Parmar for two days. Thereafter, they went to Police Station in a police van. While they were taken to Police Station, he passed his residence and he saw his residence was burnt down and his belongings were looted.

140 PW 31 Rasool has stated that he was a resident of village Randhikpur. Riots broke out in village Randhikpur on the next day following the Godhra train burning incident. Mob armed with weapons and articles for arson was seen moving through the village. They were shouting slogans, "Cut and kill Muslims". They started burning the houses. He identified accused No. 11 Mitesh Bhatt and accused No. 12 Rameshbhai Chandana as being part of the mob (identification of the accused is not disputed). To save himself, he ran towards the jungle. Then he went to village Pipliya. He stayed there for three days. Thereafter, he was taken in a police vehicle to Police Station. Thereafter, he was taken to Godhra Relief Camp.

141 PW 45 Sayyed Salam has stated that he was from Randhikpur. On the day following Godhra train burning incident, riots broke out in village Randhikpur. A mob of 100 to 150 persons collected in village Randhikpur at around 10-11 a.m. He saw accused No. 7 Kesar Vohania who was part of the mob. The mob was shouting, "Kill Muslims". Petrol was spread on his residence and one person from the mob lit his residence. As a result, his residence was burnt down. He ran away from Randhikpur.

142 PW 46 Salim Ghanchi has stated that he was a resident of Randhikpur. On the day following Godhra train burning incident, riots broke out in village Randhikpur. He saw mob of 50 to 60 persons who were Hindus were involved in riots. This was at about 10 to 10.30 a.m. They were shouting, "Kill the Muslims". He identified accused No. 8 Pradeepbhai Modhiya as being part of the mob. He ran towards his residence. Thereafter, he and his family

members left their home. They stayed in the house of one person for 7 to 8 days. Thereafter, they were taken to Police Station and thereafter to Godhra Relief Camp.

143 PW 47 Sattar Ghanchi has stated that he was a resident of Randhikpur. On the day following Godhra train burning, riots broke out in village Randhikpur around 10 to 10.30 a.m. He saw mob of 100 to 150 persons approaching his residence. They were shouting slogans, "Kill, loot and burn Muslims". He saw that accused No. 1 Jasvantbhai Nai and accused No. 2 Govindbhai Nai were part of the mob. The mob was throwing fire balls on their residence. He, therefore, left his residence and went to village Piplia. Thereafter, he went in a police van to the Police Station. From there, he was taken to Godhra Relief Camp in a police van.

144 Thus, the evidence of the above witnesses corroborates the story of the prosecutrix that on the day following Godhra train burning incident, riots took place in

village Randhikpur. A huge mob collected, they were shouting slogans against Muslims and they were burning houses. It was on account of this that the prosecutrix also fled from her residence along with some of her relatives. Thereafter, the prosecutrix moved from village to village till on 3.3.2002, she reached near Pannivel where the incident occurred.

145 Mr. Ponda assailed the evidence of the above witnesses and submitted that their evidence cannot be believed though they are victims of riots because no complaints were lodged by them in relation to the fact that the mob burnt the houses of some of these witnesses. He further submitted that their statements were recorded after inordinate delay.

146 The learned counsel Mr. Ponda argued that almost all the witnesses i.e PW 4, PW 19, PW 25, PW 26, PW 31, PW 45, PW 46 and PW 47 were related to each other, however,

none of them lodged any complaint against the acts of accused persons in relation to the rioting. He submitted that they had four good chances to lodge the complaint. Firstly, after leaving Randhikpur when they all went to Limkheda Police Station to seek shelter, none of them gave complaint. They all have admitted that they did not lodge complaint except PW 26 Imitiaz Ghachi and PW 31 Rasul Ghachi. These two witnesses though have stated that they lodged the complaint, they did not produce a copy of the said complaint lodged by them with the police station though in the cross-examination, opportunity was given to them. Secondly, when they all were taken to Godhra Relief Camp, many police officers, revenue officers, Collector like PW 18 Jayanti Ravi visited Godhra Relief camp and they enquired about the refugees. None of these witnesses came forward to register any complaint against the accused persons. Thirdly he pointed out that in the evidence of PW 2 Faruqhai the defence has brought admissions on record that Limkheda police station and the Limkheda Court were situated very

close to each other, hence, even if the police did not record their complaints, they could have filed private complaints before the Court. Fourthly, all these refugees including the group of 9 witnesses were given residence at Rahimatbaug. They were all occupying the tenements in the same area and stayed there nearly 1½ to 2 years. The admissions are brought out in the cross-examination from all these witnesses that they used to meet and discuss about the riot. Thus, Mr. Ponda submitted that lodging of complaint was expected from these witnesses and their not doing so, shows that they are got up witnesses.

147 The submissions and the points raised by the learned counsel Mr. Ponda about non-lodging of the complaint by the witnesses about the riot and the case of the prosecutrix is answered by these witnesses in their respective evidence itself. These witnesses undoubtedly are the victims of riot. They were all residents of Randhikpur but lost their houses in the riot. Their houses were burnt or

destroyed by the violent mob in Randhikpur. Out of fear, they left Randhikpur and did not go back to their village. Thus, they left not only their houses but also their occupations and parted from their family members. The witnesses like PW 2, PW 4, PW 26, PW 31 have stated that the police were not in a mood to record any complaint of the Muslims. PW 31 Rasul Umer has stated that "I discussed the issue of reluctance of revenue and police to record the complaint of the inmates of the camp". Thus, when these witnesses found police non-cooperative or hostile, then naturally they were discouraged to lodge any complaint at any place where they were staying. By lodging complaint against the hindus who were in majority or the assailants who were also Hindus, might have led to a situation more dangerous and traumatic and the complainant could have invited further trouble. The apprehension and fear in the minds of these witnesses was not imaginary but it was supported by the physical fact of their running away from their village in great haste as the houses of Muslims were

being burned down. We do not find anything illegal in the appeal made by CBI to the residents in Rahimatbaug Colony to come forward and give statement in respect of incident of riot and the prosecutrix. The police have power to appeal to the people to give information to them in respect of incident which had occurred earlier. Such appeal helps the people to embolden themselves and they come forward and give information to the police which can be recorded. Therefore, the statement of most of the witnesses were recorded on 6<sup>th</sup> and 7<sup>th</sup> March, 2004 when CBI was entrusted to investigate the matter. Looking to the peculiar facts and circumstances of this case, delay in recording the statement of these witnesses would not render them unreliable.

**GROUP 2:**

148           Group 2 consists of persons whom the prosecutrix met during her journey from Randhikpur from 28<sup>th</sup> February, 2002 till 3.3.2002 i.e., the persons whom she met prior to the incident of assault. On 3.3.2002 after the incident, the

prosecutrix met nobody but she was hiding between boulders on top of the hill. The prosecutrix and her family members started from Randhikpur, i.e. the village where they were residing. They went to Kadakiyabhai, who was Sarpanch of Randhikpur. From Kadakiyabhai they went to Chundadi to the village of PW 33 Bijalbhai Damor who provided food and water to them on 28.2.2002. From Bijalbhai's house they went to Kuwajar. At Kuwajar Shamim started having labour pain. There they met PW 21 Salim who took them to the house of midwife PW 6 Zaitoon where Shamim delivered a baby girl. Thereafter they went to Khudra. There they met PW 20 Nanjibhai Nayak. They stayed there for two days, took clothes from Nanjibhai Nayak and left for Sarjumi via Chapparwad and were going by kachha road via Panivel when the incident occurred. PW 8 Saddam aged 8 years & one Hussain @ Mohsin aged 3 / 4 years are the only survivors along with the prosecutrix.

**ON MEETING OTHER PERSONS BEFORE ASSAULT & RAPE:**

149 Mr. Ponda referred to the evidence of 4 witnesses,

i.e., PW 33 Bijalbai Damor, PW 21 Salim Rasul Rampuria, PW 6 Zaitoon Atila and PW 20 Nanjibhai Nayak, and he pointed out the omissions and contradictions in the evidence of all these witnesses. He submitted that the statements of PW 21 Salim Rampuria and PW 20 Nayak were recorded by CBI respectively on 13<sup>th</sup> February, 2004 and 1<sup>st</sup> April, 2004. He submitted that there are omissions in the statements of these witnesses. The learned counsel argued that the prosecutrix has stated that first they went to Kadakiyabhai, who is Sarpanch of Randhikpur. However, she did not mention the name of Kadakiyabhai in the FIR (Exh 56). She has stated that thereafter they went to Chundadi at the residence of PW 33 Bijalbai. In her examination-in-chief in paragraph 36 she has stated that Bijalbai had given them food and water, however, in paragraph 88 she admitted that she did not meet Bijalbai though food and water was provided to them.

150        The contradictions which are brought on record in respect of meeting PW 33 Bijalbai Damor is also not

significant. The prosecutrix has stated in her examination-in-chief that Bijalbai provided food and water, however, she accepted in paragraph 88 that she did not meet Bijalbai but food and water was provided to her. So Bijalbai provided water and food means it is provided not personally by him but at his behest. No doubt PW 33 Bijalbai does not state anything at all about the prosecutrix and her group coming to him and he providing food to them. No doubt, this is true, however, the evidence of PW 6 Zaitoon shows that on the second day after Godhra riots i.e on Thursday, 4 to 5 Muslim women came to her residence at Kuwajar and they were from Randhikpur. One of them i.e Shamim was to deliver a child. Shamim delivered a baby girl around midnight. Thus, the evidence of PW 6 Zaitoon corroborates the evidence of the prosecutrix.

151 First, the group proceeded and went to the house of Sarpanch Kadkiyabhai. There, they found that it was unsafe. So, they went to Chundadi, where at the house of PW

33 Damor, who was an ex-MLA of village Randhikpur food and water was provided to the group of the prosecutrix and thereafter, on that day they went to Kuwajar and took shelter in a mosque. There Shamim who was pregnant was taken to the house of midwife Zaitoon and Shamim delivered a baby with the assistance of PW 6 Zaitoon. The learned Defence Counsel Mr Ponda on the point of this journey of the prosecutrix and delivery of Shamim raised number of objections.

152 Mr. Ponda, while assailing the evidence of the prosecutrix further submitted that in fact Shamim had not delivered a baby at Kuwajar. As per the evidence of the prosecutrix, Shamim delivered a baby at Kuwajar at the residence of PW 6 Zaitoon. Mr. Ponda submitted that neither the prosecutrix nor PW 6 Zaitoon make a mention about PW 21 Salim. However, PW 21 Salim who is brother-in-law of Zaitoon has stated that on the next day of Godhra riot at around 9 to 10 p.m., 16 to 17 people from Randhikpur arrived

at his residence. One lady was to deliver a baby, so he took the said lady and some persons from her group to Zaitoon (PW 6) who was a midwife. Mr. Ponda pointed out that however, all this is absent in the evidence of the prosecutrix and Zaitoon. PW6 Zaitoon has stated in her evidence that 4 to 5 people visited her house and one of them was to deliver a child. This according to Mr. Ponda completely ruled out Salim's evidence.

153 On the point of journey of the prosecutrix and her group, Mr. Ponda submitted that the story does not appear true. He further argued that PW 6 Zaitoon does not corroborate the prosecutrix. Mr. Ponda pointed out that a question was put to PW 6 Zaitoon as to whether she was maintaining registers of birth or not, to which she answered in affirmative. However, no such register is produced before the Court. Mr. Ponda submitted that such register would have been contemporaneous document which would have corroborated the prosecutrix and Zaitoon. Mr. Ponda

submitted that the fact that register of birth / delivery, was not produced by the prosecution falsifies evidence of Zaitoon and the prosecutrix however, considering the situation of Kuwajar and the circumstances under which the delivery has taken place, at that time, the entry about birth might not have been entered. In our view, non production of birth register would not affect the credibility of the evidence of Zaitoon or the prosecutrix.

154 Mr. Ponda submitted that moreover, Zaitoon has admitted in paragraph 12 of her evidence that she left Kuwajar on next day of Godhra riots, i.e., on 28<sup>th</sup> February, 2002. However, as per the evidence of the prosecutrix and Zaitoon, Shamim delivered a baby girl on the next day of Godhra riots, i.e., on 28<sup>th</sup> February, 2002. The admissions are sought to be relied upon by the defence in the cross-examination of PW 6 Zaitoon that after Godhra riots her house was attacked by Adivasis and therefore, she left the house. Mr. Ponda submitted that if Zaitoon has left the

house on the same day, how it was possible for her to attend the delivery of Shamim at her residence. Thus, this falsifies the whole story of delivery of Shamim at her house.

155 Learned Counsel Mr. Ponda has raised one question on the evidence of the prosecutrix on the point of delivery of Shamim, which has taken place on the night of 28.2.2002 at the house of PW 6 Zaitoon. He submitted that there is discrepancy in the evidence of PW 21 Salim about who offered food and shelter in the beginning at Kuwajar to the group of the prosecutrix and who took Shamim to the house of PW 6 Zaitoon. He submitted whether the group stayed at mosque; whether Shamim was taken to PW 6 Zaitoon directly from the mosque or from the house of Salim is not clear. The witnesses have made different statements to that extent. He pointed out from the evidence of PW 6 Zaitoon that in the cross-examination, she admitted that when there was stone pelting by adivasis, she left her house immediately on the next day of the Godhra riots. Thus, Mr.

Ponda contended that in fact, PW6 Zaitoon was not present at her residence on 28<sup>th</sup> i.e., on Wednesday, as she had accepted in her further cross-examination that she left the house and went to the jungle. The learned counsel Mr. Ponda thus made a point that Shamim has in fact not delivered a baby at Kuwajar.

156 The learned Prosecutor Mr. Venegavkar relied on the evidence of the prosecutrix. He submitted that she has specifically stated that when the group went to Kuwajar, Shamim had delivery pains and so Shamim was taken to PW 6 Zaitoon. The prosecutrix went along with Shamim and there, Shamim delivered a baby girl. The learned Prosecutor submitted that PW 6 Zaitoon, PW 21 Salim and PW 20 Nayak are the witnesses, who corroborate the evidence of the prosecutrix on the point of delivery of Shamim. He pointed out that PW 6 Zaitoon has categorically stated that she left her residence not on day of breaking of Godhra riots but on Friday that is the day next after the delivery. Mr. Venegavkar

submitted that though Mr.Ponda tried to make capital of her statement that there was stone throwing on her residence on the day Godhra riots broke and hence, she was afraid and left her residence, this statement does not mean she did not come back to her residence thereafter. Mr. Venegavkar submitted that her categorical statement that she left the house the day next of the delivery cannot be brushed aside and ignored. Mr. Venegavkar drew our attention to evidence of PW 21 Salim where he has stated that 16 to 17 persons from Randhikpur came to him. One of them was pregnant, hence, he took her to PW 6 Zaitoon who was a mid wife. Mr. Venegavkar pointed out that PW 20 Nayak in paragraph 8 of his cross-examination has specifically stated that in the group of the prosecutrix, there were four women, one girl and one recently born baby and rest were male persons. He submitted that the omissions in respect of this incident in the statement of the prosecutrix and also in the statement of Zaitoon cannot be taken into account as the earlier statements of the prosecutrix were recorded by Limkheda

police station.

157           Regarding Zaitoon leaving the house after stone pelting and running away to the jungle, the learned trial Judge put Court questions to her in order to remove doubt as to whether Shamim really delivered at the house of Zaitoon or not? While answering to the Court questions, she said that she attended the delivery of Shamim and thereafter she left her house and went to Jungle. Thereafter questions were put to Zaitoon by the prosecution as well as the defence. Zaitoon was cross-examined and she admitted that after Godhra incident, next day there were riots and stone pelting and after that she left the house immediately. Zaitoon answered in re-examination that she left the house after Godhra riots and only after delivery of Shamim, she left the house and ran away. Further, in order to dislodge the witness, a question was put that on Wednesday, there were Godhra riots and on the next day, there was stone pelting and so she immediately left the house. In the cross-

examination, a skillful question was asked, however, the answer given to that question cannot be read in isolation but in the context with the answer given by the witness in her re-examination which is to be taken into account. If context is considered, then, the effect of re-examination is not washed out by further cross-examination. A confusion was created by changing the sequence of the incidents. Zaitoon is found firm on three points - firstly that Shamim delivered a baby at her house; secondly, there was attack by Adivasis and stone pelting and thirdly, after delivery she left the house. The evidence of PW 21 Salim Rampuria is also to be read along with PW 6 Zaitoon. He has corroborated Zaitoon on the point that one pregnant lady was there and Zaitoon had attended her. The train burning of kar sevaks took place on 27.2.2002 at Godhra. Next day, riots exploded in district Godhra and Dahod i.e., on Thursday, 28.2.2002. On the same day, the prosecutrix and the group left Randhikpur; went to Chundadi, reached Kuwajar and at night, Shamim delivered a baby and thereafter, PW 6 Zaitoon ran away from Kuwajar on Friday.

The omissions in the evidence of PW 21 are insignificant and we are of the opinion that evidence of PW 21 Salim corroborates PW 6 Zaitoon in all material particulars.

158           Thereafter the prosecutrix and her group went to Khudra and stayed in the house of PW 20 Nanjibhai Nayak. Mr. Ponda further argued that evidence of PW 20 Nanjibhai Nayak is full of falsehood. As per the case of the prosecutrix, she met Nanjibhai on the next day of delivery. Mr. Ponda submitted that Nanjibhai has mentioned the timing in the examination-in-chief to suit the story of the prosecutrix. Nanjibhai has admitted that he did not state the date or timing when he gave statement to CBI. Mr. Ponda further submitted that as per the evidence of the prosecutrix and Nanjibhai, 4 ghagras and 4 lehengas were provided by Nanjibhai to the prosecutrix and her group. He submitted that it was necessary for CBI to confront the prosecutrix and Nanjibhai with each other, however, it was not done. Similarly, as per the evidence of the prosecutrix and PW 3

Sugra, Sugra handed over one green colour lehenga of the prosecutrix to the police, which is marked as Article 5A. So, this lehenga should have been shown to Nanjibhai to confirm whether this was one of the lehengas which he provided to the group of the prosecutrix. He contended Nanjibhai Nayak's evidence on the number of children is also not reliable as to whether 16 to 17 people with 3 ½ years old child and 2 days old baby were proceeding or not is doubtful. Thus, he submitted that if the evidence of Nanjibhai is tested it does not corroborate the evidence of the prosecutrix.

159 As far as PW 20 Nanjibhai is concerned, he has stated that about 16 to 17 persons were seen by him running helter skelter. They were from Randhikpur. This corroborates the prosecutrix. Nanjibhai further stated that he gave them food, water and clothes. In paragraph 8, he has stated that four women, one girl and one recently born baby and rest were males in that group. This in fact fully corroborates the evidence of the prosecutrix that they stayed

at the house of PW 20 Nayak. The prosecutrix and those in her group were from Randhikpur. Moreover, Shamim had just delivered a baby and the prosecutrix stated that one person from Nayak tribe took pity on them as Shamim had a new born child and he provided them with food, water and clothes and gave them shelter for two days.

160 We have perused the evidence of the prosecutrix, PW 6 Zaitoon, PW 21 Salim Rasul Rampuria and PW 20 Nanjibhai Nayak. The prosecutrix has narrated certain important incidents which had taken place when the group was running away from Randhikpur after Godhra riots. In paragraph 40, in her examination in chief, she has given the names of all the persons, who have moved along with her. That means the persons, who formed the group and became victims of the assailants on 3.3.2002. She has specifically mentioned the name of Shamim in her substantive evidence. The omissions brought on record by the defence are mainly from the statement i.e., FIR and from the statement dated

13.3.2002, which was recorded by the accused persons i.e. accused Nos. 17 and 16 respectively. These two statements were recorded by the police of Limkheda police station. From the beginning, the stand of the prosecution is consistent that the statements recorded by the police of Limkheda police station, who are accused i.e., accused Nos.16 & 17 are not to be relied on and the contents therein cannot be construed as true as they were recorded by the accused. The CBI has recorded further 3 statements of the prosecutrix and no omissions in respect of delivery of Shamim are brought on record from those statements.

161 Not finding of the body of newly born baby of Shamim at the time of panchanama of the spot or inquest panchnama is one more aspect which Mr. Ponda tried to take advantage of.

162 According to the prosecutrix, the group on 1.3.2002, moved to Khudra and they took refuge at the house

of PW 20 Nayak, who offered them food, shelter and clothes to women. PW 20 Nayak has said in the examination in chief that in the group, he noticed one lady with a newly born baby. Non-finding of body of the newly born baby at the time of the spot panchanama itself cannot disprove the fact of birth of baby at the house of PW 6 Zaitoon when ocular evidence of the witnesses on this point is found consistent and believable. Thus, the challenge given to the delivery of Shamim does not sustain and according to us, the prosecution has established that Shamim had delivered a baby girl at the house of PW 6 Zaitoon at Kuwajar.

**GROUP 3:**

**GROUP OF PERSONS THE PROSECUTRIX MET ON 4.3.2002:**

163 On 4.3.2002, the prosecutrix met PW 11 Sumaliben Patel at handpump; DW 2 Vanrajsingh Raibhansingh Dhingra and PW 27 Natwarbhai Kikabhai Bamnia, Home Guards, who took her to Limkheda police station; DW 1 Budhsingh Mathurbhai Patel, the writer

constable in Limkheda police station, who is one of the scribes of FIR Exh. 56; DW 6 Chandubhai A. Tariyad, and DW 5 Jaisinghbhai Hirabhai Patel, police constables, who were present when FIR Exh. 56 was prepared on 4.3.2002. At Limkheda police station, the prosecutrix met PW 7 Madina Siraj Patel, and PW 19 Firoz Abdul Sattar Ghachi, who had sought refuge at Limkheda police station.

164 According to the prosecutrix, when she came down from the hillock, she met PW 11 Sumaliben. According to the prosecutrix, as she was semi-nude, when she met the adivasi lady, she asked the lady to provide her some clothes. At that time, Sumaliben gave her blouse and odni. Mr. Ponda submitted that the entire story of the prosecutrix of assault and rape and murder is false which can be seen from the fact that the prosecutrix did not disclose about rape and murder to Sumaliben. He submitted that if the story of the prosecutrix was true, the prosecutrix would have immediately disclosed this fact to Sumaliben. He argued that

if the prosecutrix was only in petticoat, i.e., semi nude condition, then, it was obvious for any woman to tell the reason for such condition to the other lady. This silence of the prosecutrix shows that she never met PW 11 Sumaliben and no such incident occurred. Moreover, production of the petticoat, ghagra (article 5A, 6A) of the prosecutrix by PW 3 Sugra before police, is also doubtful as there was no reason for Sugra to preserve that ghagra from March, 2002 till March, 2004. Sumaliben also did not support the statement of the prosecutrix that she was semi nude and when Sumaliben met the prosecutrix, she provided clothes to her.

165 It is to be noted that Sumaliben is a hostile witness. Along with the evidence of Sumaliben, it is necessary to consider the evidence of DW 2 Vanraj Dhingra and PW 27 Natwarbhai Bamnia as these were the two persons whom the prosecutrix met on 4.3.2002 i.e. the next day after the incident and before going to the police station.

166 The prosecutrix has stated that after she met Sumaliben, she drank water from hand-pump and washed her face. She then saw one person in uniform (DW 2 Vanraj) standing near one vehicle on kachcha road. He was in police uniform. She ran to him. She asked him to save her and told him that her family including her daughter was killed and she was raped. He took her to Limkheda Police Station in a vehicle. PW 27 Natwarbhai was with DW 1 (Vanraj). He has stated that he and his commandant Vanraj left Home Guard Office in a jeep around 7.00 a.m. on 4.3.2002. When they were proceeding towards village Randhikpur, on the way they learnt that riot took place and corpses were lying in Kesharpur-Panivela hills, hence, they proceeded towards that place. When they came near Kachcha road, they left the jeep and made search for the corpses but could not locate them. He and home-guards went up the hill. Commandant Vanraj remained at the bottom of the hill. When he came down from the hill, he saw one woman standing near the jeep and commandant Vanraj was there but he could not know

what was the talk between Vanraj and the lady. They took the lady in the jeep to Limkheda Police Station.

167 DW 2 Vanraj has stated that on 4.3.2002 at about 7.30 a.m. they proceeded towards Limkheda. He was accompanied by four home-guards including PW 27 Natwarbhai. When they were at the junction of four roads, some people reported that there was a riot at Kesharpur, hence, he proceeded towards Kesharpur. They found that police were making enquiry in the vicinity of a small hill. They proceeded towards the other side of the place i.e. kachcha road leading to Panivela. There they got down and started making search. After about 30 to 45 minutes, they came back near the vehicle. There he found one lady near the vehicle. She gave her name as "Bilkis". She told him that she and her family members were returning home from work at Vadodara and on the way, they were accosted by a mob of 400 to 500 persons, therefore, they ran helter skelter and in the process, she was separated from her family

members. She further told that she did not know whereabouts of her family members and she should be saved and she should be taken to the police station, hence, they took her to Limkheda Police Station.

168 Mr. Ponda submitted that though the prosecutrix has stated that she met DW 2 Vanraj, her story is totally different than the case of Vanraj. The prosecution dropped DW2 Vanraj though he was a necessary witness for the prosecution. Mr. Ponda submitted that therefore they examined DW 2 Vanraj as defence witness. DW 2 Vanraj arrived in a jeep on 4.3.2002 in the morning along with his assistant PW27 Natwarbhai when he was going near Keshpur jungle and carrying out search. Mr. Ponda submitted that this witness has admitted the fact of meeting the prosecutrix on that day as she approached them. According to Vanraj, she told that when she and her family were returning home from Vadodara on the way, she was attacked by a mob of 400 to 500 persons. Thereafter, she and her family members ran

and in the process, she was separated from her family members. She requested him to save her and take her to police station and therefore, he took her in his vehicle and handed her over to PSO at Limkheda police station. Mr. Ponda referred to PW 27 Natwarbhai, who has confirmed the fact that one woman i.e., the prosecutrix met commandant DW 2 Vanraj on the way and it was DW 2, who talked with her. However, he said he did not know what was the talk. Mr.Ponda argued that all these three witnesses PW 11 Sumaliben, DW 2 Vanraj and PW 27 Natwarbhai are the key witnesses whom the prosecutrix met soon after the incident, and their evidence, in fact, has demolished the case of the prosecution, as the prosecutrix did not disclose anything about the rape or killing of her family members to them.

169 In reply, Mr. Venegavkar, the learned Counsel has submitted that DW 2 Vanraj and PW 11 Sumaliben did not support the prosecution and PW 27 Natwarbhai did not talk with the prosecutrix directly but he relied on what DW 2

Vanraj had stated. Mr. Venegavkar submitted that the learned Prosecutor has cross-examined both DW 2 Vanraj and PW 11 Sumaliben. He submitted that the defence has deliberately tried to bring the case of 400 to 500 assailants and Vanraj has deliberately said that they were coming from Vadodara. Randhikpur and Kuwajar are in completely different direction than Vadodara. The prosecutrix could not have told DW2 Vanraj that she was coming from Vadodara when she was coming from Kuwajar or even Randhikpur. He pointed out that DW2 Vanraj was on duty. He was trying to find out the dead bodies because Vanraj had received message and directions from the authority to find out the dead bodies which were lying in the jungle and when he was in search of the bodies, he met the prosecutrix. His statement was recorded by Gujarat CID on 14.9.2003 and 27.9.2003.

170 PW 11 Sumaliben was the first person who met the prosecutrix at the hand pump after the prosecutrix

descended the hillock. As per case of the prosecutrix, she was in a petticoat and when the prosecutrix approached Sumaliben, the Adivasi lady, was violent. Therefore, the prosecutrix convinced her that she was like her and thereafter, Sumaliben provided her clothes including blouse and odni. Thereafter, as per the prosecutrix, she saw that one police person came there in a vehicle. So, she ran towards the vehicle.

171 PW 11 Sumaliben did not support the case of the prosecution. PW 11 has stated in the examination in chief that she did not provide clothes to the prosecutrix. Mr. Ponda argued that why the prosecutrix did not disclose to Sumaliben about the fact of rape and killing of her family members. He argued that if the prosecutrix was only in a petticoat, i.e., in a semi-nude condition, it was obvious for any woman to tell the reason for her condition to the other lady. In addition Sumaliben stated that when she met the prosecutrix, she was wearing clothes and she did not say that

she supplied clothes to the prosecutrix. Thus, Sumaliben did not support the case of the prosecution.

172 DW 2 Vanraj is Commander in Home Guards, who was given the duty of patrolling in a jeep with PW27 Natwarbhai near Panivel. He met the prosecutrix on 4.3.2002 but he did not say that she complained about killing of her relatives and she was raped and also killing of her daughter.

173 As per the case of the prosecutrix, the first two persons she met after the incident are PW11 Sumaliben and DW2 Vanraj. However, both did not support the case of the prosecution and they maintained a stand that the prosecutrix did not say a word to them about the killing of her relatives and rape on her. While appreciating the submissions of the learned defence Counsel on this point, we keep in mind the fact that these two witnesses have turned hostile. The prosecutrix did not mention that she disclosed the fact of rape or killing of her relatives to Sumaliben. She had asked

for clothes and then, the lady offered blouse and odni to her. Assuming that the prosecutrix was not fully clothed and was wearing only petticoat, barely covering her body, it cannot be expected that the prosecutrix ought to have disclosed about the fatal incident to an unknown woman. The prosecutrix had lost her two brothers, mother, sister and 3½ year old daughter on the earlier day. She had witnessed the massacre of all her near relatives who were with her. She had to leave everything and she was walking and running from one place to the other since last three days to find shelter and save herself. Moreover, she was raped when she was 5 months pregnant. This was a big trauma. Under such circumstances, a woman may react in a totally different way and not as per the expected behaviour in any other rape case.

174        The fact that the prosecutrix went to DW 2 Vanraj is admitted by the prosecution and the defence. He was a home guard person in the jeep. Naturally, the prosecutrix thought him to be a police person and, therefore, her

approach to him with a view that she might get some protection is found logical. She told him the facts regarding what had happened. Vanraj did not support the prosecution and PW 27 Natwar, who is examined by the prosecution has also in fact, deposed on the same lines as that of Vanraj. We are of the opinion that the disclosure by the prosecutrix which is stated by DW 2 Vanraj itself appears false and, therefore, we discard evidence of DW 2 and PW 27 on this point. The prosecutrix was in fact coming from Randhikpur and was going towards Sarjumi. Baroda (Vadodara) is in a totally different direction and there was no need for her to hide her identity and tell that they were coming from Baroda. This lie put in the mouth of the prosecutrix, in fact proves DW 2 Vanraj is a liar.

175 A mob of 500 persons chasing and assaulting relatives of the prosecutrix has come in the evidence firstly in the FIR (Exhibit 56) which can be relied only on the point that the prosecutrix had grievance that some trauma had

happened and she had approached the police to complain about it. However, it is to be noted that she has deposed that her FIR Exhibit 56 was incorrectly recorded and the person who had recorded the complaint, was subsequently made accused No.17 and convicted under sections 217 and 218. Thus, Exhibit 56, in a way is a very important document which establishes the fact that though the prosecutrix went to police station and urged for her complaint to be recorded, many facts were suppressed at the police station and her FIR was manipulated. The FIR itself throws light on the falsity in recording of the information narrated by the prosecutrix. Thus, exhibit 56 initiated an imaginary story of 500 persons chasing and attacking group of the prosecutrix. Undoubtedly, this figure of 500 persons was deliberately mentioned to show the impossibility in the story of the prosecutrix of her being able to identify accused nos.1 to 12 from a mob of 500 people. The exaggerated figure of 500 persons was false. It was intentionally written. If a mob of 500 persons would have attacked group of 16 to 17 people

with full of emotions of communal vengeance, the prosecutrix would not have been spared and she would also have been killed or terribly injured. However, it was not so. Therefore, by mentioning mob of 500 persons, it was intended to show that nothing happened, as per story given by the prosecutrix so that she can be proved a liar or a lady giving all imaginary version.

176 As per the case of the prosecutrix, she saw two persons, i.e., DW 2 Vanrajsingh Dhingra and PW 27 Natwarbhai who were from Home Guard, however, she treated them as police, hence, she approached them for help. The learned Counsel Mr. Ponda submitted that though statement of DW 2 Vanraj was recorded, he did not want to lie before the Court, so prosecution chose not to examine him. PW 27 Natwarbhai was substituted in the place of Vanrajsingh and hence defence examined Vanraj. He submitted that the evidence of the prosecutrix can be scrutinized on the basis of the witnesses who met her first

after the incident. The prosecutrix has stated that she met Vanraj and told about the killing and also that she was raped and thereafter, he took her to the police station. The prosecutrix meeting Vanraj is not disputed by either the prosecution or by the defence. However, as per the deposition of Vanraj, the prosecutrix met him and told him that she was coming with a group from Baroda and 500 people attacked them at around 12 pm on the earlier day and, therefore, she lost the group. Therefore, she requested him to take her to the police station and she was taken to police station. PW 27 Natwar has also stated that when they reached near kachha road, at that time, he along with Vanraj got down. One woman was standing near the jeep and there was talk between Commandant Vanraj (DW 2) and the lady. However, he did not know what was the talk and they took the lady in the jeep to Limkheda Police Station. In the cross-examination, he has stated that he had talk with Commandant Vanrajsingh, who told him that the lady was in a group from Baroda and the group was chased by 500

people after the riots. Mr.Ponda has submitted that this shows that the prosecutrix did not disclose to Vanraj the fact of killing of her relatives and of rape on her which had taken place on the earlier day.

177 The learned Counsel Mr. Ponda argued that DW2 Vanraj was called as defence witness and the Prosecutor in the cross-examination had contradicted him on the basis of his statement recorded under section 161 of Cr.P.C. and the omissions in his evidence were proved through PW 72 Mr. Sinha in para 88 of his evidence. Mr. Ponda made submission on law in respect of use of proviso of section 162 Cr.P.C. by the Prosecutor for contradicting DW 2 or for bringing omissions on record in the evidence of this defence witness. He submitted that as per the requirement of proviso of section 162 of the Cr.P.C., the witness standing in the box should be a witness for prosecution and if such witness states or omits to state certain significant facts which are already recorded or not recorded in his statement under section 161

of Code of Criminal Procedure, then, the prosecution with permission of the Court, may cross-examine the witness in the manner set out under section 145 of the Evidence Act to that extent without declaring him hostile. However, a defence witness cannot be cross-examined and contradicted by the Prosecutor on the basis of his statement recorded under section 161 of the Code of Criminal Procedure. So Mr.Ponda questioned the legality of the cross-examination and especially the attempt of the prosecution of proving the omissions in the evidence of DW 2 Vanraj through Investigating Officer i.e., PW 72 Sinha.

**PROVISO TO SECTION 162 OF THE CODE OF CRIMINAL PROCEDURE:**

178 We deal with the point raised by Mr. Ponda, as it decides the scope of proviso to section 162 of the Cr.P.C. Proviso to section 162 reads thus:

“162. Statements to police not to be signed: Use of

statements in evidence.

1. No statement made by any person to a police officer in the course of an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made:

Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution, to contradict such witness in the manner provided by section 145 of the Indian Evidence Act, 1872 (1 of 1872 ); and when any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination."

179 Under section 161 of the Code of Criminal Procedure, the police have power to examine the witnesses during the course of investigation. Under subsection (3) of section 161, the police officer may reduce into writing any

statement made to him in the course of examination of a witness during investigation. However, in our criminal system, neither the statement recorded by the police under section 161 needs to be signed by the person making it nor under section 162 the said statement can be used for any purpose except as stated or allowed under the proviso of the section. The proviso permits the use of the statement only to contradict to bring on record significant omissions and contradictions. This helps the prosecution to produce that record to prove the authenticity and the truthfulness in the investigation and so also it is helpful to the defence. So also, it safeguards the interest of the accused if at all, he is falsely or wrongly implicated and prosecuted in the case. The FIR recorded under section 154 of Cr.P.C. is always signed by the maker and the statement under section 161 is never signed by the witness. This procedure is not arbitrary but is meaningful if the rationale behind this procedure is examined. The investigating machinery is presumed to be interested in the success of the case i.e., punishing the

accused person. Therefore, there is a likelihood that the investigating machinery may avail of some illegal methods i.e., coercion, threat, pressure and procure false statement of the witness. Corruption, political pressure and interference is a known malignancy in the investigation and therefore, the statements recorded under section 161 are not to be signed by the witnesses. If a person signs a statement then, it carries authenticity. Hence, the Legislature wanted to restrict the scope and use of the contents of the statements recorded under section 161 and therefore, such statements are neither signed nor to be used in the evidence except as mentioned in the proviso. In the absence of this bar of section 162, it was an easy job for the police to record the statement of the witness and along with his evidence to produce his written statement and get it admitted in the evidence and make it a part of the evidence and thus, the conviction of the accused would have been smooth and more in number. The Legislature is concerned not only with the success rate but the law makers wanted the method used and the procedure

followed to achieve the higher rate of conviction should be correct, legal and not atrocious. By putting embargo of section 162 of Code of Criminal Procedure, it has wisely restricted the use of the same. Thus, these two sections i.e. Section 161 and 162 encapsulate both the power of the police and the limitations on the police. The police during the course of investigation can record statement only under section 161 of the Cr.P.C. When a witness stands before the Court either as a witness for the prosecution or as a defence witness, his status may change. However, this cannot affect the character of the statement. His previous statement, if recorded by the police during the course of investigation, then, it is to be treated necessarily as a statement recorded under section 161 of the Cr. PC. If the statement is used in the evidence, then, the bar under section 162 comes into play and the said statement cannot be used in the evidence except as is allowed under the proviso. The said proviso opens with the words “provided that when any witness is called for the prosecution....”.

180 Thus, under the proviso, the nature of the witness contemplated is that the witness should be for prosecution. The proviso does not state about "any witness" but it states 'witness for prosecution'. Thus, it is specified that witness should be called as witness for prosecution. Therefore, it is necessarily implied that witness should not be a witness for defence. A person may stand as a witness for defence though he is cited as a witness for prosecution in the report (charge sheet) filed under section 173 of Cr. P.C. The prosecution has choice to examine or delete the witness though his statement is recorded. It is always open for the defence to lead evidence by calling any witness. If defence chooses to examine a witness cited but dropped by the prosecution, then he is a defence witness, thus, his character as a witness changes. The prosecution witness gets converted into defence witness. However, this conversion does not change the nature or the character of the statement which is recorded by the police under section 161 of the Code

of Criminal Procedure. The statement remains as a statement under section 161 of the Code of Criminal Procedure, therefore, procedural bar under section 162 runs against the use of a statement in the evidence and it can be used only for the limited purpose. The said proviso and provision to contradict the witnesses is not available to the prosecution because the witness does not remain as a witness for the prosecution but is converted into a witness of the defence. The section by necessary implication puts bar on use of such statement on the prosecution for the purpose of contradiction to a witness who was earlier its own witness but now has stepped in the box as a defence witness. In such case omissions and contradictions brought on record in the case of DW 2 Vanraj cannot be looked into. However, we are of the view that his evidence does not inspire confidence, hence, we place no reliance on it.

**PERSONS THE PROSECUTRIX MET AT LIMKHEDA  
POLICE STATION ON 4.3.2002 :**

181           The prosecutrix met DW 1 Budhsingh Mathurabhai Patel, the writer constable in Limkheda Police Station who is one of the scribes of FIR Exh. 56; DW 6 Chandubhai A. Tariyad and DW 5 Jaisingbhai Hirabhai Patel, Police Constables who were present when FIR Exh. 56 was prepared on 4.3.2002. We have already discussed above regarding the FIR in detail, hence, we need not discuss the evidence of these three witnesses.

182           Mr. Ponda again submitted that the evidence of the prosecutrix is not corroborated by the evidence of other prosecution witnesses. As per the case of the prosecution, after meeting Sumaliben, she met DW 2 Vanraj and PW 27 Natwarbhai, none of whom supported the case of the prosecution. No doubt after the incident the prosecutrix first met PW 11 Sumaliben, DW 2 Vanraj and PW 27 Natwarbhai and their evidence does not corroborate her evidence but there are 9 witnesses who the prosecutrix met from 4.3.2002 to 7.3.2002 who fully corroborate her testimony. The first is

PW 7 Madina.

183 The first persons the prosecutrix met at Limkheda Police Station were PW 7 Madina and PW 19 Phiroz. In relation to them, the prosecutrix has stated that when she reached Limkheda Police Station, she found Abdul Sattar Ghachi, PW 7 Madina, PW 19 Phiroz at Limkheda Police Station. She disclosed the facts to Limkheda Police Station that her family members including her daughter was killed and she was raped. She disclosed the names of the offenders. The police told her why she was disclosing the names of the offenders and the facts concerning rape on her and if she was taken to the hospital for examination, she would be given poisonous injection at the hospital.

184 PW 7 Madina has stated that on the next day of her coming to Limkheda police station, the prosecutrix came to Limkheda Police Station. Police told her that a girl from Randhikpur was at the Police Station and whether she could

identify that girl. Madina identified her as Bilkis, daughter of Abdul Isa of Randhikpur. Madina has stated that the prosecutrix gave her complaint at Limkheda Police Station in her presence. The prosecutrix narrated that her family was murdered and she was raped by Jaswantbhai Nai, Govindbhai Nai and Nareshkumar Modhiya i.e accused Nos. 1 to 3. Madina has further stated that at that time PW 19 Phiroz and Sattar were with her when this narration was made by the prosecutrix to the police. On such narration made by the prosecutrix, the police gave abuses and asked them to go out.

185 Thus, PW 7 Madina Patel spoke about she meeting the prosecutrix at Limkheda police station. She supported the prosecution. She spoke about the prosecutrix disclosing about the murder of her relatives and also about rape on her and others. Madina stated that the prosecutrix disclosed the names of three persons i.e., accused Nos.1,2 and 3 as the persons who committed rape on her.

186 As per the evidence of the prosecutrix, she was taken to Limkheda police station on 4.3.2002 by DW2 Vanraj. There, she first met Madina, who was present at the police station and as she was also a riot affected person and hailed from Randhikpur, the police from Limkheda police station told Madina that there was a girl from Randhikpur at the police station and whether she could identify that girl. PW 7 Madina was therefore confronted with the prosecutrix at the police station and she identified the prosecutrix as daughter of Abdul Issa Ghachi from Randhikpur. According to the prosecutrix, thereafter her FIR was recorded by Limkheda police station. This FIR was recorded by accused No.17 Somabhai Gori, DW 1 Budhasingh and DW 6 Tariyad. However, her FIR was not read over to her and the contents in the FIR were not taken down as per her narration. Madina has also stated that the prosecutrix was threatened by police that if she disclosed the names of the offenders and the facts concerning rape on her then, when she was taken

to hospital, she would be given a poisonous injection in the hospital. So, the prosecutrix was frightened. The FIR was not read over to her and the police forcibly obtained her thumb impression. The prosecutrix has stated that at the time of narrating these facts, she was not alone but she told these facts in the presence of Abdul Sattar Ghachi, PW 19 Firoz Ghachi and PW 7 Madina who were sitting near her. Then, the police asked them to go away and therefore, they left. On the point of narration of the FIR by the prosecutrix at the Limkheda police station, the prosecution has tendered evidence of PW 7 Madina and PW 19 Feroz.

187 On 4.3.2002, when the prosecutrix reached at Limkheda police station, the police station was crowded with many Muslims who were there seeking protection. The prosecutrix was confronted with Madina for identification and Madina stated in her evidence that she knew the prosecutrix as the daughter of Abdul Ghachi. Both Madina and Feroz were the victims of the riots and so their coming together at

the police station and supporting each other was natural. Madina also was separated from her family members. PW 7 Madina has stated that when the prosecutrix narrated the incident to Limkheda police station, she told that her family members were murdered and she was raped by Jaswant Nai, Govind Nai and Naresh Modhiya i.e., accused Nos.1 to 3 respectively. She mentioned that Feroz and Abdul Sattar were with her at the time of narration and at that time, the police drove them away so they left the place. Thereafter, she did not know what happened. She claimed that when the prosecutrix was sent for medical examination, she along with one lady constable accompanied her to Limkheda hospital. She also mentioned that one Abdul Sattar, was taken in the evening by the police to the place where the bodies were lying. He was taken to the spot of offence for the purpose of identification of the dead bodies and when he returned, he was crying and said they met a bad end.

188           The learned Counsel Mr. Ponda submitted that on

4.3.2002, the prosecutrix was taken by DW 2 Vanraj to Limkheda Police Station where she met PW 7 Madina and PW 19 Firoz. He pointed out omission in the evidence of Madina that she did not state at the time of recording of her statement by CBI that she was called by Limkheda police station and she was asked to identify the prosecutrix. The learned Counsel submitted that there was no reason for Madina to go to the prosecutrix and be there at the time of recording of the statement when there were many refugees from different villages waiting at Limkheda police station. First of all Madina was not from any village but she was from Randhikpur i.e. the same village as the prosecutrix, hence, when the prosecutrix came to the police station, Madina would try to go near her to find out the facts. Secondly, the police station was crowded, hence, the chances of people including Madina being in hearing distance were very high, hence, there was every possibility for Madina to hear what the prosecutrix stated.

189 PW 19 Phiroz was the son of Abdul Sattar. Phiroz has stated that he is a resident of Randhikpur. There was stone throwing at his residence. Thereupon, he fled to the jungle along with his family members to save themselves due to Godhra riots. They stayed in the jungle. After two days, they saw a police vehicle and they were taken to the police station at Limkheda. There, he met Madina. Two days thereafter, one person brought the prosecutrix to the Police Station around 10.00 to 10.30 a.m. It was the fourth day of the month. He noticed injuries on the hand of the prosecutrix. Her hair was loose. The prosecutrix stated that while she was at the place near Kachcha road leading to Pannivel, two white vehicles came to the spot. Mob of persons alighted from those vehicles and attacked her and her relations. She further stated that she was raped by Jaswantbhai Nai, Govindbhai Nai and Nareshkumar Modhiya i.e accused Nos. 1 to 3. She also told the police that one Shailesh Bhatt (accused No. 4) snatched her daughter from her and killed her by smashing on stone. The police

thereafter threatened the prosecutrix that if she gives the names of the rapists, she would be finished by giving poisonous injection. He and Madina were then asked to go away.

190 Mr. Ponda argued that the evidence of PW 19 Feroz Ghachi is not reliable on the point of being present at the time of recording of the FIR Exh. 56 of the prosecutrix at Limkheda police station. He submitted that PW 19 is an interested witness as the prosecutrix was related to him through her grandfather. He submitted that the statement of this witness was recorded by CBI two years after the incident and there is a material omission that he heard the prosecutrix narrating the incident had taken place at Kaccha road. Thereafter, it is stated that there is an omission in respect of narration of the prosecutrix that the persons alighted from the vehicle and attacked her relatives. Mr. Ponda further submitted that social workers, namely, Farha Naqvi, Huma Khan and Sugra, were present at the Camp and they tutored

these witnesses including the prosecutrix. As far as omissions in the evidence of Feroz are concerned, they are all inconsequential in nature and do not change the basic substratum of the case of the prosecutrix.

191 It was vehemently argued by Mr. Ponda that there was a delay in recording the statements of these witnesses i.e. PW 7 Madina and PW 19 Feroz and therefore, these witnesses are tutored by social workers. We do not consider that there is a delay in recording of the statements of these witnesses, on the background of callous investigation conducted by the Limkheda police station and Gujarat CID. This is a case where the police wanted to help the accused by suppressing their names. The police were not passive towards investigation but they were very active in destroying the case of the prosecutrix. Therefore, at no point of time there was any chance of recording the statements of these two witnesses. Thus only after the CBI took over the investigation in January, 2004 that after collecting the

information from the prosecutrix and other sources, they could reach to these witnesses and their statements were recorded.

192 Mr. Venegavkar submitted that there are no material omissions in the evidence of PW 7 Madina, PW 19 Firoz and only suggestions are given to these witnesses which were denied by the witnesses. This position is true. It is noticed that there was a specific reason for both Madina and Phiroz to be present at the Limkheda police station. Both were from Randhikpur and were victims of riot and therefore they were together. The evidence of these two witnesses i.e Madina and Feroz is not demolished in the cross-examination, hence, we find it safe to rely on their testimony and we are of the opinion that their evidence fully corroborates the evidence of the prosecutrix.

**GROUP 4: GROUP OF PERSONS BILKIS MET FROM 5<sup>TH</sup> MARCH, 2002 TO 7<sup>TH</sup> MARCH, 2002:**

**5.3.2002:** This group includes DW 7 Ushaben Kishori, who was a police constable attached to Limkheda police station and who took the prosecutrix to community health centre, Limkheda on 5.3.2002 where the prosecutrix was examined by PW 9 Dr. Rakeshkumar Mahto. PW 9 Dr. Rakeshkumar Mahto and DW 7 Ushaben Kishori were the witnesses the prosecutrix met in the morning of 5.3.2002. We shall deal with the evidence of Dr. Mahto a little later. Later on, on 5.3.2002, the prosecutrix also met PW 3 Sugraben, aunt of the prosecutrix and PW 5 Sharifa Abdul Razzak Umarjee, social worker whom she met at the Godhra Relief Camp.

**6.3.2002:** On 6.3.2002 PW 18 Jayanti Ravi, District Magistrate and Collector, Godhra and PW 23 Govindbhai Patel, the Executive Magistrate visited Godhra Relief Camp. The prosecutrix narrated the incident to PW 18 Jayanti Ravi. PW 18 Jayanti Ravi directed PW 23 to record the statement of the prosecutrix. Accordingly, he recorded statement (**Exh. 277**) of the prosecutrix.

**7.3.2002:** PW 17 Dr.Rohini Katti and DW 3 Dr.Geeta Pisagar examined the prosecutrix on 7.3.2002 at Godhra Civil Hospital. On that day PW 42 Mr.Shivaji Pawar, PSI attached to the Godhra town police station

recorded the statement of the prosecutrix on 7.3.2002 at Civil hospital, Godhra. Except for recording this statement he has played no further role. We will deal with the evidence of PW 17, DW 3 and PW 9 together when we deal with the medical evidence.

193 In relation to the persons the prosecutrix met on 5.3.2002, Mr. Ponda submitted that if story of the prosecutrix was true, she would have definitely told about it to Police Constable DW 7 Ushaben. DW 7 Ushaben went along with the prosecutrix on 5.3.2002 to Community Health Centre from Limkheda Police Station. Ushaben admits it, however, she does not say that the prosecutrix told her that she was raped, who raped her and her relatives were killed. It is to be noted that Ushaben was also attached to Limkheda police station, hence, she would certainly not support the prosecutrix.

194 Mr. Venegavkar has submitted that on 5.3.2002, the prosecutrix was taken to Dr. Mahato (PW 9) at CHC Limkheda in the morning. She was accompanied by PW 7

Madina and DW 7 Ushaben. On the same day, she was shifted to Godhra Refugee Camp and there, she met PW 3 Sugra and PW 5 Sharifa. He submitted that the evidence of the prosecutrix that she was taken to CHC Limkheda is corroborated by the evidence of these 3 witnesses i.e. Madina, Ushaben and Dr. Mahto. The fact of the prosecutrix going to Godhra Relief Camp on 5.3.2002 is corroborated by PW 5 Sharifa who says that she met the prosecutrix in the relief camp on 5.3.2002.

195 Mr. Ponda has argued that there is a confusion in the evidence of Madina and the prosecutrix as to on which date she was taken to CHC Limkheda and when she was examined by PW 9 Dr.Mahto. He argued that the record of the hospital is manipulated by CBI and the evidence of PW 9 Mahto in fact does not help the prosecution to prove its case of rape and assault. There is no question of manipulating the record of CHC Limkheda because the record is not in favour of the prosecution. If the CBI wanted to manipulate

this record there was ample opportunity to do so but it was not done.

196 About PW 3 Sugra, the prosecutrix has stated that at the Relief Camp, she met her aunt Sugra (PW 3). Sugra asked her why she was sitting alone and not talking with them. The prosecutrix then disclosed all the facts to her. She also disclosed to Sugra the names of the offenders. The prosecutrix also met Latifaben and Sharifa (PW 5) at the camp and she disclosed the facts to them.

197 PW 3 Sugra was a resident of Randhikpur and aunt of the prosecutrix. She also left Randhikpur on the next day of train burning incident. She has stated that she met the prosecutrix at Godhra Refugee Camp and there the prosecutrix disclosed to her that accused Nos.1 to 3 i.e., Jaswant Nai, Govindbhai Nai and Naresh Modhiya raped her and one Shailesh Bhatt, accused No.4, killed her daughter by smashing her on the ground and other 7 to 8 persons from

Randhikpur had killed her relatives. At that time, the prosecutrix handed over her clothes which were on her person to PW 3 Sugra and the prosecutrix wore clothes given to her at the camp. The prosecutrix also told that the clothes were given to her by an adivasi lady. Sugra kept those clothes with her in anticipation that the adivasi woman who had given those clothes to the prosecutrix may come and the clothes would be handed over to the said lady. The clothes remained with Sugra and when the CBI asked her she handed over those clothes which were collected under memorandum exhibit 72 dated 20.1.2004 drawn by PW 72 the Investigating Officer Dy. SP, CBI Mr.Sinha. Subsequently, they were sent to C.A. It may be stated that no incriminating material was found on these clothes.

198 Sugra was put number of questions in the cross-examination in respect of the villagers who were residents of Randhikpur. Questions were also put to her about the accused and she answered that she knew most of the

accused prior to the incident. They are all from Randhikpur. She was elected member of Gram Panchayat and worked as such for 5 years. In her evidence, it has come on record that she also stated that the population of Randhikpur was 1000 to 1500 out of which 100 to 150 houses were of muslims at the time of Godhra riots. She has mentioned that she left with her family members including Haleema, Munni, Mumtaz and the prosecutrix together. However, she stayed back at Chundadi for two days. There is no confusion about these names because though many persons left together, later at different points of time, the group separated and the group which was moving with the prosecutrix till Panivel was a group of 16 to 17 persons and nothing much is brought on record which damages the evidence of Sugra. It appears that a large number of muslims left Randhikpur. They stopped at Chundadi where some stayed back and others broke up into different groups and proceeded in different directions.

199 PW 5 Sharifa was working as a social worker in Godhra Relief Camp. She has stated that she met the prosecutrix on 5.3.2002 in the camp. When Sharifa first met the prosecutrix, the prosecutrix was crying. Sharifa asked her why she was crying. At that time, the prosecutrix told her that accused Jaswant Nai, Govind Nai and Naresh Modhiya, i.e. accused Nos.1, 2 and 3 raped her and wrong was done with her mother and sisters and accused no.4 Shailesh Bhatt killed her daughter. The prosecutrix also told her that after the incident, she had been to Limkheda police station and she had lodged her complaint at Limkheda police station, however, her complaint was not read over to her but they obtained her thumb impression on the complaint. She also told that the police at Limkheda had threatened her that if she disclosed the names, she would be finished by giving poisonous injection. Mr.Ponda has submitted that the statement of this witness was recorded only by CBI. This woman, who was a social worker did not come forward to give her statement to Limkheda police station or the Gujarat

CID, hence, her evidence is suspect.

200 Admittedly, Shareefa was a social worker and has stated that there were 2500 to 3000 persons staying at Godhra Refugee Camp at that time. She has deposed that she met the prosecutrix and the prosecutrix disclosed the fact of rape, assault on her and murder of her daughter Saleha by the accused Nos.1 to 4 attributing them specific roles. In the cross-examination, some immaterial omissions in respect of her residence as to whether it was Dahod or Godhra and about the name of her husband were brought. She was put questions about many persons including other social workers Farha Naqvi, Huma Khan, Sugra, Farooq, Mukhtiyar, etc. However, the witness remained consistent that the prosecutrix did give the names of the rapists and killer of her daughter to her and also before the Collector PW 18 Jayanti Ravi on 6.3.2002. Thus, we find that her evidence corroborates evidence of the prosecutrix.

201 Mr. Ponda also pointed out that there was a seizure panchanama of the clothes of the prosecutrix, i.e., petticoat, odni and blouse which she wore immediately after the incident. This is marked as Articles 5A, 6A and 7A respectively. Panchanama of seizure of clothes was drawn by CBI in January, 2004. As per the evidence of the prosecutrix, she handed over her clothes to one Sugra in March 2002 at Godhra Relief Camp, so it is surprising that Sugra preserved her clothes for 2 years, i.e., till January 2004, hence, it is obviously a planted evidence. Mr. Ponda has submitted that the statement of Sugra that she received clothes from the prosecutrix at the Godhra Refugee Camp i.e., one green colour lehenga/ghagra (article 5A), blouse (article 7A) and cream colour dupatta (article 6A) is a cooked up story and so also Sugra's evidence that she preserved the clothes for two years is also bogus. He submitted that Sugra did not know the adivasi lady and why the prosecutrix handed over those clothes to Sugra and why did Sugra preserve these clothes with her, appears to be absurd, hence, these clothes must

have been planted. As far as this contention is concerned, it is not the case of the prosecution that any semen or blood stains etc. were found on these clothes. Hence, no purpose would have been served by planting these articles. Moreover, Sugra has given an explanation for keeping the clothes with her i.e. she thought that the owner of the clothes would come to take them. Thus, as far as this contention is concerned, we may state that nothing could have been achieved by the prosecution by planting these clothes. The clothes were washed by Sugra and it is not anybody's case that any stains or anything incriminating was present on those clothes. Thus, we find no merit in the submission of Mr. Ponda that the clothes were planted.

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202 Mr. Ponda pointed out that in the evidence of PW 3 Sugra and PW 5 Sharifa both the ladies have deposed assertively that they met the prosecutrix on 5th March, 2002, however, their evidence is falsified by a document, i.e., the relevant pages dated 5th March, 2002 of the register of

refugees of Godhra Relief / Refugee Camp. In the said register, the names of the persons who had come to stay in the camp are mentioned and though the names of many persons from Randhikpur are mentioned in the record of this refugee camp dated 5.3.2002, the name of the prosecutrix is not seen and therefore, Mr. Ponda submitted that this fact creates doubt as to where the prosecutrix was on the evening and night of 5th March, 2002. He submitted that it is the case of the defence that she was taken somewhere where she was tutored and accordingly she has falsely implicated the accused persons on 6<sup>th</sup> and 7<sup>th</sup> March, 2002. Mr. Ponda further submitted that there is no consistency in the statement of Sugra and Sharifa about who were the assailants and there is also variance in the evidence of the prosecutrix.

203 Mr. Ponda further pointed out that a list of refugees at Godhra Relief Camp was maintained for the purpose of supply of ration (Exhibit 440). He relied on the list

dated 5.3.2002 which is annexure to letter dated 13.2.2002 which is at Exh. 440 colly. However, he pointed out that the name of the prosecutrix is not appearing in the list dated 5.3.2002. Thus, according to Mr. Ponda, the prosecutrix in fact did not go to Godhra Relief Camp on 5.3.2002 but she was surrounded by social workers on 5.3.2002 and was tutored on that evening and night and thereafter she went to Godhra Relief Camp on 6.3.2002.

204 The contention of Mr. Ponda that because the name of the prosecutrix was not there in the register of Godhra Relief Camp dated 5.3.2002, hence, the prosecutrix was not in the camp on 5.3.2002, cannot be accepted. First of all such registers are not prepared at midnight. The register must have been prepared sometime in the day by which time the prosecutrix may not have reached the camp. We also find no merit in the contention that on 5.3.2002 the prosecutrix was taken somewhere from the police station and tutored. The prosecutrix was brought to Limkheda police

station on 4.3.2002. She stayed that night at the police station which is clear from the evidence of PW 35 Ranjeetsingh Patel. Many Muslims had sought shelter in the police station because the situation outside was fraught with danger. Almost all the relations of the prosecutrix had been killed, in such case, she would not dare to leave the safety of the police station and go outside with some unrelated persons. Thus, we find no merit in the contention that on 5.3.2002, she was taken somewhere from the police station and she was tutored to falsely implicate accused nos. 1 to 12.

**CORROBORATION BY 9 WITNESSES TO THE EVIDENCE OF THE PROSECUTRIX REGARDING ASSAULT AND RAPE:-**

205 As far as the actual incident is concerned, the evidence of the prosecutrix is corroborated by PW 3 Sugra, PW 5 Sharifa, PW 7 Madina, PW 18 Jayanti Ravi, PW 19 Firoz and PW 23 Govindbhai Patel.

206 In relation to the witnesses the prosecutrix met on 6.3.2002, the prosecutrix has stated that one District

Magistrate and Collector Ms. Jayanti Ravi (PW 18) visited the relief camp on 6.3.2002. She narrated the facts to PW 18 Jayanti Ravi. Another person PW 23 Govindbhai Patel who accompanied PW 18 made record (Exh. 277) of the narration of the prosecutrix. The said record was read over to the prosecutrix. It was a faithful record of her narration. In this connection, PW 18 Ms. Jayanti Ravi has stated that she was District Magistrate and Collector, Godhra, Gujarat. Situation in the district was tense due to riots and arson following the burning of Sabarmati Express in February 2002. Relief camps were set up at various places including Godhra. As the District Magistrate, she visited the relief camps. On 6.3.2002, she visited Godhra Relief Camp. She came across several complaints in the camp. One distinct complaint was that of the prosecutrix. On her interaction with the prosecutrix, Jayanti Ravi learnt from her that she and her relatives while escaping from violence were attacked by a mob and she was raped and her family members were killed. She mentioned the names of the offenders whom she identified. The

prosecutrix further disclosed that the FIR given by her was not lodged as per her narration. She expressed that she be given an opportunity to lodge her complaint. PW 18 Jayanti Ravi then directed the Executive Magistrate PW 23 Govindbhai Patel to record the narration of the prosecutrix. On going through the statement (Exh. 277) of the prosecutrix, she realized the gravity and ordered medical examination of the prosecutrix by Civil Surgeon, Godhra.

207 PW 23 Govindbhai Patel has stated that he was Mamlatdar and Executive Magistrate at Godhra at the relevant time. PW 18 Ms. Jayanti Ravi was the District Magistrate and Collector of Godhra. On 6.3.2002, he accompanied PW 18 Jayanti Ravi to Godhra Relief Camp. PW 18 Jayanti Ravi made inquiries with the inmates of the camp. Two ladies approached PW 18 Jayanti Ravi with a grievance of rape on the prosecutrix and killing of her relations. Jayanti Ravi then instructed him to record the statement of the prosecutrix. Thereupon, he recorded the statement (Exh.

277) of the prosecutrix. He obtained thumb impression of the prosecutrix on the statement. Govindbhai attested the thumb impression of the prosecutrix with his counter signature. He handed over this statement to PW 18 Jayanti Ravi. Not only the evidence of PW 18 Jayanti Ravi and PW 23 Govindbhai Patel corroborate the case of the prosecutrix but the statement (Exh. 277) of the prosecutrix also corroborates the case of the prosecutrix. We have already dealt with **Exh. 277** in detail, hence, we need not discuss it any further.

208 On 7.3.2002, the prosecutrix met PW 17 Dr. Rohini Katti and DW 3 Dr. Geeta Pisagar, who examined her. We shall deal with their evidence & the evidence of PW 9 Dr. Mahto a little later, while dealing with the medical evidence.

209 Some other witnesses who corroborate the prosecutrix are PW 12, 16 and 54. We will deal with the evidence of PW 12 Madhusudan Prajapati along with the evidence of PW 54 Prafulchandra Sevak as they are

connected. PW 12 Madhusudan has stated that a panchnama concerning white colour marshal jeep bearing registration No. GJ-20-A-3123 was made in their presence. The vehicle was seized. He has identified the photographs Exh. 58/1 to 58/4 as those of the vehicle. Madhusudan has stated that the prosecutrix was present at the time of seizure of the said vehicle. The photographs of the vehicle were taken in their presence.

210 PW 54 Prafulchandra has stated that the vehicle in question was transferred in the name of Ramilaben Rameshchandra Chandana on 18.9.2001. While giving his evidence, he relied on the Motor Vehicle Register (Article 50) having pages consecutively numbered. It may be stated that Ramilaben is admittedly the wife of accused No. 12 Rameshchandra Chandana.

211 As far as the vehicle is concerned, the prosecutrix has stated that the vehicle involved in the crime was shown

to her. It was the vehicle which was used by the offenders for arriving at the scene of offence. She has identified it before CBI. She has further stated that she was shown jeep Article 2 and she has identified it as the same jeep which was used by the offenders on the date of the incident.

212 The prosecutrix has stated that the incident took place on the kachcha road leading to Pannivel. This is corroborated by the evidence of PW 16 Balwantsingh Rajput. PW 16 Balwantsingh Rajput has stated that PW 1 prosecutrix led them to one place. They went to the place by vehicle. They halted the vehicle at the confluence of pakka road and kachcha road. The kachcha road led to village Pannivel.

**DISCREPANCIES IN NUMBER OF ACCUSED, WEAPON AND SLOGANS:**

213 Mr. Ponda has submitted that the prosecution could not tender reliable evidence on the point of how many assailants were in the mob? what weapons they were carrying? what slogans the mob was shouting? which vehicle

they came in? He referred to examination-in-chief of the prosecutrix in paragraph 6 where she has stated that 25 to 30 persons had come in a white vehicle, however, this white colour vehicle is an omission which she has admitted in paragraph 112 of her evidence. She has stated that they were carrying swords, sickles and sticks and were shouting that "Aa Raye Musalmano. Emne Maro, Kapo" and its translation verbatim is that "See these are Muslims, kill, cut them". He argued that in FIR Exhibit 56, the prosecutrix has stated that there was mob of 500 people and to that effect question was put to her, and in fax Exhibit 57 she has stated 40 persons. These are the omissions and contradictions in relation to number of people in the mob. On the point of weapons Mr. Ponda argued that she has stated in paragraphs 6 and 7 in chief that assailants were holding sticks, swords and sickle, however, she has admitted in paragraph 113 that the said fact is not mentioned in FIR Exhibit 56. He argued that it was not mentioned in the Fax Exh. 57 and also in the statement dated 7<sup>th</sup> March, 2002 recorded by PW 42 Mr.

Pawar. He further pointed out that in Exhibit 57 i.e. fax she has mentioned weapons as spear, dagger, bow and arrow. He argued that the contradictions are also in respect of slogans shouted by mob who allegedly attacked the prosecutrix and her relatives. In paragraph 6 she has stated that they were saying "Aa Raye Musalmano, Emne Maro, kapo", however, in paragraph 117 it is brought on record that such slogans are not mentioned in FIR Exhibit 56 but it is stated that "Tamaro Musalman manus ne maro hindu manus ne mari nakel che". She for the first time took the names of accused nos. 1 to 12 in her statement Exh. 277 recorded on 6<sup>th</sup> March, 2002 by PW 23 Govindbhai Patel and no names were given in FIR Exh. 56. He argued that the question how Saleha was killed has remained mute though the prosecutrix in paragraph 7 of her examination-in-chief has stated that accused No. 4 Shailesh has snatched Saleha from her and smashed her. However, she is completely silent about this fact in her FIR, in the fax or further statements recorded on 6<sup>th</sup> March, 2002 (Exh. 277) by PW 23 Govindbhai Patel and so

also on 7<sup>th</sup> March, 2002 which is recorded by PW 42 Pawar so also in the statement recorded on 13<sup>th</sup> March, 2002 by Circle Inspector Limkheda i.e accused No. 16 Ramsingh Bhabhor.

214 As far as statement (Exh. 277) recorded by PW 23 is concerned, the prosecutrix mentions about killing of her relatives, hence, her daughter Saleha is covered in that category. No doubt, there is non-disclosure of killing of daughter in her two statements, i.e., FIR dated 4<sup>th</sup> March, 2002 and the statements recorded on 7<sup>th</sup> and 13<sup>th</sup> March, 2002 by PW 42 and accused no. 16 respectively. As far as FIR is concerned, we have already observed that the police have on purpose not recorded it correctly. As far as fax Exh. 57 is concerned, we have already held that it was not sent by the prosecutrix. As far as, statement dated 7<sup>th</sup> and 13<sup>th</sup> March 2002 of the prosecutrix are concerned, these cannot be scrutinized properly unless we advert to the most important aspect in this case, i.e., the investigation. The investigation has started at Limkheda Police Station on 4<sup>th</sup>

March, 2002 with recording of FIR Exh. 56. The investigation remained with Limkheda Police and thereafter with Gujarat CID. However, there was negative progress in the investigation as 'A' Summary was filed before the Court of Magistrate by Limkheda, Gujarat Police. The members of National Human Rights Commission had interacted with the prosecutrix and thereafter Writ Petition No. 118 of 2003 which is marked as Exhibit 61 was filed in the Supreme Court by her. The relevant FIR and her statements recorded by Limkheda, Gujarat Police were annexed to the said Writ Petition Exh 61. She prayed before the Supreme Court that the investigation of her case be transferred from Gujarat police to Central Bureau of Investigation. The Writ Petition was allowed and her prayer was granted by the Supreme Court in December, 2003. Pursuant to this, the investigation was taken over by CBI on 1<sup>st</sup> January, 2004. Thus, it shows that she had to fight for nearly one year and 10 months to get her case transferred from Gujarat Police to CBI and investigated by CBI. On account of the tainted and biased

investigation, there are bound to be discrepancies in the evidence of the prosecutrix. However, once the CBI took over the investigation and recorded the statements of the prosecutrix, it is noticed that there are no significant omissions or contradictions.

215 Mr. Venegavkar has submitted that the evidence of the prosecutrix is corroborated by the evidence of 9 witnesses i.e., PW 3 Sugra, PW 5 Sharifa, PW 7 Madina, PW 8 Saddam, PW 12 Madhusudan Prajapati, PW 18 Jayanti Ravi, PW 19 Firoz, PW 23 Govindbhai Patel and PW 54 Prafulchandra V. Sevak. He has read over the evidence of the prosecutrix. He argued that the prosecutrix has narrated the incident of assault and rape attributing specific roles to accused Nos.1, 2 and 3, who raped her and accused No.4, who snatched her daughter Saleha and smashed her on the ground. This is how Saleeha was killed.

216 Mr. Venegavkar argued that the prosecutrix has

stated that the persons, who arrived there in two vehicles were from Randhikpur and they were holding weapons like swords, sticks and sickle and they assaulted her relatives who started running helter skelter. Accused no.4 snatched her daughter Saleeha and smashed her on the ground. They tore clothes of the women and raped them. She was raped by accused nos. 1 to 3. She mentioned that at the time of attack, these persons were shouting slogans against Muslims. She became unconscious because of the sexual assault on her. When she became conscious she climbed up the hill and hid herself between some boulders. She came down the next day. He read the relevant paragraphs in the evidence of these witnesses along with the cross-examination and submitted that the omissions and contradictions which the defence tried to bring on record, they are insignificant. He submitted that in fact, all these witnesses have corroborated the prosecutrix. On going through their evidence, we find much merit in this submission.

**NO COMPLAINT THOUGH FOUR CHANCES**

217 Mr. Ponda submitted that there is group of 9 witnesses who were examined by the prosecution on the incident of 28<sup>th</sup> February, 2002 at Randhikpur. He gave list of the witnesses that is PW 2 Pinjara, PW 4 Salim Ghachi, PW 19 Feroz Ghachi, PW 25 Siraj Ghachi, PW 26 Imitiaz Ghachi, PW 31 Rasul Aziz Umer, PW 45 Sayad Abdul Salam, PW 46 Salim Abdul Sattar Musa Ghanchi, PW 47 Sattar Majid Ghanchi. These 9 witnesses were residents of Randhikpur.

218 The learned counsel Mr. Ponda has argued that 7 witnesses i.e. PW 19, 25, 26, 31, 45, 46 & 47 were related to each other, however, none of them lodged any complaint against the acts of accused persons or the rioting. He submitted that they had four good chances to lodge the complaint. Firstly, after leaving RanPdhikpur when they all went to Limkheda Police Station to seek shelter, none of them gave complaint. They all have admitted that they did not lodge complaint except PW 26 Imitiaz Ghachi and PW 31 Rasul Ghachi. These 2 witnesses though have stated that

they lodged the complaint, they did not produce a copy of the said complaint lodged by them with the police station though in the cross-examination, opportunity was given to them. Secondly, when they all were taken to Godhra Refugee Camp, many police officers & revenue officers, like PW 18 Jayanti Ravi visited Godhra camp and they enquired about the refugees. None of them came forward to register any complaint against the accused. Thirdly he pointed out that in the evidence of PW 2 Pinjara the defence has brought admissions on record that Limkheda police station and the Limkheda Court were situated very close to each other hence, if police were reluctant to lodge FIR, they could have lodged private complaints. Fourthly, all these refugees including the group of 9 witnesses were given residence at Rahimatbaug. They were all occupying tenements in the same area and stayed there nearly 1½ to 2 years. The admissions are brought out in the cross-examination from these witnesses that they used to meet and discuss about the riot. Thus, lodging of complaint was expected from these witnesses.

219           The submissions and the points raised by learned counsel Mr. Ponda about non-lodging of the complaint by the witnesses about the riot and the case of the prosecutrix is answered by these witnesses in their respective evidence itself. These 7 witnesses undoubtedly are the victims of riot. They all are residents of Randhikpur but lost their houses in the riot. Their houses were burnt or destroyed by the violent mob in Randhikpur. Out of fear, they left Randhikpur and did not go back to their village. Thus, they left not only their houses but also their occupations and parted from their family members. The witnesses like PW 2, PW 4, PW 26 and PW 31 have stated that the police were not in a mood to record any complaint of the muslims. PW 31 Rasul Umer has stated that "I discussed the issue of reluctance of revenue and police to record the complaint of the inmates of the camp". Thus, when these witnesses found police non-cooperative or hostile, then naturally they were discouraged to lodge any complaint at any place where they were staying.

By lodging complaint against the hindus who were in majority or the assailants who are also Hindus, might have led to a situation more dangerous and traumatic and the complainant could have invited further trouble.

**WHO LEFT RANDHIKPUR WITH THE PROSECUTRIX:**

220 Mr. Ponda, the learned Counsel thereafter raised objections that there is a lot of confusion in respect of persons, who left Randhikpur with the prosecutrix on 28.2.2002. She has taken names of one Iqbal, her brother, so also, there is confusion about Mumtaz, whether she was really with the group or not. The prosecutrix has taken the name of her father Abdul Issa Ghachi, who also left with her. She has taken the name of Majidbhai Patel, who was in the group. However, her evidence is not clear on the point who accompanied her.

221 The learned Counsel Mr. Venegavkar while answering this point has submitted that who left with the

prosecutrix on 28.2.2002 and who moved alongwith the prosecutrix on 28.2.2002 and thereafter till 3.3.2002 are two different issues. He submitted that the persons, who were subjected to assault and were killed were the persons, who had moved with her. She has taken the names of the persons specifically who moved with her. She has mentioned the names of Saddam so also Mumtaz, though she has stated that her father PW 24 Abdul also left Randhikpur with them. After going through the evidence of PW 24, it is found that though he left Randhikpur with the prosecutrix, he returned back and he did not move alongwith the prosecutrix on the same day. He stayed back to look after his cattle.

222 The prosecutrix in para 40 of her evidence has specifically mentioned about the persons who left Randhikpur and moved from one place to another. She has stated as follows:

“myself, my daughter Saleha, my mother Haleemaben, Sisters Mumtaz and Munni, brothers Aslam and Irfan, uncles Majidbhai and Yusuf Musa Patel, aunt Sugraben, cousins

Shamimben, Mumtazben, Hussain, cousin Shamim, aunt Ameena, Saddam son of Ameena had left our residence at village Randhikpur and moved from the places as aforesaid”.

223 In para 3 of her evidence, the prosecutrix has stated that her maternal aunt Bibi came to her and she advised them to leave the residence immediately in view of the violent developments in the village. Therefore, all of them left the residence. This shows that all the members of her family had left home and some of the members in her group formed one group, who proceeded in one direction. In her examination in chief, she did not mention the name of her father PW 24 as being part of her group. PW 24 Abdul Ghachi, her father, also corroborates her as he has said that his daughter (the prosecutrix) alongwith his wife and children left the house in the morning, however, he remained in the village to look after his cattle and arrange belongings. Then on the same day, he left Randhikpur at 1.15 pm. Therefore, in the cross-examination, though the defence has brought on record that in FIR Exh 56, she has taken the name of her

father Abdul, who left alongwith her, we are of the opinion that the said evidence cannot be read in isolation or only in the light of some omission that his name was included by the prosecutrix in her FIR or other statements. PW 24 Abdul may have initially left with the prosecutrix, however, immediately, thereafter, he returned back. No doubt in FIR Exh. 56, the name of Saddam is not mentioned. However, as we discussed earlier, Exh.56 is a disputed document in respect of some portion of the contents, so is Fax Exh. 57.

224 As far as the prosecutrix, PW 3 Sugra and PW 24 Abdul giving different names of the persons who left Randhikpur is concerned, it is seen that on account of Hindus burning and looting the houses of Muslims, there was mass exodus of Muslims from Randhikpur. Some of these persons converged at Chundadi. Thereafter, these persons appear to have formed different groups and they went onwards in different directions. PW 3 Sugra did not accompany the group of the prosecutrix after Chundadi and she stayed back

at Chundadi. It appears that each witness has stated the names of the persons who were close to them and other persons in the group are not mentioned. In any event, it appears that many groups left for Chundadi. Thereafter, they formed smaller groups or some joined other groups and then these groups proceeded in different directions. Looking to the mass exodus of persons from Randhikpur, much importance cannot be given to the fact that initially the group consisted of different persons and thereafter, the group consisted of different persons.

**TIME WHEN BILKIS LEFT RANDHIKPUR :-**

225 Learned counsel Mr. Ponda argued that there is serious discrepancy about the time Bilkis left Randhikpur, hence, her evidence cannot be believed. He relied on paragraphs 3, 71 and 83 of her evidence and submitted that whether prosecutrix and the group left in the afternoon or in the evening. In paragraph 71, she stated that we did not leave in the evening. In paragraph 83, she has stated that it

is not true that we left Randhikpur at 10.00 a.m. In our opinion at what exact time, she left Randhikpur is not at all material. The fact remains she left Randhikpur on 28.2.2002. About the incident taking place on 3.3.2002, there is no discrepancy.

**WHEN THEY WERE SAFE AT CHUNDHADI, WHY THEY LEFT :-**

226 Mr. Ponda thereafter argued that the evidence of the prosecutrix shows that many Muslims had gathered at Chundadi. He submitted that when many Muslims had gathered at the residence of Kadakiyabhai or Bijalbhai, they would be safe there, then why Bilkis and her family members left Chundhadi? This conduct was not natural. This question can be answered. The house of Kadakiyabhai, being Sarpanch of Randhikpur was itself in Randhikpur and Bijalbhai's house was in Chundhadi which is also close to Randhikpur. At that time, the fear of death was in the minds of the prosecutrix and her relatives and in fact in the minds of all the Muslims from Randhikpur. They were hearing news of

riots, looting and killing of Muslims by Hindus and therefore, these people wanted to run far away from the village where Muslims were being attacked and their houses were being looted and were being set on fire.

**THE PROSECUTRIX DID NOT TELL HER FATHER SHE WAS RAPED:**

227 Mr. Ponda argued that the evidence of the prosecutrix is further falsified by the evidence of her father PW 24 Abdul Ghachi. He pointed out that in paragraph 6 of evidence of PW 24 Abdul Ghachi, he has stated about his daughter (prosecutrix) telling him only about rape on other women and killing of daughter Saleha by accused no. 4 Shailesh Bhatt, however, she did not tell him about rape on her and also killing of her relatives. In view of this fact, he argued that the story of the prosecutrix is imaginary and, as there is lot of variance it is hence, unworthy of credit. He further submitted that the story of the prosecutrix that she had been raped cannot be believed because if any such incident had occurred, she would have definitely told about

the same to her father. However, her father PW 24 Abdul makes no reference to the prosecutrix making any such disclosure. This shows the evidence of the prosecutrix cannot be believed.

228 In relation to the above connection, it is seen that PW 24 Abdul Ghachi, (father of the prosecutrix) in para 18 of his cross-examination has stated that his first statement was recorded on 18.3.2002 by Circle Inspector, Limkheda, who is an accused. His second statement was recorded on 9.1.2004 by PW 68 Mr.Tariyal, PW68 of CBI and the portion in the said statement is marked at exhibit 369. The witness in para 6 of his evidence has stated that the prosecutrix met him outside the camp 3 months after the incident at Godhra. At that time, she disclosed to him that “her daughter Saleha was killed by accused No.4 Shailesh Bhatt by smashing her on the ground” and “persons with her were raped.” The learned defence Counsel, cross-examined PW 18 Abdul to bring on record that whatever he has stated in para 6 of his examination-in-chief is an omission and no such disclosure

was made by the prosecutrix to him and therefore, the incident of rape on the prosecutrix and Saleha's killing did not take place.

229 In para 25 of the cross-examination of Abdul Ghachi, he has stated as follows:

“I did state before the CBI about the disclosure made by PW1 Bilkis. I cannot say why the facts disclosed by PW1 Bilkis that her daughter Saleha was killed by accused No.4 Shailesh Bhatt by smashing her on the ground and that persons with her were raped do not figure in my statement”.

It is to be noted that at that time, Abdul Ghachi referred to his statement dated 9.1.2004. In para 26, he has stated that he did not know whether the Circle Inspector, Limkheda, has recorded his statement and then, the statement dated 18.3.2002 was shown to him and read over to him and then, he denied that he gave that statement. He also stated in his evidence that why this record i.e., exhibit X18 was made.

230 In order to ascertain the omission and find out correct facts, we went through the statement dated 9.1.2004 Exh.369. His statement was mainly recorded for the identification of the photographs and at the end, he has stated that his daughter Bilkis met him two months after the incident and narrated the incident which happened to her and other relatives. Thus, it appears that this witness was called for specific purpose i.e., identification of the photographs by the police and the police did not put specific questions to him to acquire the details of the narration by the prosecutrix to him.

231 At the time of recording of the statement of a witness under section 161 of the CRPC, the police are required to navigate the witness by putting proper and relevant questions to bring out true facts from him or her. Some persons are vocal; some are silent; some are accurate; some may be timid or some may be miser in expression and

words. So, it is the police who has to lead the witnesses to give correct, true and relevant answers and the information while recording his or her statement. The witnesses who have seen the incident or who are aware of the incident sometimes keep quiet and remain very cryptic having an impression that the incident is so much discussed on number of occasions and known to everybody, therefore he need not say anything about the incident but needs to talk only about his impressions or will answer the questions only which are asked by the police. A witness may not be aware for what he is called. In the present case, Abdul Ghachi was called on 9.1.2004. The photographs of the dead bodies were shown to him. These were the photographs of the dead bodies of his near and dear relatives. Thus, it appears that the witness has presumed that the fact of murder and rape must be within the knowledge of the police and therefore it was not necessary for him to repeat and speak about it. A common man does not know the law that though the police may be aware that who committed murder but yet for the purpose of

evidence, it should come through a witness and not as a fact within the knowledge of the police. Therefore, we do not discard the evidence of Abdul Ghachi as untrustworthy and similarly it would be erroneous to infer on the basis of his partial silence that the prosecutrix must not have told him anything about her rape and killing of her relatives, because it did not occur. Drawing such conclusion is grossly illogical.

232 The Court cannot go beyond evidence. However, there are certain circumstances which can be spotted and read between the lines. His statement recorded on 18.3.2002 cannot be given any importance because it was recorded by the police officer of Limkheda who was an accused.

Abdul Ghachi could not meet Bilkis at least for a period of two months from the occurrence of the incident of murder and rape. The police of Limkheda were fully aware that Abdul Ghachi is the father of the prosecutrix and they

had sent the prosecutrix to Godhra camp. However, they did not bring the father and the daughter together to find out the truth and more details from them which in fact, was required and expected from the investigating agency.

**SADDAM :-**

233 One more witness corroborates the prosecutrix to some extent i.e. PW 8 Saddam. Saddam is a child witness. At the time of giving evidence, Saddam was only about 12 years old. His evidence was recorded in June, 2005. So, at the time of the incident, he was hardly 8/9 years old. Considering his age, he was capable of remembering the incident. He has stated that he was residing in Randhikpur. He left the house because all Hindus were burning the houses of Muslims. Then, he alongwith the prosecutrix, his mother Akli and other family members left Randhikpur. 2-3 days after they left Randhikpur, two white colour vehicles arrived. The people in the vehicles were giving slogans. They pelted stones on them. He said that he was hit with stone on his

forehead. In fact, even at the time of his evidence a visible scar could be seen on his forehead which lends further assurance to his evidence. He deposed about killing of his mother and other relatives and when he became conscious, he found Hussain, a four year old boy, weeping in the bush. He took Hussain with him and they ran towards the road. Saddam has further stated that one person arrived there and he took them to Limkheda police station and then, they were sent to hospital for medical treatment and thereafter to Devgad Bariya. Thereafter he was studying in 2005 in 4<sup>th</sup> standard at Ahmedabad. He has identified accused Nos. 1 and 7 to 10 in the dock as assailants who were from Randhikpur. He was cross-examined thoroughly as he was the only witness on the point of taking name of the accused as assailants corroborating the evidence of the prosecutrix. He has stated that there was no jungle at the place where he was hit with stone. He gave admission that a big stone was kept on his stomach, however, he removed the stone and he ran away. We would like to note that in the cross-

examination, the defence has tried to bring omissions in respect of the names of the accused persons as assailants and the offenders were from village Randhikpur. In paragraph 28, he has stated that he did not recollect whether he disclosed before the CBI that all the offenders were from village Randhikpur and he did not know if there is a specific reference to these persons or not. The defence has moved applications under section 391 of the Code of Criminal Procedure before us at the time of hearing the appeal on 22.9.2016 with prayer of recalling  $\frac{1}{4}$  witnesses including the Investigating Officer Mr.Sinha (PW 72). The learned Counsel Mr. Ponda has submitted that the Investigating Officer PW 72 had recorded the statement of Saddam. However, these omissions could not be proved inadvertently by putting those to PW 72. In the said applications, the defence wanted to recall some other witnesses to prove the omissions and contradictions in the statements of the prosecutrix which was recorded by accused No.18, who could not be put in the box and, therefore, those omissions and contradictions could not

be proved. However, for the reasons mentioned therein, we have rejected all the applications in all the appeals.

234 PW 9 Dr. Mahato was working as a medical officer at CHC, Limkheda at the relevant time. He has mentioned about the OPD register, the MLC register and case papers. He has stated that on the night intervening between 3.3.2002 and 4.3.2002, he has attended Saddam and Mohsin as OPD patients. Saddam was treated at 1.55 am. He found CLW on his person admeasuring 0.5 cms over the forehead, right side and small abrasion over the occipital area. He then issued MLC dated 4.3.2002 in the name of Saddam under MLC No.1794 which is marked exhibit 88ABC. He attended Mohsin at MLC No.1795 and issued certificate at Exh. 90ABC and he found 5 to 7 linear abrasions on the right cheek of Mohsin and thereafter, he made endorsement on the case papers with sign, date at 7.30am on 4.3.2002. The children were received from constable PW 37 Jorawarsingh R. Rathwa.

235 PW 37 Jorawarsingh was working at Limkheda police station as a police constable and he was on duty on 3.3.2002 and 4.3.2002. He has mentioned that Muslims had sought refuge in Limkheda police station and CHC was next to the police station. He visited the CHC taking 2 injured boys to CHC, at around 1.30am in the night of 2.3.2002. The witness was cross-examined by the CBI prosecutor mainly on the point of date of taking the boys to CHC and it was brought on record to contradict him that the children were taken on the night intervening between 3.3.2002 and 4.3.2002 and not on 2.3.2002 and 3.3.2002. This portion marked A from the statement dated 24.3.2004 which was recorded by CBI is proved. Of course, we cannot make serious use of this contradiction. However, on account of the contradictions being brought out we can certainly take into consideration that he cannot be relied upon. It has also to be borne in mind that PW 37 was attached to Limkheda Police Station and he had interest in purposely giving wrong dates.

236            Learned counsel Mr. Ponda while appreciating the evidence of PW 8 Saddam, has submitted that Saddam was not in the group of the prosecutrix. He submitted that the case of the prosecution that Saddam left Randhikpur with the prosecutrix, is a failed attempt of the prosecution to bring corroboration to the evidence of the prosecutrix. PW 24 Abdul Issa in paragraph 3 of his evidence has given the list of the persons who left along with the prosecutrix and has mentioned the name of Saddam and Hussain, however, he admitted the omission that he did not give the names of Saddam and Hussain when his statements dated 9<sup>th</sup> January, 2004 and 2<sup>nd</sup> February, 2004 were recorded. He submitted that whatever list is given by PW 24 of the persons who left Randhikpur along with the prosecutrix is different than the list given by PW 3 Sugra who left with the prosecutrix or the list given by the prosecutrix. He further submitted that Saddam was not present at the spot. He relied on the evidence of PW 4 Salim, brother of Saddam and he argued that Salim was in Community Health Centre (CHC) at

Limkheda on 2<sup>nd</sup> March, 2002. He submitted that Saddam along with Mohsin/Hussain was at CHC, Limkheda on 2<sup>nd</sup> March, and this falsifies the presence of Saddam at the spot and thus, his evidence is not to be relied upon. The injuries sustained by him were very minor which is possible by some fall. Mr. Ponda discussed the evidence of medical record of Saddam, Mohsin and the prosecutrix which is maintained by Community Health Centre, Limkheda. He pointed out that the Medical Legal Case (MLC) register Article 38 and OPD register of CHC Limkheda (Article 37) are produced by the prosecution. Mr. Ponda pointed out that both the registers are not maintained in regular course of business. The entries are incorrect. Some of the pages are blank, dates are manipulated. Names of Saddam and Hussain are mentioned below the date of 2.2.2002 and not under 4.2.2002. Thus, Saddam and Hussain were not with the group which was allegedly attacked on 3<sup>rd</sup> March, 2002 because they were produced before the Medical Officer PW 9 Dr. Mahato on 2.2.2002. This falsifies presence of Saddam on 3<sup>rd</sup> March at

kachcha road at Panivel with the prosecutrix.

237 Mr. Ponda tried to make capital of the fact that Exh. 90A dated 4.2.2002 shows that Saddam was not examined after the incident but one month prior to the incident. However, it is seen that PW 9 Dr. Mahato has stated that after he examined the patient, the medical officer used to record his observations on OPD case papers. Nurse on duty used to fill in the particulars of the patient and the medical officer used to record the observations made and the treatment advised in his indoor case papers. Thus, it is seen that the upper part where the date 4.2.2002 is appearing is filled in by the nurse and is not attributed to PW 9 Dr. Mahato who on the same document below has written the date as 4.3.2002. Moreover, in the MLC of Saddam which is MLC No. 1794, the date is clearly stated as 4.3.2002 which shows that Saddam was examined on 4.3.2002.

238 Mr. Ponda has submitted that the evidence of

Saddam is full of omissions and contradictions. He did not say anything about the incident of rape. He has admitted that he did not state before Gujarat CID when his statement was recorded on 4<sup>th</sup> March, 2002 that he saw his mother was hit with dhariya. He did not state about tearing of clothes of the ladies. He did not state about his mother telling him that his sister Akli was dead. He also admitted that he did not state that the persons in the mob were holding weapons like sword, dhariya, sticks etc. Mr. Ponda pointed out that Saddam has also admitted that at the time of recording his statement by CBI he had not mentioned that he was hit by a 'big' stone. On the other hand, Mr. Ponda further submitted that it is a very minor injury and Saddam did not mention that he became unconscious. The learned counsel submitted that his evidence is full of contradictions and thus, he was not in the group of the prosecutrix when they all started from Randhikpur and the incident took place. However, it is seen that Saddam has stated that he was hit by stone. This is further corroborated by the evidence of PW 9 Dr. Mahto as

well as the fact that when he was deposing before the Court, a scar was seen on his forehead.

239 Mr. Ponda pointed out that the prosecutrix in her previous statement Exh. 57 (Fax) and Exh. 277 makes no mention of Saddam. Regarding Exh. 57 (Fax) we have already discussed in detail why it cannot be said to be a document of which the prosecutrix is the author. Exh. 277 is the only document which is exhibited and can be read wherein it is noticed that the prosecutrix has not taken specific name of any relatives but she has stated that "we started running.... we left Randhikpur...we started to go to kachcha road..." Thus, she has not taken specific names, therefore, it cannot be said that Saddam's name is a deliberate addition made by the prosecutrix in her evidence just to create one witness to the incident. At this juncture, the submissions of Mr. Venegavkar that the injuries caused to Saddam and his medical examination by PW 9 Dr. Mahato on the early morning of 4.3.2002 is a corroboration of his

presence at the time of assault, is also required to be considered.

240 We have seen the record of various entries as pointed out by Mr. Ponda from MLC register. For example Entry No. 1883 dated 9<sup>th</sup> April 2002 is marked Exh 101 and entry No. 1980 dated 7<sup>th</sup> May, 2002 is marked Exh 102, however, there is entry No. 1900 which is on 7<sup>th</sup> March, 2002, i.e., prior to entry No. 1883. With this, we accept that entries made in MLC register at CHC Limkheda were not made properly.

241 Mr. Venegavkar admitted that the MLC and OPD registers of Community Health Centre at Limkheda were not maintained properly which is clear from the evidence of PW 9 Dr. Mahato. However, Mr. Venegavkar relied on the evidence of PW 9 Dr. Mahato who has stated that Saddam was examined by him on 4.3.2002 at 1:55 a.m. When he examined Saddam, he found C.L.W. measuring 0.5 cm on the

right side of the forehead of Saddam and abrasion over occipital area of the scalp on the right side. Accordingly, he made record of it in the OPD Papers. In Article 37 - OPD register, we find entries of Saddam and Mohsin / Hussain at serial No.3908 and 3909. We have gone through the evidence of PW 9 Dr.Mahato along with the evidence of PW 8 Saddam. Dr. Mahato has stated that Saddam was eight years old child. If Dr. Mahato had not examined Saddam, there would be no occasion for him to see Saddam and to state that he was a boy who was eight years of age. Mr. Venegavkar submitted that Saddam himself is an injured witness and hence, his testimony ought to be relied upon because the testimony of an injured witness stands on a higher footing than that of other eye witnesses.

242 In relation to testimony of injured witness, Mr. Venegavkar and Mr. Sait, learned APP relied on the decision of the Supreme Court in the case of **Abdul Sayeed Vs State of Madhya Pradesh** reported in **(2010) 10 SCC 259**. They

relied on paragraphs 28 and 29 of the said decision which reads thus:

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 & Ors. v. State of Bihar, AIR 1972 SC 2593; Malkhan Singh & Anr. v. State of Uttar Pradesh, AIR 1975 SC 12; Machhi Singh & Ors. v. State of Punjab, AIR 1983 SC 957; Appabhai & Anr. v. State of Gujarat, AIR 1988 SC 696; Bonkya alias Bharat Shivaji Mane & Ors. v. State of Maharashtra, (1995) 6 SCC 447; Bhag Singh & Ors. (supra); Mohar & Anr. v. State of Uttar Pradesh, (2002) 7 SCC 606; Dinesh Kumar v. State of Rajasthan, (2008) 8 SCC 270; Vishnu & Ors. v. State of Rajasthan, (2009) 10 SCC 477; Annareddy Sambasiva Reddy & Ors. v. State of Andhra Pradesh, AIR 2009 SC 2261;

Balraje alias Trimbak 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 SCC 719, 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:-

"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 injured 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."

243 The Supreme Court in the case of **State of M.P. Vs. Mansingh & Ors.** reported in **(2003) 10 SCC 414** has observed that the evidence of injured witness has greater evidentiary value.

244 Mr. Venegavkar read over the evidence of PW 8 Saddam so also PW 24 Abdul Ghachi and the prosecutrix on the point of the presence of Saddam. He submitted the omission of name of Saddam is found in the FIR (Exh.56), however, the name of PW 24 Abdul Ghachi, the father of the

prosecutrix is mentioned in the FIR (Exh. 56). Mr. Venegavkar submitted that Exh. 56 is a manipulated document prepared by the police of Limkheda police station and some of these police officials were made accused and Saddam being an eye witness to the incident, his name is deliberately omitted. However, he submitted that Saddam's presence is not doubtful. The discrepancies, which are highlighted by the defence are superficial. He further relied on the documentary evidence of medical certificate of Saddam's MLC and OPD registers of CHC Limkheda. He further submitted that Saddam was taken to hospital and was attended by PW 9 Dr. Mahato. This fact itself confirms that Saddam was present at the time of the assault and he has identified accused Nos. 1 and 7 to 10 as assailants, who were from Randhikpur.

245 Mr. Venegavkar submitted that from the evidence of Saddam, it is proved by the prosecution that on the same day, i.e., 3<sup>rd</sup> March, 2002, Saddam was taken to Limkheda

Police Station and he has disclosed the fact, however, his FIR was not recorded. He further relied on medical papers of Saddam Exh 88B. Exh 88B discloses that Saddam was taken to the hospital at 1.55 a.m. on 4<sup>th</sup> March, 2002. He has stated that erroneously the date is shown as 4<sup>th</sup> February, 2002 but this discrepancy is explained by witness PW 9 Dr. Rakeshkumar Mahato who examined Saddam.

246 From the cumulative effect of the evidence of PW 8 Saddam and PW 9 Dr. Mahato, the prosecution has proved that Saddam was injured in the incident on 3.3.2002 and was taken to the hospital and was attended to by PW 9 Dr. Mahto on 4.3.2002. Therefore, Saddam corroborates the prosecutrix on the point of moving with the group and on that particular day i.e., on 3.3.2002 some persons in white vehicles arrived at kachcha road and they attacked the prosecutrix and also Saddam and other persons.

247 However, as far as Saddam is concerned, in his

evidence, he has not deposed about the prosecutrix or any of her relatives being raped or killed. He has only stated that his mother was killed and he received injury on account of stone being thrown at him, hence, his testimony is of limited use to prosecution.

**MEDICAL EVIDENCE - PW 9 DR. Mahto, PW 17 DR. ROHINI KATTI AND DW 3 DR. GEETA PISAGAR IN RELATION TO THE PROSECUTRIX:**

248 PW 9 Dr.Mahto is the medical officer who was deputed at CHC, Limkheda which was under the Government of Gujarat. Dr. Mahto has stated that he examined the prosecutrix on 5.3.2002 at 10.10 a.m. when she was brought to CHC, Limkheda, by a lady constable with yadi written in Gujarati. So, he made entry at entry No.3983 dated 5.3.2002 (Exh. 95) in the register i.e., OPD register (article 37). Exh. 95A is true extract of Exh. 95. Thereafter, he also entered name of the prosecutrix at Sr.No. 1796 dated 5.3.2002 in medico legal case register (article 38) which are marked exhibits 91 & 91A. She was treated as OPD patient. He had recorded the observations made by him in OPD case

papers. He has stated in his evidence that he found swelling on the left hand and pain in the neck and back of the prosecutrix. She was also complaining about pain in the right occipital area of the scalp. These observations are found at exhibit 92. He issued the MLC certificate on 5.3.2002 after examining her at around 10 am on 5.3.2002, which is marked exhibit 93. He was cross-examined thoroughly especially on the point of maintaining the OPD and MLC registers.

249 The learned Counsel Mr.Ponda submitted that on the point of injury on the person of the prosecutrix, she has stated in paragraph 7 of her examination-in-chief that accused no.1 Jaswantbhai was holding sword and he assaulted her with sword, at that time, she tried to ward it off which caused cut injury to her left palm between thumb and index finger. She was examined by PW 9 Dr.Rakeshkumar Mahto immediately on 5th March, 2002. Mr. Ponda submitted that the medical evidence does not support her oral evidence. He pointed out from the evidence of PW9 Dr.Mahto

that there was only swelling on her left hand and no other injury was found. He submitted that the injury noted by Dr. Mahto is not consistent with assault by sword.

250 The learned counsel Mr. Ponda submitted that the prosecutrix has deposed that she told about her health and injuries to PW 9 Dr. Mahto, however, after going through the evidence of Dr. Mahto, it is clear that he did not tell that the prosecutrix had informed him about rape on her and killing of her relatives. The learned counsel submitted that the prosecutrix did not disclose the fact of rape on her and killing of her daughter at the earliest opportunity when she was taken to Dr. Mahto because it never happened that she was raped nor her daughter was killed as stated by her. It is pertinent to note that Dr. Mahto had stated that he was not conversant with Gujarati and the prosecutrix has stated that she did not understand Hindi. Dr. Mahto has stated that he is originally from Patna, Bihar. He passed MBBS from Medical College in Bihar. He joined Medical services as Medical

Officer in January, 2002 and was posted at Community Health Centre Limkheda. He has specifically stated that in 2002, he was only knowing Hindi and little English.

251 Mr.Ponda further pointed out that two entries of Fakruddin and Qutubuddin are shown at Sr. nos. 3904 and 3905 on 2nd March, 2002 in OPD register of CHC Limkheda and though they are shown as MLC cases, these two names are not mentioned on the relevant dates in MLC register. He relied on the evidence of PW 9 Dr. Mahto in paragraph 42 where PW 9 has admitted that the entries were made by him in the MLC registers on 2nd March, 2002 or on 3rd March, 2002 but they were not made on the respective dates. The learned counsel thus submitted that this clearly shows that the registers were not maintained in the regular course of business and the entries relating to the prosecutrix are manipulated. He submitted that in the loose papers, i.e., medical certificates which were prepared, wrong dates are mentioned, wrong timing is given and hence, these

documents cannot be relied upon.

252 Mr. Ponda submitted that the defence has examined DW3 Dr.Geeta Pisagar. She stated that she examined the prosecutrix at Godhra civil hospital and the case papers (exhibit 138A) were in her hand-writing. She concurred with the negative finding given by Dr.Katti in respect of the prosecutrix about the injuries to genitals and presence of spermatozoa. On the basis of Exh. 138A and pathological report marked exh. 144 of vaginal swab and blood, she opined that she did not think that the prosecutrix might have been raped by three persons.

253 Mr. Ponda elaborated the circumstances to discredit the evidence of the prosecutrix and relied on the evidence of PW 17 Dr. Katti and also DW 3 Dr.Pisagar. As per the evidence of PW 17 Dr. Rohini Katti, the prosecutrix disclosed the suffering to her and the prosecutrix told her that accused Nos.1, 2 and 3 raped her. Mr. Ponda pointed

out that however, on the same day i.e. 7.3.2002, different names are given by the prosecutrix in the fax Exh.57. We have already dealt with in detail about Exh.57 and how it cannot be relied upon.

254 Mr.Ponda on the injuries of the prosecutrix and the medical evidence before the Court has submitted that as per her case, which is brought out in the cross-examination, her clothes were torn and she was dragged nearly for 30 feet by the accused and thereafter, accused Nos.1, 2 and 3 raped her one after the other. Mr. Ponda submitted that in such case, large number of injuries would have been found on her back but that is not so, which falsifies story given by the prosecutrix. However, it is to be noted that if the medical evidence given by PW 17 Dr.Rohini and DW 2 Dr.Pisagar is considered, it shows that there were multiple abrasions on her back which in fact corroborates the case of the prosecutrix.

255 Mr. Ponda submitted that though she had stated that accused No.2 put foot with chappal on her neck, there was no injury on neck which shows that her story cannot be believed. As far as this aspect of no injury on neck is concerned, in our opinion it does not necessarily follow that because foot was kept on neck of the prosecutrix, there should be an injury. Thereafter Mr. Ponda further submitted that moreover, she was 5 months pregnant and if 3 persons would have raped her one after the other, there would have been injury to her so also the foetus would have been harmed. He relied on the evidence of Dr.Rohini Katti, who has stated that she might not have been raped by three persons.

256 Mr. Ponda further pointed out that PW 9 Dr. Mahto who examined the prosecutrix on 5th March, 2002 found only swelling on the left hand of the prosecutrix. However, Dr.Rohini who examined her on 7.3.2002 i.e. two days thereafter found CLW injury on the left hand. Thus, there is a

variance in the evidence of the two Doctors. He pointed out DW 2 Dr. Geeta Pisagar was M.D. Gynaecologist and she was superior to Rohini and she has opined that it was not a case of rape, hence, it has to be believed.

257 On the other hand, Mr.Venegavkar has fully relied on the evidence of PW 17 Dr. Rohini Katti and submitted that the defence could not dislodge the evidence of Dr. Katti in the cross-examination. He pointed out that Dr. Katti examined the prosecutrix on 7.3.2002 at 6.45 p.m. which is clear not only from the evidence of Dr. Katti but also from case paper of the prosecutrix which is at Exh. 138. This case paper is in the hand writing of Dr. Katti. He argued that Dr. Katti has described the injuries on the back of the prosecutrix which corroborate her evidence that she was dragged. Dr. Katti has stated that she noticed multiple abrasions over back of the prosecutrix with scab formation. She also noticed abrasions on her right arm with scab formation. Dr. Katti also noticed CLW admeasuring about 4 cm. x 2 cm. x 1 cm in the

web between left thumb and index finger with diffused swelling on left hand. So also, DW 3 Dr. Geeta Pisagar has stated that on 7.3.2002, she examined the prosecutrix and she has admitted her hand-writing on exhibit 138A. Mr. Venegavkar submitted that the prosecutrix has given the history to the Doctor and that is reproduced as narrated by the prosecutrix in the history-sheet (Exh.138 and 138A). In the said history, it is stated that the prosecutrix along with her family members ran away from Randhikpur to Chundadi village, then to Kuwajar and on the way to Panivela a mob killed her relatives and she was raped by accused nos.1 to 3. The next day police came and rescued her. He pointed out that the names of all the 3 accused 1, 2 and 3 i.e., Jaswant Nai, Govind Nai and Naresh Modhiya are mentioned and that they raped her on the road leading to village Panivel. He submitted that these medical papers (Exh. 138, 138A, 141, 143) dated 7.3.2002 corroborate the evidence of the prosecutrix in respect of the incident and identification of the persons, who raped her. Mr. Venegavkar drew our attention

to Exh. 138A and other case papers & more specifically to page 1217 of the paper book and pointed out that the case papers of the prosecutrix show that she had abrasions on the back, right breast, gluteal region, left leg and right thigh. He submitted that the evidence of DW 3 Dr.Geeta Pisagar could not demolish the case of prosecution and the evidence of Dr.Katti, who hails from Madhya Pradesh and has corroborated the fact of recording of history as narrated by the prosecutrix. DW3 Dr.Geeta Pisagar was from Godhra and therefore she was won over by the investigating accused who were investigating the case at the relevant time.

258 Mr.Venegavkar has submitted that prosecution relies on evidence of PW-9 Dr. Mahto for three points - (i) the prosecutrix was examined on 5th March, 2002 at Community Health Centre Limkheda; (ii) Saddam and Hussein / Mohsin were brought to Community Health Centre at 1.55 a.m. on 4th March, 2002; and (iii) there were injuries on the person of the prosecutrix, Saddam and Hussein. It is the case of the

defence that the prosecutrix did not narrate the incident of rape to PW 9 Dr. Mahto, because no such incident occurred. Mr. Venegavkar submitted that PW 9 Dr. Mahto did not say that he examined the prosecutrix for rape. This is because the prosecutrix was unable to communicate to him that she was raped. This is because she is a rustic illiterate villager from Gujarat, who knew only Gujarati hence, it was not possible for her to communicate with PW 9 Dr. Mahto in Hindi. Dr. Mahto only knew Hindi and a little English. He joined Community Health Centre first time in Gujarat on 7th January, 2002, i.e, 2 months prior to the examination of the prosecutrix. Earlier, he was at Bihar where Hindi is the local language. He could not read Gujarati and hence could not read Yadi Exhibit 302 in which rape was mentioned. Mr. Venegavkar submitted that there is no cross-examination of CLW on forehead of Saddam and also the injury on the hand of the prosecutrix. He submitted that PW 9 Dr. Mahto could not write history of the patients because Saddam and Hussein were crying and the prosecutrix spoke to him in

Gujarati which he could not understand. He further submitted that there was no nurse in the room, that has been brought out in the cross-examination in paragraph 74 of PW 9 Dr. Mahto and therefore it was not possible for him to conduct vaginal examination of the prosecutrix.

259 Mr. Venegavkar has submitted that PW 9 Dr. Mahto was a Doctor. He fairly submitted that the prosecution is not relying much on the evidence of Dr. Mahto. Mr. Venegavkar argued that the OPD registers (article 37) and MLC case register (article 38) were not actually maintained by this witness. Many questions were put to him in respect of maintaining these two registers but they were actually maintained by the nurse or staff of CHC and not by this Doctor and therefore, he cannot explain inconsistency in the entries and dates made in these two registers. He further submitted that the prosecutrix talked with him in Gujarati. The witness has stated so and he has also stated that she did not reply in Hindi. Thus, though the prosecutrix talked

with him, he did not understand what the prosecutrix said and he just said that the prosecutrix did not make statement of any rape before him.

260 Mr. Venegavkar submitted that PW 17 Dr. Rohini Katti examined the prosecutrix on 7th March, 2002 and he has relied on Exhibits 138 and 138A, 141 and 143. These are the case papers of the prosecutrix. He submitted that the prosecutrix was admitted as indoor patient. He further submitted that this witness had handed over medical case papers and documents to CBI under seizure panchnama dated 5th March, 2004 which is marked as Exhibit 142. This panchnama is also signed by PW 17 Dr. Katti which is admitted by her.

261 The learned counsel Mr. Venegavkar argued that DW-3 Geeta Pisagar, is M.D. (Gynaecology) but the main doctor who has examined the prosecutrix is PW-17 Dr. Katti. He submitted that opinion given by DW 3 Dr. Geeta Pisagar

on the point of rape is inconsistent with law. She said that partial penetration with or without emission of semen would not constitute the offence of rape. Mr. Venegavkar submitted that even partial penetration would constitute the offence of rape. Dr. Geeta Pisagar has given opinion that the prosecutrix was not raped. However, it is the opinion of Dr. Pisagar as expert in the medical field. We have to consider the offence in legal terminology where the definition of rape is different than sexual intercourse.

262 We have perused Article 37 OPD register and Article 38 MLC register of CHC Limkheda. Entry of the prosecutrix is found at sr. no. 3983 in OPD register and entry of the prosecutrix is marked as Exhibit 95. The submissions of Mr. Ponda on the point of MLC and OPD register that they are not properly maintained at CHC Limkheda is accepted. The entries which are pointed out by him clearly disclose that the doctors or the staff had made the entries subsequently and the names of the patients who were treated were not

entered in the registers on the respective dates that they were examined. There are blank pages in MLC register. OPD and MLC registers are the important documents which could place contemporaneous record before the Court. Thus, the prosecution had an opportunity to place such contemporaneous record, however, it is evident from the record that PW 9 Dr. Mahto and other doctors and staff at CHC Limkheda did not bother to maintain these registers meticulously, though it is expected to maintain the registers meticulously in the regular course of business. These being the documents which are supposed to be maintained in the regular course of business, the documents are rightly admitted in the evidence as Articles 37 and 38 however they are not maintained properly in relation to dates is a fact which is believed by us.

263            However, as per the evidence of PW9 Dr.Mahto, he had attended 3 patients, i.e., Saddam and Mohsin on the night intervening 3rd March and 4th March, 2002 and

thereafter the prosecutrix on 5th March, 2002 at Community Health Centre. The witnesses i.e the prosecutrix and PW8 Saddam have stated that they were sent to Community Health Centre on the relevant dates. In fact, defence has also admitted that the prosecutrix was sent to Community Health Centre on 5th March, 2002. On this point, defence has examined DW6 Ushaben, the police constable, who has stated that she took the prosecutrix to Community Health Centre on 5th March, 2002.

264 The prosecutrix was subjected to medical examination twice. First, on 5.3.2002 by PW 9 Dr.Mahto at CHC Limkheda and thereafter on 7.3.2002 at Godhra civil hospital, Godhra by PW 17 Dr.Rohini Katti and DW 3 Dr.Geeta Pisagar. PW 17 Dr.Rohini Katti is a resident of Madhya Pradesh and M.S. in Gynaecology. DW 3 Dr.Geeta Pisagar is a resident of Gujarat. DW 3 Dr.Geeta Pisagar was M.D. in Gynaecology. On 7.3.2002, the prosecutrix was brought to Godhra civil hospital and PW 17 Dr.Rohini Katti was informed

by persons who produced her that it was a case of rape. Thereafter, she examined the prosecutrix along with DW3 Dr. Geeta Pisagar, who was her senior. The case papers of the prosecutrix were prepared (Exh. 138, 138A and 143). After examination by the two Doctors, PW17 Dr. Rohini Katti sent a written report to the police in writing. The said report dated 7.3.2002 is in her hand-writing (exhibit 137). Dr. Katti stated that the prosecutrix disclosed to her that she along with her relatives left Randhikpur due to riots and when she was on road leading to Panivel along with her relations, a mob attacked them and killed her relations and she was raped by three persons. She disclosed the names of rapists that is accused nos.1 to 3 which was mentioned in the medical history. Her case paper with medical history as an indoor patient No.15767 dated 7.3.2002 is produced which is marked exhibit 138. PW 17 Dr.Rohini Katti stated that she noticed one CLW about 4cm X 2cm X 1cm in the web between left thumb and index finger as well as defused tender swelling on the left hand. She noticed multiple

abrasions over back and right arm with scab formation. She has opined that those injuries were 4 to 5 days old. This fully corroborates the evidence of the prosecutrix of being assaulted by Accused No.1 with sword. The prosecutrix was pregnant at that time. Dr. Katti noted down that the prosecutrix was 20 weeks' pregnant. She sent vaginal swabs and blood sample of the prosecutrix to forensic laboratory. The prosecutrix was admitted as an indoor patient for one day and discharged on 8.3.2002. Dr. Katti has stated that no police yadi was sent along with the prosecutrix. Though she had sent the report (Exhibit 137), no yadi was sent. She sent reminder on 13.3.2002 and ultimately, the yadi was received on 18.3.2002 (Exh. 140). The CBI seized the case papers and relevant medical papers of the prosecutrix from PW 17 Dr. Rohini Katti under seizure memo on 5.2.2004, which is marked exhibit 142. Dr. Katti identified her signature on it. The medical certificate issued is marked exh. 143 wherein she described the details. Dr. Katti stated that she had joined her senior in the medical examination. She identified the two

sheets of case papers on which DW 3 Dr.Geeta Pisagar has signed and has recorded observations which is marked exhibit 138A and certificate is marked exhibit 143.

265 No doubt, in her cross-examination Dr. Katti has admitted that no spermatozoa were detected in the vaginal swab sent to the pathological laboratory, Godhra and no injuries were detected on external or internal genital organs and no semen was found on the genital organs of the prosecutrix. Dr. Katti gave admission in the cross-examination that she was not in a position to say from these aspects as to whether the prosecutrix was raped or not. In this connection it may be stated that the incident occurred on 3.2.2002, it is not expected that on 7.2.2002 when the prosecutrix was examined, traces of semen would be found. As far as finding of injuries on genitals is concerned, the prosecutrix was a married woman. Much prior to the incident she had given birth to a child which is seen from case paper of the prosecutrix Exh. 138A that previously she had a full

term normal delivery of a female child who died in the riots. In such case, it is not expected that there would be any injuries on the genitals of the prosecutrix on account of rape. As far as Dr. Katti not being able to state whether the prosecutrix was raped or not, we would like to make a reference to Exh. 137 which is a letter written by PW 17 Dr. Rohini Katti to the police Inspector of Godhra town. It is stated therein that one Bilkis Yakub Rasul Patel age 20 years came to Civil Hospital Godhra from rescue camp at Godhra on 7.3.2002 at 6.45 p.m. with history of rape five days ago.

266 PW 17 Dr.Rohini Katti and DW3 Dr.Geeta Pisagar have admitted that the documents at exhibit 138 and 138A are in their respective hand-writing. In Exh. 138, it is found that the prosecutrix has mentioned the names of accused Nos.1,2 and 3. The injuries are also mentioned. In Exh. 138A which is in the hand-writing of DW 3 Dr.Geeta Pisagar, there is a mention of history of rape. She found the injury on the left hand of the prosecutrix. She has admitted in the cross-

examination by the prosecution that she did not record her opinion that there was no possibility of rape on the prosecutrix. Though DW 3 Dr.Geeta Pisagar did not record a positive finding of rape, she also did not record the opinion about non-possibility of rape on the prosecutrix. The prosecutrix was married. She had a daughter who was 3½ years old. She was pregnant second time. The most important fact in respect of absence of spermatozoa & internal or external injuries on vagina is that when the prosecutrix was examined almost 5 days had elapsed since the incident. The prosecutrix was examined by these Doctors almost 5 days after the incident and therefore, there cannot be any possibility of finding of spermatozoa or semen so many days after the incident. However, after 5 days, formation of scab on the abrasions was seen on the back of the prosecutrix which further supports her case.

267 In relation to the contention of Mr. Ponda that the prosecutrix was dragged for 30 feet and absence of abrasion

on her back disproves her theory, it is to be noted that the prosecutrix did not state in the examination-in-chief that she was dragged for 30 feet. She has stated that she was taken away near the tree. However, in what manner, she was dragged is not stated by her. In the cross-examination, the defence has sought admission from her that she was dragged for 30 feet. However, she has not stated that when she was dragged, she was naked. She has admitted that her clothes were torn. However, tearing of clothes does not mean that the person was naked at the relevant time so also which portion of the clothes was torn also matters. It is not necessary that when the person is dragged, his or her back should touch the ground. A person can be forcibly dragged without the back touching the ground. Thus, it is not necessary that when the prosecutrix was taken there forcibly and her clothes were torn, there should be marks or abrasions on her back or buttocks. It is to be noted that as per the case of the prosecutrix, she was raped on the morning of 3.2.2002. Thereafter, for one day, she hid on the

hillock. Next day, she climbed down and then she was taken to Limkheda police station on 4.2.2002. On 7th March she was sent for medical examination, four days had already gone by. However, it is pertinent to note that PW 17 Dr. Rohini Katti found a number of abrasions on the back of the prosecutrix which supports the case of the prosecutrix.

268 In relation to the contention of Mr. Ponda that it is the case of the prosecutrix that accused No. 1 was going to assault her with sword, hence, she held out her hand to ward off the blow due to which she received injury on her left hand and Dr. Mahto finding only swelling on her palm which falsifies the case of the prosecutrix, we may state that Dr. Mahto could not understand what the prosecutrix was saying. He did not think it is a serious case and hence he examined her cursorily. His evidence also shows that there was a huge crowd at the hospital, he was the only doctor dealing with the patients, hence, he did not examine the prosecutrix very carefully. However, the evidence of Dr. Katti clearly shows

that a CLW was found on the hand of the prosecutrix which was 5 days old. The injury seen by Dr. Katti on the palm of the prosecutrix is consistent with the case of the prosecutrix of accused no.1 assaulting her with sword.

269 It appears from the evidence of PW 9 Dr. Mahto that he did not understand what she was telling and moreover, he was a male Doctor. From his side, he being a Doctor, all patients irrespective of the gender, are same before him. However, the prosecutrix would not have been comfortable with a male doctor so also there was barrier of language. She was also threatened by the police not to disclose the names of the assailants and rapists otherwise poisonous injection would be administered to her at hospital. Though she has not stated specifically in the evidence but the fact that she deposed that she told Dr. Mahto but she could not explain it properly, appears true. She might have attempted to disclose but as she could not succeed she left it. On 7.3.2002 when she was taken to PW 17 Dr.Rohini and DW

2 Dr.Pisagar, she told that she was raped. In fact earlier she has disclosed this fact of rape to PW 18 District Magistrate and Collector Jayanti Ravi and PW 23 Govindbhai Patel on 6.3.2002. She has also disclosed that her relatives were killed. When she was sent for medical examination as a victim of rape, that time, she was carrying a foetus of 5 months. It is not necessary that after three successive sexual intercourse, the foetus must be affected as contended by Mr. Ponda. DW 3 Dr.Geeta Pisagar has expressed her opinion regarding rape on the prosecutrix and according to her, there cannot be rape if there is partial penetration with or without emission of semen. The Doctor has medical knowledge and is not expected to be conversant with legal definition of rape. Rape is a legal terminology and therefore, in medical science, there is no such act of rape but it is always sexual intercourse. Whatever opinion she has expressed is a medical view and therefore, it cannot be given any weightage so far as evidence in rape case is concerned. Under the law, even in a case of partial penetration or no ejaculation, the

offence of rape is complete. Therefore, the act fulfills the definition of rape in law and not of sexual intercourse under medical science.

270 On 5th March, 2002 when the prosecutrix was examined by PW 9 Dr. Mahto, on paper there is nothing to show that the prosecutrix has disclosed that she was raped and yadi, which is marked as Exhibit 203 sent by Limkheda Police Station to Medical Officer is also silent about whether the prosecutrix was raped or not as yadi was prepared consistent with FIR Exh. 56 which is a fabricated document. In the medical examination conducted by PW-17 Dr. Katti and DW-3 Dr. Pisagar on 7th March, 2002 her vaginal swab and blood was taken and samples were sent to Forensic Laboratory. However, the report of finding of semen or spermatozoa is negative. Such report is bound to be negative because the vaginal fluid samples were taken 4 days after the incident of rape.

271 At this stage, we would like to highlight one point that yadi was sent by Limkheda Police station on 5th March, 2002 to PW-9 Dr. Mahto Medical officer, Community Health Centre Limkheda. In that yadi which is marked as Exhibit 203, the offence under section 376 was mentioned, however, there is no mention of rape on the prosecutrix. In Exh. 203 there is specific mention that the palm of the prosecutrix was injured so she was to be examined. Thus, as far as Dr. Mahto was concerned, there was no clue whether the prosecutrix was raped. There was no reason for PW-9 Mahto to be aware of the contents in Exhibit 56 wherein there was no mention that the prosecutrix was raped but the narration of rape of other ladies was only mentioned. The said yadi was in Gujarati and PW 9 Dr. Mahto could not read Gujarati. According to the evidence of the prosecutrix, she told in Gujarati that she was raped, however, Dr. Mahto did not understand what the prosecutrix was saying. PW-17 Dr. Katti has stated that the prosecutrix was brought to her by Dr. Jamila of Godhra Hospital and she examined the prosecutrix

as she gave history of rape. She immediately sent medical report dated 7th March, 2002 which is marked Exhibit 137. PW-17 Dr. Rohini Katti addressed that report to P.I. Godhra specifically stating that it is a medico legal case of rape during riots which has taken place 5 days back. Pursuant to this note, PW-17 Dr. Rohini Katti was expecting yadi from Limkheda Police Station, however, yadi was not sent immediately. She waited for it. Again she sent a reminder on 13.3.2002 (Exh.139) and then yadi was sent which was received on 18<sup>th</sup> March, 2002. The yadi is marked as Exhibit 140. Thus, 10 days after medical examination of the prosecutrix by PW 17 Dr. Katti, the yadi was sent by Limkheda Police Station. It is the same police station which earlier sent the prosecutrix for medical examination to CHC Limkheda along with first yadi dated 5<sup>th</sup> March, 2002 , which is marked Exhibit 203.

272 We have perused both the yadis Exhs. 203 and 140 and compared them with each other. We found that in

yadi Exhibit 203 though section 376 was written but it was not in relation to the prosecutrix. However, in this yadi, there was specific mention of injury to palm of the prosecutrix, so it was suggested that she has to be treated for that injury. However, in yadi Exhibit 140 though PW 17 Dr. Katti had mentioned that the prosecutrix has come there with the history of rape committed on her about 5 days back during the riot and she requested for yadi, the police officer of Limkheda did not mention that the prosecutrix is to be examined medically for the offence under section 376 of Indian Penal Code. It was necessary and obvious that any police officer, while preparing yadi in relation to victim of rape, would request doctor to examine victim medically for sexual assault. However, yadi Exhibit 140 is vague and it does not specifically mention that the prosecutrix has to be medically examined in relation to rape. Thereafter it was further necessary step for Limkheda Police to record supplementary statement of the prosecutrix as soon as they were informed about the rape. However, this was not done.

Thus, we don't require any other proof to infer that police from Limkheda Police Station wanted to suppress the fact of rape committed on the prosecutrix. They wanted to screen the perpetrators of the crime for the reasons best known to the police. This is how they gagged mouth of the prosecutrix so that her cry for justice would not be heard by anybody.

273 On going through the medical evidence, we are of the opinion that the evidence of PW 17 Dr. Rohini Katti fully corroborates the prosecutrix.

### **TAINED INVESTIGATION**

274 As per the case of the prosecution, 14 persons were killed in the incident dated 3.3.2002. Out of these 7 bodies were found. The evidence of PW 34 Amrutsingh Khant and PW 35 Ranjeetsingh Patel show that 7 corpses were found i.e. of 4 females and 3 children. The evidence of panch witness Baria also shows that 7 bodies were found. The defence has not disputed this position. According to the

prosecution, the bodies of 7 persons are as under:

- (1) 4 women i.e. Haleema, Ameena, Sugra and Shamim;
- (2) 2 boys - Irfan and Aslam;
- (3) One girl Munni.

However, the body of 2 days old daughter of Shamim and Saleha 3½ year old daughter of the prosecutrix were not found but the photographs of dead body of Saleha are on record.

275 On 4.3.2002, FIR of the prosecutrix was recorded at Limkheda police station by accused No.17 Somabhai Koyabhai Gori and DW1 Budhsingh who scribed the same. DW 6 Chandubhai also scribed 1 copy of FIR. At that time, PW 35 Ranjeetsingh the police constable, was present. He has stated that a Yadi was prepared for sending the prosecutrix for medical examination. A copy of the said yadi dated 4.3.2002 was shown to PW 35 and he has identified the

certified copy of the said yadi. Exhibit 203 is the yadi. Yadi discloses that it was prepared on 4.3.2002 at Limkheda police station. However, the prosecutrix was not sent for medical examination on the same day. It has come in the evidence of DW 7 Usha and PW 7 Madina that CHC Limkheda was very close to Limkheda police station. We do not find any good reason for not sending the prosecutrix for medical examination on 4.3.2002. The prosecutrix had suffered one injury to her hand and it was visible. It was noticed by PW 19 Feroz Ghachi and the prosecutrix has also stated about the injury in her examination in chief. The case of the prosecutrix was that she had disclosed to the Limkheda police that she was raped by three persons. If there is a complaint of rape made by any woman to the police, then it is the first and foremost duty of the police to send that lady for medical examination to collect medical evidence and also to ascertain the truthfulness. Instead, the police i.e., accused No.16, who was in charge of investigation did not send her for medical examination. This is a big flaw in

the investigation of Limkheda police station which in fact goes against the accused persons and this flaw is an incriminating circumstance against the accused as not sending the prosecutrix to CHC on the same day along with the Yadi, though the same was issued, itself corroborates the case of the prosecutrix that she disclosed that she was raped and injured but with a view to suppress the fact, she was not sent for medical examination on that day. She stayed overnight in the police station and was sent on the next day for medical examination. The evidence of PW 35 Ranjeetsingh Patel shows that the prosecutrix stayed overnight at Limkheda Police Station.

276 We came across one letter which is marked exhibit 200 which was written in Gujarati to the medical officer CHC, by Investigating Officer of the Limkheda police station in C.R. No.59 of 2002. This letter is dated 4.3.2002 and it was received by the medical officer on 5.3.2002 at 12.10pm. It is surprising that when Limkheda police station and CHC are

situated very close why it was not sent on the same day but it was received in the afternoon on 5.3.2002. This shows the nature of the investigation.

277 Another biggest manipulation by the Investigating accused in the case is not to take the prosecutrix to the spot on the same day i.e., on 4.3.2002 and to only visit the spot at Kachha road at night on the same day i.e., on 4.3.2002. Though the police had visited it, they did not conduct either inquest panchanama or spot panchanama. It was argued by the learned defence counsel by way of explanation that the police informed the Magistrate and they wanted permission from the Court to carry out the inquest panchanama and after getting such permission from the Court, they conducted inquest and spot panchanamas on the next day i.e., on 5.3.2002. Another explanation which has come forward from the defence is that the bodies were lying in the jungle and therefore it was not possible to conduct the spot panchama or inquest panchanama at night. Both the explanations are

unsatisfactory.

278 The learned Counsel Mr.Venegavkar vehemently argued on the point of taking of the photographs by the witnesses and he has discussed and analysed their evidence at length and pointed out that the photographers PW 10 Soni and PW 28 Patel did not support the prosecution with an object to defeat the prosecution case though they had gone there. In fact, they had gone there and took photographs on 4.3.2002 and 5.3.2002. After unfolding of the entire evidence, especially of the police officers from Limkheda police station, the police persons who supported the prosecution, the other police persons and the hostile witnesses, we are unable to accept the explanations of the defence that on that day i.e., 4.3.2002, they could not carry out the inquest and spot panchanamas. Though the police witnesses like PW 34 Amrutsingh Khant and PW 35 Ranjeetsingh Patel remained silent about the visit of accused persons along with the photographers on 4.3.2002 and

5.3.2002 and they took the photographs, considering the documentary evidence especially of PW 68 Tariyal and PW 72 K.N.Sinha and so also the cross examination of these hostile witnesses, we are convinced that on 4.3.2002, the accused and the police have visited the spot and took the photographs of the dead bodies. The photographs of the dead bodies themselves speak the truth.

279 Regarding burial of dead bodies and tainted investigation, Mr.Venegavkar has submitted that the dead bodies which were found on the spot were hurriedly buried so that no other person or the relatives of the dead persons was given any opportunity of identification of the deceased. Panch PW 15 Baria Nayaka did state in his evidence that one muslim person was present to identify the dead bodies and he identified dead body of Haleema. He relied on the evidence of PW 56 Dr. Rudra, who was a Professor in Forensic Department. In his evidence, he has stated that the clothes were found when the bodies were exhumed in January, 2004.

Thus, those clothes could have been seized and preserved by the police, who were investigating the offence for the purpose of identification and also as evidence of murder. However, the police i.e. previous investigating agency did not seize most of the articles which were found on the person of the dead bodies. For example, in exhibit 123, there is a description of the articles on the body of Haleema that is one nose ring, two plastic bangles, blouse and legwear were found on the body of Haleema. However, those articles were not seized and not preserved.

280 Mr.Venegavkar further submitted that missing of dead body of Saleha is another circumstance in respect of defective investigation. He submitted that photograph of dead body of Saleha was taken on 4.3.2002. However, her body was not found at the time of inquest panchanama at Exhibit 123 and spot panchanama at exhibit 124 which were drawn on 5.3.2002. Mr. Venegavkar submitted that the bodies were left unguarded. According to Mr. Ponda, Saleha

was not killed in the incident and totally false story is put forward by the prosecutrix. In this connection, it may be noted that the medical case papers Exh. 138A of the prosecutrix were prepared by PW 17 Dr. Katti and in relation to the prosecutrix it is mentioned in the case papers that one full term normal delivery female died in the riots. This shows that the prosecutrix lost her minor daughter in the riots. It is also pertinent to note that it is not the case of the defence that the prosecutrix had no 3½ year old daughter by the name of Saleha or that Saleha is still alive. Accused nos. 1 to 12 were residents of Randhikpur, the prosecutrix was also residing in Randhikpur, she knew accused nos. 1 to 12, hence, these accused would be in a position to say that the prosecutrix had no such daughter or that Saleha was still alive, but they have not raised any such defence.

281 Mr.Venegavkar while commenting on investigation relied on Exhibit 149 - a letter dated 8.7.2002 written by the District Magistrate, Panch Mahal, Godhra i.e., PW18 Jayanti

Ravi to Additional Chief Secretary, Home Department. He pointed out that in this letter, PW 18 has informed in detail about the case of the prosecutrix, however, no steps were taken by investigating officers to investigate the matter properly. He also drew our attention to the letter dated 7.3.2002 written by PW 18 to Superintendent of Police Dahod regarding case of the prosecutrix as well as subsequent letters and pointed out that no steps were taken by the police to arrest the accused or investigate the matter.

282 On FIR Exh. 56, Mr.Venegavkar submitted that it is not recorded on 4.3.2002 at 10.45 am but it was recorded much later after some deliberation. In support of his submission, he relied on station diary, which is article 69 and entries i.e., 406A and 406B. He submitted that it is the defence case that accused No.17, started recording the FIR at 10.45 am. Mr. Venegavkar pointed out that in fact, accused No.17 took charge at 11.35 am on that day i.e. on 4.3.2002. PW 72 has stated that page 34 of station Diary

shows that charge was handed over to accused no. 17 at 11.35 a.m. The evidence of DW 5 Head Constable Jaisingh Patel shows that he handed over the charge to accused no. 17 at 11.35 a.m. on 4.3.2002. This is stated in para 5 of his evidence. DW 1 has also stated that Somabhai took charge on 4.3.2002 at 11.35 a.m. He also relied on PW 72 Sinha and DW 1 Budh Singh. He submitted that there is an overwriting on exhibit 56C. So also, in exhibit 56, a different ink was used in relation to timing. He further submitted that copy of FIR was sent to the Magistrate late i.e., on 8.3.2002 and not forthwith as is the mandate under Section 157 Cr.P.C.

283 Mr.Venegavkar submitted that it is a tainted investigation and it is the duty of the police to investigate as prescribed under the law. He relied on Rule 64 of Gujarat Police Act, where it is mentioned in Sub-rule (f) that the police have to discharge such duties as are imposed on him by any law for the time being in force. So, the procedure for investigation laid down under Chapter XII of the

Code of Criminal Procedure is to be followed. He also relied on the definition of 'investigation' under section 2(h) of the Code of Criminal Procedure which includes all proceedings under the Code for collection of evidence conducted by a police officer or by any person (other than the Magistrate) who is authorised under the Act.

284 Mr.Venegavkar has submitted that the investigation is tainted and, therefore, it is the duty of the Court to uphold the fundamental right of free and fair trial which is guaranteed under Article 21 of the Constitution of India. He further submitted that when the investigation is defective and bad, then, it is the duty of the Court to uphold Article 21 of the Constitution which guarantees free and fair trial. On this point, he relied on four judgments of the Supreme Court in the case of **Baladin & Ors. vs. State of UP** reported in **AIR 1956 SC 181**, **State of A.P. vs. Punati Ramulu & Ors.** reported in **AIR 1993 SC 2644**, **Babubhai vs. State of Gujarat** reported in **(2010) 12 SCC 254** and

***Dayal Singh and ors. vs. State of Uttaranchal* reported in (2012) 8 SCC 263.**

285 We have gone through the said judgments. ***Baladin (supra)*** was relied on, on the point of honest, efficient and fair investigation is a requirement of each and every criminal trial. In the case of ***Baladin (supra)***, it was observed as follows:

“11. On appeal by the convicted persons, the Division Bench of the High Court wrote a very painstaking judgment which runs into 83 printed pages. The judgment tends to be discursive and could have been more concise without affecting its quality. The High Court went into meticulous details but, as will presently appear, fell into a grievous error as a result of which it acquitted 20 of the appellants, a number of whom had been ascribed leading parts in the occurrence which was the subject matter of the charge against them.

The High Court held that the Sub-Inspector, the Circle Inspector and the Deputy Superintendent of Police who were successively in charge of the police investigation, to put it mildly, were not very circumspect in conducting the investigation. The investigation

suffered from lack of thoroughness and quickness, with the result that statements of witnesses were recorded by them in the "most haphazard manner" and many matters of importance and significance to the case were omitted. It also observed that:

"Sub-Inspector Raj Bahadur Singh for oblique motives distorted their statements, ..... that his attempt was to introduce such variations in the statements and to leave such loopholes as to damage the ultimate result of the case to as large a measure as possible".

The High Court in the main relied upon the testimony of the four eye-witnesses, the ladies belonging to the family of the victims, but with reference to the testimony of Paiyyan Devi and Shanti Devi further observed that their evidence should be scrutinized and relied upon only when corroborated by other evidence on the record. Hence in respect of those two witnesses, the learned Judges were not as sure as in respect of the others.

Having held that the four eye-witnesses were on the whole reliable and that the record of their statements made by the investigating Sub-Inspector was not honest and faithful, the High Court fell into the error of acquitting all those accused persons, appellants before it, whose names did not find a place in the record made by that police officer. In other words it rejected reliable testimony with reference to that very record which it had condemned as unreliable."

Thus, both the parties before the Court should be given a fair trial.

286           ***Punati Ramulu (supra)*** and ***Babubhai (supra)*** are relied on by the learned Prosecutor on the point of tainted investigation. In both the cases, the police have dishonestly investigated the case. In the case of ***Punati Ramulu (supra)***, the Investigating Officer did not record intentionally the FIR on receipt of information of cognizable offence and the Supreme Court held that such investigation is to be discarded. In ***Babubhai (supra)***, the Supreme Court has dealt with the law relating to manipulated investigation, which is laid down in the earlier cases by the Supreme Court. In the case of ***Babubhai (supra)***, there were two different FIRs lodged by two different persons after dispute between them. The High Court quashed the second FIR. Therefore, appeal was made and while dealing with the said issue, the Supreme Court held that in order to prevent miscarriage of criminal justice, the Court is empowered to transfer the investigation to an independent agency.

287 In the case of **Dayal Singh (supra)**, it was held that when there are deliberate acts of omission and commission, resulting in improper and defective investigation and there is dereliction of duty then, it is obligatory upon the Court to pass appropriate directions including directions in regard to taking of penal or other civil action against such officers. In the said judgment, the Supreme Court has relied and referred to earlier judgments wherein the Supreme Court held that if suspicious and illegal investigation is not scrutinized independently, then, the criminal trial plummets to the level of investigating officers ruling the roost.

288 On the point of digging of dead bodies, the prosecution has examined PW13 Mukeshbhai. He has stated that he was taken to Kottar i.e., the ravine at around 12.30pm. There, he found two Doctors - one male and another female and others. He found 7 bodies lying including

4 female and three children. He went alongwith the police. He dug a waist deep pit and all dead bodies were buried in the pit. He and his three colleagues were paid Rs.200/- by the police. The work was over by 5pm to 5.30 pm.

289 We have already observed that not a single skull of the dead bodies was found at the time of exhumation. As per PW56 Rudra, 109 bones were found from the grave and they were of 5 different individuals. As per the evidence of PW13 Mukeshbhai Kalubhai Harijan, all 7 bodies were put in one pit and buried after piling them one on the other. It is pertinent to note that there is no suggestion to this witness that there were only five bodies or there were no bodies. This position that there were 7 bodies appears to have been accepted by the defence. Then where did the bones of two bodies disappear remains unanswered.

290 When we perused the photographs, we found exhibit 59/4, which is a photograph of a 3 to 4 years old small

girl wearing green (pista) colour frock/top and legwear. According to the prosecution, this photograph was taken on 4.3.2002 by PW 28. The evidence in respect of the photographs is already discussed earlier in detail. However, the body of Saleha was not found on 5.3.2002 i.e., on the next day when accused Nos.13, 14 and 16 went to Kesharpur jungle and drew scene of offence Panchanama and Inquest panchnama. From the evidence of the prosecutrix corroborated with photograph of Saleha and the other circumstances cumulatively brought on record, it is evident that Saleha was killed on 3.3.2002. It was the duty of the police officer i.e., accused Nos.13, 14 & 16 to depute somebody on 4.3.2002 itself to take care of the bodies which were lying. This was not done. This shows another lapse in investigation.

291 Another glaring lapse is that the prosecutrix was not taken to the spot to identify the spot or the dead bodies. We fail to understand why the prosecutrix was not taken to

the spot for identification of the dead bodies or even to identify the spot.

292 It is to be noted that police officers, who were part of the investigating team are accused Nos.13 to 18. The FIR Exhibit 56 was recorded by one of the accused, i.e., accused No.17 Somabhai Koyabhai Gori and the statement of the prosecutrix dated 7<sup>th</sup> March, 2002 was recorded by accused No.16 Ramsingh Mitlibhai Bhabhor, Circle Inspector of Limkheda. Thus the investigation was not only unsatisfactory but it smacked of dishonest steps to screen the culprits. This itself is the most incriminating circumstance against the accused. Earlier investigation has played the role of villain in this case. That the investigation was tainted can also be seen from the fact that in paragraph 19 of the evidence of PW9 Dr.Mahato i.e the Doctor attached to Limkheda Community Health Centre, he has stated that no postmortem of any body was conducted on 4<sup>th</sup> March or 5<sup>th</sup> March, 2002 and there was no request from the police to conduct any postmortem.

Despite Dr. Mahto being available, the postmortem was got conducted by accused Nos. 19 and 20 Dr. Arunkumar Prasad and Dr. Sangeeta Arunkumar Prasad, a husband and wife team who was attached to Dudhia and Bandipur respectively.

293 On the point of quality of investigation, we highlight two major aspects: (i) identification of the dead bodies and (ii) keeping silence over the queries made by PW18 District Magistrate Jayanti Ravi and suppression of original statement Exh. 277 dated 6.3.2002 by the police at Limkheda police station.

**(i) Identification of dead bodies:** Admittedly 7 dead bodies were found at the ravine i.e., Kottar. To take the prosecutrix to the spot was an obvious part of the investigation. However, the prosecutrix who is the informant and who is a victim and relative of the deceased was not taken to the spot for identification of

the spot or dead bodies. No close relative of the deceased was taken on 4.3.2002 or 5.3.2002 for identification of the dead bodies. However, one Abdul Sattar Ghanchi was taken to the spot to identify the bodies. He was not a close relative of any of the deceased. He identified only the body of Haleema i.e mother of the prosecutrix. This circumstance has created a big question mark before us and undoubtedly it leads to the only inference that this was a deliberate act on the part of the police. Identification of the dead bodies is a first and the basic step in the investigation. Without that, the police have conducted the post-mortem with the help of accused Nos.19 and 20 and hurriedly buried the dead bodies with sacks full of salt, so that the bodies will decompose faster.

In the alleged FIR (Exh. 56), there was a mention of rape on ladies. Even if it is taken as it stands, then it was the duty of the police to ask the lady Doctor i.e., accused No. 20 Dr. Sangeeta Arunkumar

Prasad to conduct a proper examination of the private parts of the dead bodies and give a finding accordingly. However, in the inquest panchanama at exhibit 123 in the description, there is a mention that marks of cruelty / violence were found on the private parts of one female dead body and some white fluid was seen coming out of the private parts of two female dead bodies. In such case, it was necessary for the medical officer to give specific finding regarding violence and marks of injuries on the private parts and to take the cotton swab samples of the fluid coming out of the dead bodies and send the same to the forensic laboratory. However, nothing was done by the police or the Doctors but they conducted haphazard post-mortems, dug a pit with the help of labourers, put salt in it and buried 7 dead bodies one on top of the other in the same pit. In the photographs, 7 bodies are each complete in one piece, however, when the bodies were exhumed by the FCSL and CBI on 28/30.1.2004, not a single skull was

found which is extremely strange to say the least.

294 The second part of the investigation is the first disclosure by the prosecutrix about the names of the accused in exhibit 277 i.e., the statement dated 6.3.2002. This statement was recorded by Executive Magistrate PW 23 Govindbhai pursuant to directions given by the Collector / District Magistrate PW 18 Jayanti Ravi. This statement was sent by PW 18 Jayanti Ravi to Mr. Jadeja. SP, Dahod alongwith the letter dated 7.3.2002 Exh.147. She has mentioned that the statement of Bilkis (prosecutrix) was sent to take necessary steps. There is a chain of correspondence from the side of PW 18 Jayanti Ravi, thereafter for two months, whereby she asked about what happened to the complaint of the prosecutrix. She has directed the officer to take steps and arrest the accused persons. Exh. 148A is a reminder sent by her on 11.3.2002. Thereafter, she sent a letter on 18.3.2002 to Dy.SP, Dahod marked 148B demanding report of progress in the case of the prosecutrix. However,

there was no reply. She again sent letter dated 3.5.2002 marked Exh. 148C. By 27.6.2002, no report was sent by Dy.SP. so, letter exh. 148D was sent. Another letter was sent on 29.6.2002, which is marked Exh.148E. Through the police witnesses PW 23, PW 48, PW 49, PW 50, PW 51 and PW 52, the prosecution has successfully brought on record the fact that the said letter dated 7.3.2002 sent by PW 18 District Magistrate Jayanti Ravi was suppressed by the police at Limkheda. At that time, accused No. 16 and accused No. 18 were in charge of the investigation and holding key positions in the investigation at Limkheda. There is no answer why there was no immediate response to the letter of the District Collector dated 7.3.2002 or reminder dated 11.3.2002. No reply was given to her till July 2002. Thus, there was total silence on the part of the police from Limkheda and the obvious reason is the names of 12 accused persons were disclosed by the prosecutrix in the said statement. This silence does not speak of negligence or inertness but apparent dishonesty and callousness. Hence, all

omissions, contradictions and discrepancies brought out in the evidence of the prosecutrix have to be evaluated keeping this in mind. As far as the statement Exh. 277 and statements of the prosecutrix recorded by CBI are concerned, there is no major omission or contradiction.

**MR. VENEGAVKAR ON INQUEST PANCHNAMA ALONG WITH FAULTY INVESTIGATION:**

295 Mr. Venegavkar submitted that the entire investigation is manipulated. He pointed out that as per the inquest Panchnama exhibit 123 it was carried out on 5.3.2002 between 10 a.m. to 12 noon. Mr.Venegavkar submitted that the inquest Panchnama at exhibit 123 is not correctly recorded and it is a manipulated document. It has not taken place between 10 am and 12 noon as mentioned in the Panchnama. The timing is false. The persons, who are stated to be present at the time of Panchnama i.e., Abdul Sattar, who identified the body of Haleema is falsely stated to be present on 5.3.2002 because the evidence of the prosecutrix, PW 7 Madina and PW 19 Phiroz (son of Abdul

Sattar) shows that Abdul Sattar was taken to the spot on "4.3.2002" and he came back and informed that the relatives of the prosecutrix were killed. He submitted that Ramtiben, the woman panch to the inquest panchnama, was also not present when the panchnama was carried out. Mr. Venegavkar submitted that in fact such a person did not exist. Learned Counsel Mr. Venegavkar submitted that Ramtiben, a female panch, was never traced and therefore, she could not be examined. However, the prosecution examined other two panchas to the Inquest panchnama, i.e., PW 15 Ramsingh Bariya and second panch PW 73 Somabhai Chavan. He submitted that there is an inter se contradiction between the evidence of these two panchas. PW 73 has stated that he was standing at the bus stop near Kesharpur to go to Limkheda alongwith Ramsingh Bariya at noon and at that time, the police came and took them to Kesharpur jungle to act as panchas. However, PW 15 who is the second panch has stated that at 10 am, the police approached them at Limkheda bus stop. He further relied on the evidence of

PW 34 police officer Amrutsingh Khant where he has stated that at 9.45 am, he was present alongwith others at the jungle for Panchnama. Mr. Venegavkar relied on exhibit 244 i.e., a letter sent by Limkheda police dated 4.3.2002 to Magistrate at Limkheda seeking permission to conduct inquest. Mr.Venegavkar pointed out that on this letter (Exhibit 244), there is an endorsement that this letter was received by the Magistrate on 5.3.2002 at 11.30 am and thereafter the Magistrate gave permission immediately. He submitted that if the permission was given by the Magistrate after 11.30 am, for inquest panchnama then, how the timing is mentioned in the inquest Panchnama of 10 am to 12 noon remains an issue. He submitted that this shows that it is a fabricated document created by Limkheda police.

296 Mr. Venegavkar pointed out one more document i.e., the letter (Exh.233) written by Circle Police Inspector, Limkheda dated 10.4.2002. It was addressed to Director of Gujarat Forensic Science Laboratory (GFSL). By this letter

signed by the accused No.16, Circle Police Inspector, Limkheda, the samples of soil, property collected at the time of the inquest Panchnama Exh. 123, the clothes of the deceased and other samples including those of the prosecutrix were sent to forensic laboratory for its opinion and the report was sent by GFSL on 24.4.2002 to Limkheda Police Station. Mr. Venegavkar argued that till today, a stand is taken by Limkheda police that the only body identified by Abdul Sattar at the time of inquest Panchnama Exhibit 123 was of Haleema. In the inquest Panchnama at Exhibit 123, no other name is appearing as no other body was identified. However, in the letter dated 10.4.2002 (Exh.233), the name of Madina and Ameena is mentioned by the Limkheda police as persons who were gang raped and murdered and the complainant Bilkis was raped is also mentioned. Mr. Venegavkar pointed out that in the report of the GFSL Exh. 238 dated 24.4.2002, the names of Akli, Irfan and Aslam are mentioned as clothes of these three persons were found at the time of inquest and were sent. It is further pertinent to

note that Akli is mentioned in Exh. 238 as wife of Yusuf Musa Patel. If only Haleema was identified by Abdul Sattar from where the names of other deceased appeared in the correspondence of Limkheda police station and GFSL. This shows that the police of Limkheda Police Station including accused no.16 who was the investigating officer were suppressing the names of the deceased and wanted to show them as unidentified bodies.

297 All these lapses which clearly appear to be deliberate show that the investigation is not only faulty but it is downright tainted.

**SUBMISSION OF MR. PONDA UNDER SECTIONS 143, 147 & 148 OF IPC**

298 Mr. Ponda submitted that there is a group of 9 witnesses who were examined by the prosecution regarding the incident of 28<sup>th</sup> February, 2002 at Randhikpur. He gave list of the witnesses that is PW 2 Pinjara, PW 4 Salim Ghachi,

PW 19 Feroz Ghachi, PW 25 Siraj Ghachi, PW 26 Imitiaz Ghachi, PW 31 Rasul Aziz Umer, PW 45 Sayad Abdul Salam, PW 46 Salim Abdul Sattar Musa Ghanchi, PW 47 Sattar Majid Ghanchi. These 9 witnesses were residents of Randhikpur.

299 This group of 9 witnesses was examined by the prosecution on the incidents that took place on 28.2.2002 at Randhikpur. On 27.2.2002, the incident of burning of train at Godhra took place and on the next day, there were riots in the Districts Godhra and Dahod. All these 9 witnesses were the residents of Randhikpur, which is near Godhra. The riots were the after-math of burning of train at Godhra in which there were large number of Kar Sevaks. Overall, these witnesses say about the mob of people shouting slogans against Muslims that “Musalmano ko maro” was moving in village Randhikpur after 10 am – 10.30 am on 28.2.2002. Some of the witnesses have stated that it was a mob of 30 to 40 people. Some have stated that it was a mob of 100 to 150 people. Each of the 9 persons have identified some of the

accused persons; one or two accused persons individually as the members of the mob. They have identified and attributed a particular role to these accused persons. Their identification and the roles attributed to them respectively by the witnesses are described in a tabular form as follows:

Witness	Identification of accused	Role attributed
PW2 Pinjara		
PW4 Salim Ghachi		
PW19 Feroz Ghachi	Identified accused no.8 Pradip	Part of mob
PW25 Siraj Gahchi	Identified accused No.4 Shailesh Bhatt Identified accused No.9 Bhikabai	Carrying sword Carrying axe
PW26 Gahchi	Imtiyaz Identified accused No.3 Naresh Modhiya Identified accused No.8 Pradip Modhiya	Holding Rampuri knife  Pelting stones
PW31 Rasool Umer	Identified accused No.11 Mitesh Identified accused No.12 Ramesh	As being part of mob
PW45 Sayed Salam	Identified Accused No.7 Kesar	Holding petrol can
PW46 Ghanchi	Salim Identified accused no.8 Pradip Modhiya	Shouting slogans kill muslims.
PW47 Ghanchi	Sattar Identified accused nos. 1 & 2 Jaswant & Govindbhai	Threw fire balls on their houses

300 The counsel Mr. Ponda made submissions on the point of conviction under section 143, 147 and 148. He submitted that accused nos. 1 to 12 are punished under section 143 of Indian Penal Code for being members of unlawful assembly. Accused nos. 1 to 12 were also punished under section 147 of IPC for rioting by forming unlawful assembly and accused no. 1 only is punished under section 148 of IPC for rioting armed with deadly weapon. It is pointed out by Mr. Ponda that name of accused nos. 5,6 and 10 were not taken by any of the witnesses from the group of 9 witnesses in respect of incident dated 28<sup>th</sup> February, 2002. So also as per the evidence of these 9 witnesses, accused no. 1 and accused no. 2 were having fire balls, accused no.3 was holding knife, accused no.4 was carrying sword, accused no. 7 was holding petrol can, accused no. 8 was pelting stones and shouting slogans, accused no. 9 was armed with axe and accused nos. 11 and 12 were part of the mob on 28<sup>th</sup> February, 2002 when the witnesses noticed these accused. All these 9 witnesses did not take the names of all the

accused persons but each witness took the name of one or two accused and attributed the role. Thus, it appears that the conviction under section 143, 147 of accused nos. 1 to 12 and conviction under section 148 of accused no. 1 is given in respect of not the acts committed on 28<sup>th</sup> February, 2002 but only on 3<sup>rd</sup> March, 2002. Therefore, none of them is convicted for conspiracy under section 120B of IPC. Therefore, the evidence of all these 9 witnesses attributing particular role of any act on 28<sup>th</sup> February, 2002 is in fact not relevant. We find much merit in this submission and therefore, we do not consider the conviction under these sections in respect of their acts of 28<sup>th</sup> February, 2002.

**POLICEMEN ARE ACCUSED, THEREFORE, POLICE STATEMENTS OUGHT TO BE READ BY THE COURT :**

301 Mr. Ponda submitted that some of the statements of the prosecutrix were recorded by policemen who were later made accused, hence, the omissions and contradictions in these police statements could not be proved by the defence. He pointed out that the statements dated

13.3.2002 of the prosecutrix was recorded by accused No. 16 and therefore the omissions and contradictions in the said statements could not be brought on record. Mr. Ponda submitted that the Court can look into the police statements of the prosecutrix though the omissions and contradictions have not been proved. In support of his submissions, he relied on paragraph 2 of the decision of the Supreme Court in the case of **Abdul Latif & Ors. Vs. State of Uttar Pradesh** reported in **1978 Cri.L.J. 639 : AIR 1978 SC 472**. Mr. Ponda also relied on two judgments of this Court in the case of **Dilip Kumar Tarachand Gandhi & Anr. Vs. State of Maharashtra** in Criminal Appeal No. 51 of 1991 and **Jalba Vs. State of Maharashtra** in Criminal Appeal No. 3 of 1991.

302 We have gone through the decision in the case of **Abdul Latif (supra)** and other rulings of the Division Benches of the Bombay High Court. In both the decisions of the Bombay High Court, the Division Benches had relied on the ratio laid down in the case of **Abdul Latif** and therefore,

we consider the ratio laid down by the Supreme Court in **Abdul Latif**. In **Abdul Latif (supra)**, the defence preferred an application for taking additional evidence and for examining some witnesses who were not examined by the prosecution. However, the High Court turned down the said application and the order of the High Court was upheld by the Supreme Court. While dealing with issue of the application for taking additional evidence, the issue of relevancy and the necessity of the recording of additional evidence and examining additional witnesses which were not examined by the prosecution, the Supreme Court took pains to go through the statements of those witnesses. Obviously, to decide such issue, it is necessary to go through the police statements of those witnesses. Thus, it is seen that in the peculiar facts and circumstances of that case, the police statements were read by the Court and they were considered to the limited extent of deciding whether the application for additional evidence or for examining additional witnesses who were not examined earlier is to be allowed.

303 In reply, Mr. Venegavkar place reliance on the decision of a bench of three Judges of the Supreme Court in the case of **V.K. Mishra & Ors. Vs. State of Uttarakhand & Ors.** reported in **(2015) 9 SCC 588**. Mr. Venegavkar pointed out that the decision in the case of **Abdul Latif** is by a bench of two Judges whereas the decision in the case of **V.K. Mishra** is by a bench of three Judges, hence, he submitted that the decision in the case of V.K. Mishra would prevail. The Supreme Court in the case of **V.K. Mishra** has observed that the purpose and the manner in which the police statements recorded under Section 161 of the Code of Criminal Procedure can be used are indicated in Section 162 of the Code of Criminal Procedure. The paragraphs 16 and 17 of the decision in the case of V.K. Mishra read thus:-

" 16. Section 162 Code of Criminal Procedure bars use of statement of witnesses recorded by the police except for the limited purpose of contradiction of such witnesses as indicated there. The statement made by a witness before the police under Section 161(1) Code of Criminal Procedure can be used only for the purpose of contradicting such witness on what he has stated at the trial as laid down in the

proviso to Section 162 (1) Code of Criminal Procedure. The statements under Section 161 Code of Criminal Procedure recorded during the investigation are not substantive pieces of evidence but can be used primarily for the limited purpose:- (i) of contradicting such witness by an accused under Section 145 of Evidence Act; (ii) the contradiction of such witness also by the prosecution but with the leave of the Court and (iii) the re-examination of the witness if necessary.

17. Court cannot suo moto make use of statements to police not proved and ask question with reference to them which are inconsistent with the testimony of the witness in the court. The words in Section 162 Code of Criminal Procedure "if duly proved" clearly show that the record of the statement of witnesses cannot be admitted in evidence straightway nor can be looked into but they must be duly proved for the purpose of contradiction by eliciting admission from the witness during cross-examination and also during the cross-examination of the investigating officer. Statement before the investigating officer can be used for contradiction but only after strict compliance with Section 145 of Evidence Act that is by drawing attention to the parts intended for contradiction."

**[ Emphasis Supplied ]**

Mr. Venegavkar pointed out that throughout the

trial, the accused and their Advocates were present. It cannot be said that they are helpless just because some of the policemen who recorded the statements of the prosecutrix were made accused. The accused could very well have examined themselves as envisaged under Section 315 of the Code of Criminal Procedure. Section 315 of the Code of Criminal Procedure reads as under:-

**"315. Accused persons to be competent witness:-**

(1) Any person accused of an offence before a Criminal Court shall be a competent witness for the defence and may give evidence on oath in disproof of the charges made against him or any person charged together with him at the same trial;

Provided that - सत्यमेव जयते

(a) he shall not be called as a witness except on his own request in writing;

(b) his failure to give evidence shall not be made the subject of any comment by any of the parties or the Court or give rise to any presumption against himself or any person charged together with him at the same trial.

(2) Any person against whom proceedings are instituted in any Criminal Court under section 98, or

section 107, or section 108, or section 109, or Section 110, or under Chapter IX or under Part B, Part C or Part D of Chapter X, may offer himself as a witness in such proceedings:-

Provided that in proceedings under section 108, section 109 or section 110, the failure of such person to give evidence shall not be made the subject of any comment by any of the parties or the Court or give rise to any presumption against him or any other person proceeded against together with him at the same inquiry. "

Thus, it is seen that the accused were not totally helpless and they could very well have examined themselves as witnesses. In view of the decision in the case of **V.K. Mishra**, it is clear that Section 162 of the Code of Criminal Procedure bars use of statements of the witnesses recorded by the police except for the limited purpose as set out in Section 162 of the Code of Criminal Procedure. In this view of the matter, it is not possible for us to look into the statements of the prosecutrix which were recorded by some of the accused persons.

304 Moreover, we have already observed the circumstances in which there are omissions and contradictions in the evidence of the prosecutrix and therefore, discrepancies in the various statements of the prosecutrix. The accused persons who recorded her statements were attached to Limkheda Police Station and they tried to gag the mouth of the prosecutrix and the FIR and the statements of the prosecutrix were mixed with truth and falsehood. It was a big job for us to shift through that evidence on the basis of other oral, documentary or circumstantial evidence. Her evidence emerged before us like a collage which we find completely trustworthy.

**SECTION 313: vis-a-vis ACCUSED NOS. 13 & 17.**

305 Mr. Ponda submitted that the prosecution has highlighted the alleged lacunae in the investigation and tried to make capital of the same. It was necessary for the learned trial Judge to put questions to that effect to the accused under Section 313 of the Code of Criminal Procedure. If it is

the case of the prosecution that why the prosecutrix was not sent on 4th March, immediately after the recording of the FIR for medical examination, but was sent on 5th March, the said question should have been put by the learned trial Judge to the accused. A point was raised by the prosecution that the spot panchnama was not conducted immediately i.e. on 4.3.2002 by Limkheda police i.e accused Nos. 13 to 18 and this point was considered against the accused by the learned judge in his judgment. So, the trial Judge ought to have formulated this question as it is a circumstance against the accused i.e the police who initially investigated the offence and an opportunity should have been given to the accused to explain the circumstance. The learned counsel argued that it was submitted by the prosecution that hurriedly the bodies were buried and the prosecutrix was not taken for identification of the dead bodies. However, no question to that effect was put to the accused persons under Section 313 of Cr.P.C. which ought to have been done. Mr. Ponda submitted that if the questions are not put to the accused

about the circumstances which are going against him in the evidence, then, the accused is denied an opportunity to explain the said circumstance.

306 Mr.Ponda has argued that it is necessary to put all the evidence against the accused to him while recording his statement under section 313 of the CRPC. He argued in the present case, no proper question was put to the accused who were policemen about not recording the names of the perpetrators and the threats given by the police of administering poisonous injection to the prosecutrix. He submitted that a general question was put to the accused about this evidence though it was necessary to put it to the accused that “you have threatened the prosecutrix and you have omitted the names of the perpetrators”. In support of his submissions, Mr.Ponda relied on the judgment of the Supreme Court in the case of **Sharad Birdhichand Sarda vs. State of Maharashtra** reported in **(1984) 4 SCC 116**. The ratio spells out the object of section 313 of the Code.

307 Mr.Venegavkar in reply submitted that in section 313, it is not necessary for the Court to put each and every circumstance to the accused but only the circumstance going against him in the evidence are to be put to him. He submitted that even if a particular circumstance is not put to the accused, then it won't vitiate the trial. This omission is to be considered a curable irregularity. In support of his submissions, he relied on the judgment of the Supreme Court in the case of **Paramjeet Singh @ Pamma vs. State of Uttarakhand** reported in **AIR 2011 SC 200**. In the said decision, it is observed as under:-

23. An accused can be questioned under Section 313 Cr.P.C. only for the purpose of enabling him personally to explain any circumstance appearing in the evidence against him. No matter how weak or scanty the prosecution evidence is in regard to certain incriminating material, it is the duty of the Court to examine the accused and seek his explanation on incriminating material which has surfaced against him.....

25. If any appellate Court or revisional court comes across the fact that the trial Court had not put any question to an accused, even if it is of a vital nature, such an omission alone should not result in the setting aside of the conviction and sentence as an inevitable consequence. An inadequate examination cannot be presumed to have caused prejudice. Every error or omission in compliance of the provisions of Section 313 Cr. P. C., does not necessarily vitiate trial. Such errors fall within category of curable irregularities and the question as to whether the trial is vitiated, in each case depends upon the degree of error and upon whether prejudice has been or is likely to have been caused to accused.....

**[Emphasis supplied]**

308 We have gone through the statements of the accused recorded under section 313 of the Code of Criminal Procedure. The learned trial Judge has put all the incriminating and relevant evidence appearing in the evidence to the accused persons. He has put what the prosecutrix has stated about the threats given to her by the police i.e., accused No.17 or accused No.13, who were present at the time of recording of FIR. It is true that they

were not addressed as “you have stated so” but when the Judge put the question that the prosecutrix has given evidence that police (at Limkheda Police Station) have threatened her and the police did not mention the names of the perpetrators, it includes the accused persons who are the police and were present at the time of recording of the FIR at Limkheda Police Station. The purpose of section 313 is to point out the incriminating and relevant evidence appearing in the evidence against the accused with a view to provide him sufficient opportunity to answer such evidence or to give any explanation which may go in his favour. Taking into account the object of section 313 of the Code of Criminal Procedure, we are of the view that how the question is worded is immaterial if evidence against the accused is rightly conveyed to him and pointed out to him with an opportunity to answer.

309 Section 313 of the Code of Criminal Procedure pertains to the power of the Court to examine the accused

though it is a power which is obligatory on the Court. It is a power coupled with obligation to examine the accused by putting to the accused the circumstances appearing in the evidence against him, to enable him to explain the same.

Section 313 reads thus:

“313. Power to examine the accused.

(1) In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the Court-

(a) may at any stage, without previously warning the accused, put such questions to him as the Court considers necessary;

(b) shall, after the witnesses for the prosecution have been examined and before he is called on for his defence, question him generally on the case: Provided that in a summons- case, where the Court has dispensed with the personal attendance of the accused, it may also dispense with his examination under clause (b).

(2) No oath shall be administered to the accused when he is examined under sub- section (1).

(3) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them.

(4) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.”

**[ Emphasis supplied ]**

310 The word 'personally' used in the section shows that there should be a direct dialogue between the Court and the accused and the accused has opportunity to speak directly to the Court and not through his advocate. In the old Criminal Procedure Code of 1898, under section 342, a similar provision was available. After recommendation of Law Commission in its 41<sup>st</sup> Report, Section 313 was amended to the present format. In order to appreciate the submissions of Mr.Ponda, it is necessary to refer to section 342 (2) of old Code (Act V of 1898) which is as follows:

“(2) The accused shall not render himself liable to

punishment by refusing to answer such questions, or by giving false answers to them; **but the Court and the jury (if any) may draw such inference from such refusal or answers as it thinks just.**"

**[Emphasis placed]**

311 Thus, it can be seen that first half portion of old section 342 (2) of the Code is *ad verbatim* adopted as subsection (3) of section 313 of the Code. The portion highlighted above was removed by the Law Commission in its report. It was held that to enable the Court to draw such inference is violative of Article 20 (3) of the Constitution of India and thus, under the present section, the accused enjoys full liberty of choice as to whether to answer or refuse to answer and to keep mum. If he answers, then, that can be used as evidence against him. However, his silence shall not go against him. Thus, the section provides an opportunity to the accused to explain the circumstances without running the risk of facing cross-examination if he does not want to offer himself as a witness. This is about the right of the accused. Thus, there is an obligation on the part of the Court to put him questions after the examination of the witnesses or the

questions may be put at any stage also. The Section clearly states before the accused enters upon his defence, the Court has to question him "generally" on the case.

312 It is important to note that questions under section 313 are the questions put by the Judge immediately after the evidence of the prosecution is concluded but before the accused enters upon his defence. Thereafter, arguments of both the prosecution and the defence are heard. Thus, the Judge is not aware of the defence taken by the accused. So also, the submissions which are going to be advanced by the prosecution. After completion of the submissions of both the sides, the Judge gets more clues and different insight. So also the inputs disclosing certain facts and leading to a particular direction to his thought in respect of appreciation of evidence and on the basis of that, he arrives at a conclusion. Thus, the reasoning, inference and conclusion which manifest in the judgment is never restricted to only circumstances appearing in the evidence against the accused

but it necessarily includes points raised by both the parties in arguments. While putting questions under section 313, the Judge has to consider a circumstance against the accused which manifests in the evidence before him and it is not at all contemplated by the Section that any inference, perception or conclusion appearing from the evidence has also to be put to the accused. This is an answer to the submissions of Mr. Ponda.

313 According to Mr. Ponda, not sending the prosecutrix immediately for medical examination, not taking her to the spot and asking her to identify the dead bodies, so also hurriedly burying the dead bodies are the circumstances taken into account by the learned trial Judge and also argued by the prosecution before us. However, the questions were not put to the accused persons to that effect. We do agree partially with Mr. Ponda that these are the circumstances going against the accused. However, these are not the circumstances **“appearing in the evidence”** and hence, as

per the Section, as they do not appear in the evidence, it need not be put to the accused under Section 313 Cr. P. C.

Section 3 of the Evidence Act reads thus:....

“3. ...

“Evidence” .— “ Evidence” means and includes—

(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry, such statements are called oral evidence;

(2) all documents including electronic records produced for the inspection of the Court, such documents are called documentary evidence.”

314 Under 313, it is obligatory on the part of the Court to put those circumstances against the accused which are appearing in the evidence and which are positively stated in the oral evidence and brought by way of documentary evidence on record. The circumstances which Mr.Ponda has pointed out are not appearing in evidence as such but they are the inferences drawn by the learned Judge after considering the entire evidence, defence and the arguments. The Legislature has used the words “appearing in the

evidence". The meaning of the word "appear" is as under:

"to appear"

As per Black's Law Dictionary, 'appearing' means *prima facie* material before the Court. The word appearing is commonly used in two senses. In one sense, it means manifest, obvious or proved and in other, it means seems or to come into view or become visible.

Oxford dictionary meaning of the word 'seem' is 'to give an impression of being'.

The Legislature in its wisdom has not used the terminology to enable the accused to explain "every circumstance in the evidence against him" and therefore, the words "appearing in evidence" are to be given due weightage. The words used are question him "generally" on the case which has been done in the present case.

315 Thus, the word 'appearance' cannot be attributed meaning "to analyze or scrutinize the matter". It carries a

flavour of 'prima facie'. It is made clear in the 41<sup>st</sup> report of the Law Commission while amending section 342 of the old Code of Criminal Procedure that the section is not to be read as authorizing an inquisitorial interrogation of the accused which is not its object at all. Putting questions which are outcome of scrutiny and inferences is likely to overstep into enquiry by the Court and, therefore, the Court has to be careful while putting the questions to the accused restricting itself to the circumstances "appearing in the evidence" which are against him. As stated earlier, the words used in Section 313 of the Code of Criminal Procedure are that the accused should be questioned "generally" on the case, which has been done in the present case. Hence, we find no merit in this submission.

### **ENHANCEMENT OF SENTENCE**

316 While deciding the appeal by the State for enhancement of sentence, we have to consider the sentencing policy of capital punishment.

317           The State has preferred Criminal Appeal No.271 of 2011 praying that the sentence of life imprisonment imposed on accused Nos. 1, 2 and 4 be enhanced to death. It is to be noted that appeal for enhancement of sentence has not been made in relation to any of the other accused. As far as accused Nos. 1, 2 and 4 are concerned, both the learned Prosecutors have vehemently argued that this is not a case where leniency can be shown but it is a rarest of the rare case. As far as the offence under Section 302 is concerned, total 14 persons were killed. They argued that at one time, 14 helpless persons including children and women were brutally murdered by these accused. While committing this inhuman act, three women were raped i.e Halima, Shamim and the prosecutrix. This shows that the accused had no regard for law and order and were perverse. These murders have shocked the conscience of the society and is a gruesome offence which is to be dealt with capital punishment. In order to substantiate its appeal for enhancement of the sentence, the learned Counsel relied on

the judgments in **Sevaka Perumal & anr. vs. State of Tamil Nadu** reported in **(1991) 3 SCC 471**; **Dhananjay Chatterjee alias Dhana vs. State of West Bengal** reported in **(1994) 2 SCC 220** and **Ramnaresh & Ors. vs. State of Chhattisgarh** reported in **(2012) 4 SCC 257**.

318 Mr.Ponda in answer to the submissions made by the State, has argued that this does not fit in the category of rarest of rare case. There is no direct evidence against accused persons Nos. 1 and 2 of either having murdered any of these 14 persons or having raped Halima or Shamim. As far as accused No. 4 is concerned, there is no evidence to show he raped any of ladies including the prosecutrix. He argued that it was not a pre-meditated murder or rape and it is not an offence against public morality and hence, he submitted that this is not a fit case to enhance the sentence.

319 14 persons were killed amongst them some were small children and some were women. We do agree that it is

a rare massacre manifesting ugly animosity and hostility. Before commenting on the enhancement of sentence in the present case, let us advert to the cases relied on by the prosecutors.

320 In the case of **Sevaka Perumal (supra)**, the accused were involved in the purchase and sale of ganja. They induced and enticed innocent boys from affluent families and took them to distant places. The boys were made to bring jewellery and valuables. After taking the money and the valuables, they killed the boys. They committed four murders in the same manner. The Sessions Court convicted the accused persons and sentenced them to death. The High Court confirmed the sentence and therefore, the appeals were preferred before the Supreme Court. The Supreme Court in the said judgment, referred the case of **Mahesh vs. State of M.P.** and reproduced the ratio laid down in **Mahesh vs. State of M.P. (supra)** as follows:

“It will be a mockery of justice to permit the accused to

escape the extreme penalty of law when faced with such evidence and such cruel acts. To give the lesser punishment for the accused would be to render the justicing system of the country suspect. The common man will lose faith in courts. In such cases, he understands and appreciates the language of deterrence more than the reformative jargon.”

321 In the case of **Dhananjay Chatterjee (supra)**, an 18 year old girl was brutally raped and killed by a guard of the society. Two days prior to the incident, she had complained to her mother against the guard that he had been teasing her on her way to and fro from school and also asked her to accompany him to a cinema hall to watch a movie. After her complaint, action was taken by the supervisor of the accused and he was transferred to some other apartment as a security guard. However, on that day, the accused did not attend his new duty but came to the society of the deceased and did the duty at the society of the deceased and at around 5.20pm, when her mother went to the temple, he entered the flat on some pretext, raped and murdered her. His movements in and out of the flat were

witnessed by the other guard and the supervisor and thereafter he was caught. In the said case, the Supreme Court has held thus:

“... If the security guards behave in this manner, who will guard the guards? The faith of the society by such a barbaric act of the guard, gets totally shaken and its cry for justice becomes loud and clear.”

322 In the case of **Ramnaresh & Ors. vs. State of Chhatisgarh (supra)**, four persons who were guests of the neighbour, raped the deceased in her house and she was killed. In the said case, the Supreme Court has elaborately discussed the mitigating and aggravating circumstances which are to be taken into account by the Judge while imposing the capital punishment to the accused. It also laid down the principles for consideration of the Judges while granting capital sentence. It held that “it is unfortunate but a hard fact that all these accused have committed a heinous and inhumane crime for satisfaction of their lust but it cannot

be held with certainty that this case falls in the rarest of rare cases” and the Supreme court commuted the sentence of death to that of life imprisonment i.e., 21 years and partially allowed the appeals.

323 The submission of the prosecution is that it is not only one or two murders but it is a case of mass murders where the women were ravished and raped and it has shocked the social conscience. In the case of **Dhananjay Chatterjee (supra)**, the culprit was a security guard and he had a history of making sexually coloured remarks towards the victim girl. Thus, he had lust for the victim from the beginning and though he was removed and given the duty of guard in another building, he disobeyed his superintendent and stayed there which shows that he had planned to rape the girl and it was a cold blooded murder. In the case of **Sevaka Perumal (supra)**, there was extortion and the accused had murdered four boys in a period of 5 years by using the same *modus operandi*. This shows that they were

hardened criminals who repeated the act.

In the case of **Ramnaresh & Ors. (supra)**, four persons who were drunk entered the house of the deceased at night and they raped her one by one, which resulted in her death, however, it is to be noted that the Supreme Court in this case held that it did not fall in category of rarest of rare, so as to award the death sentence.

324 On comparing the present case with the facts of the case of **Sevaka Perumal (supra)** and **Dhananjay Chatterjee (supra)**, it can be safely said that there is no repetition of crime in the present case so also the accused before this Court are not history-sheeters or hard-core criminals. From the clinching evidence placed before us and discussed earlier, we are convinced that all these accused persons in a mob on account of the Godhra incident were moving in search of muslims. They were boiling with revenge. It was an unlawful assembly of the 12 accused and some more unidentified persons. As soon as they saw the muslims,

they pounced upon them, assaulted them and also raped some women.

325 We have carefully gone through the elaborate discussion of aggravated and mitigating circumstances and the principles laid down by the Supreme Court in **Ramnaresh & Ors. (supra)**. We do agree that the crime is uncommon and a large number of persons from the muslim community were murdered, however, the sentencing policy is also required to be balanced on the scale of proportionality.

326 Thus, considering the facts of this case, though such crime is not justifiable and is shunned, we are of the view that it is not a case wherein the sentence imposed would be completely inadequate and would not meet the ends of justice especially looking to the fact that though the prosecutrix was present at the scene of the incident, she does not state that accused Nos. 1 and 2 murdered any of the persons in her group, nor does she say that accused Nos.

1 and 2 raped Halima or Shamim. As far as accused No. 4 is concerned, except for attributing role of murder of Saleha to him, no other role is attributed to him either of rape on anyone or murder of anyone. We also cannot be unmindful of the fact that the incident occurred in 2002, fifteen years have elapsed since then. These accused have been in custody all this while. Looking to this fact, after a gap of 15 years, we are not inclined to enhance the sentence.

327 The Appeal for enhancement of sentence is thus dismissed.

### **APPEAL AGAINST ACQUITTAL**

328 Accused Nos.1 to 12 were prosecuted for the offences punishable under sections 120B, 143, 147, 148, 302 read with 149 /34, 376(2)(e) & (g) & 376(2)(g) of the Indian Penal Code. Accused Nos. 13 to 20 were prosecuted for the offences under Sections 120B, 201 r/w 34 of IPC and 217 & 218 r/w 34 of IPC. The trial Court by its judgment and order dated 21.1.2008 convicted accused Nos.1 to 12 and 17 under

various sections as under:

(i) accused Nos.1 to 12 are convicted for the offence punishable under sections 302 r/w 149 and sentenced to suffer R.I. for life and fine.

(ii) accused Nos.1 to 12 are convicted for offence of committing rape under Sections 376 (2)(e) & (g) and sentenced to life and fine;

(iii) accused Nos.1 to 12 are also convicted under section 376(2)(g) and sentenced to 10 years imprisonment and fine.

(iv) accused Nos.1 to 12 are also held guilty under section 147 IPC and also under section 143 of Indian Penal Code and they are sentenced to suffer R.I. for 2 years and six months respectively.

(v) accused No.1 is held guilty under section 148 of the IPC and sentenced to suffer R.I. for 3 years.

(vi) accused 17 who is dead was held guilty under section 217 and 218 and sentenced to suffer R.I for two years.

329 Mr. Venegavkar submitted that accused Nos.13 to 18 are the police officers from Limkheda police station, who

have played different roles in the initial investigation. The investigation was found defective and therefore, the Supreme Court by its order dated 16.12.2003 in Miscellaneous Criminal Application No.8850 of 2003 in W.P. No. 118 of 2003 (Exh. 61) transferred the investigation to the CBI. The CBI took over the investigation on 1.1.2004 and after completion of the investigation, filed chargesheet on 19.4.2004 before CJM Ahmedabad. At the time of investigation, the CBI found that the concerned police personnel of Limkheda police station who were involved in the initial investigation were not only negligent, but deliberately tried to screen the offenders and have also caused disappearance of the evidence of the offence and gave false information to screen the offenders. Therefore, accused Nos.13 to 18 were prosecuted. Accused Nos.19 and 20 are the Doctors, who admittedly carried out the post-mortem on 7 dead bodies at the time of inquest panchanama on 5.3.2002. Accused Nos. 19 & 20 came across the 7 bodies. Though, it was apparent that the dead bodies were victims of assault and violence, and whitish

liquid was seen coming out of the private parts of some of the female dead bodies, accused Nos. 19 & 20 did not collect the necessary samples; did not conduct the post-mortem as required under law and have therefore committed the offence under sections 201, 217 and 218 of the Indian Penal Code. Hence, these appeals.

330 Mr. Venegavkar has submitted that the learned Judge has erred in acquitting all these accused. He argued that the Trial Court has discussed the evidence against the accused Nos.13 to 16 and accused Nos.18 to 20 only in paragraphs 434, 435 and 436 of the judgment. The reasons given for acquittal are erroneous in view of the fact that there is sufficient evidence against all the accused to convict them under sections 217, 218, 120B and 201 of the Indian Penal Code. He further submitted that when the role of each accused is specifically brought on record by the prosecution, the Trial Court ought to have considered it and should have

convicted all the accused.

331 The main emphasis is on acquittal of accused nos.13 to 20. The accused Nos.13 to 20 were all acquitted under Section 120B of IPC. They were also acquitted under Section 201 of the Indian Penal Code i.e., causing disappearance of evidence of offence or giving false information to screen the offenders; accused Nos.13 to 16 and accused Nos.18 to 20 are also acquitted from the offences under sections 217 & 218 r/w 34 of the Indian Penal Code. In respect of accused No.17, appeal against acquittal is filed as he is acquitted under section 201 of the Indian Penal Code though he is convicted under sections 217 and 218 of the Indian Penal Code. However, accused No.17 has expired pending appeal, so, the said appeal abates against him.

332 As far as acquittal under section 120-B of IPC is concerned, PW 2 Panjara is examined by the prosecution on

the point of conspiracy and he has stated that on 28<sup>th</sup> February, 2002 he heard shouts from the mob against muslims. He remained in the house on the loft for few hours and thereafter he came out of the house at around 1 p.m. and saw people assembled at the shop of accused no. 10 Soni. There he noticed two police, i.e., accused no. 13 Narpatsingh Patel and accused no.14 Idris Saiyed. So he went towards them for help. However, they told him to run away. So he went away. At that time he noticed all the accused persons who had assembled in the shop were saying that muslims were to be finished. Mr. Ponda has submitted that his evidence is not reliable. The learned trial Judge has not believed the evidence of PW 2 Pinjara on the point of he meeting accused no.14 Saiyed. The learned counsel Mr. Ponda relied on the evidence of DW 4 Mansinghbhai Kishori who is a police officer from Fatehpura police station where accused no.14 Idris Saiyed was on duty on 28<sup>th</sup> February, 2002. He relied on Exhibit 76 the station diary entry which is proved through DW 4 Mansinghbhai Kishori wherein it is

mentioned that accused no. 14 was directed to go to Limkheda for duty and so in a jeep he left Fatehpura police station at 1.30 p.m. The learned counsel pointed out that in his evidence DW 4 Mansinghbai Kishori has stated that the distance between Fatehpura police station and Limkheda Police Station was nearly 80 kms. Thus, it was not possible for him to reach Limkheda at 1 p.m. as deposed by PW 2 Pinjara that he had seen accused no. 14 at Limkheda at 1.00 p.m.. We find some merit in this submission.

333 We have considered the evidence of PW 2 Pinjara. PW 2 is examined by the prosecution only on the point of conspiracy. Besides PW 2 no other witness is examined on the point of conspiracy. Our attention is drawn to the judgment of the trial Court wherein accused nos. 1 to 18 are not convicted for the offence of conspiracy under section 120B of Indian Penal Code. There is no appeal by the State challenging this acquittal of the accused from the offence of conspiracy under section 120B of the Indian Penal Code.

Considering this position, we do not take into account the evidence of PW 2 who is a witness against accused no. 14 on the point of conspiracy as well as against all the accused.

334 In any event everything appears to have taken place on the spur of the moment. There is no reliable evidence that on 28.2.2002, there was any conspiracy to murder or rape muslims which can also be seen from the fact that on 28.2.2002 no physical harm was caused to any muslim in Randhikpur.

335 Mr. Venegavkar submitted that accused No.13 Narpatsingh Patel took Hussain and PW8 Saddam, without yadi, to Limkheda Community Health Centre. He abandoned Saddam and Hussain at the hospital. PW 9 Dr. Mahto has specifically stated that Narpatsingh was supposed to come there to take back the children and he had dropped them without yadi. This showed that accused No. 13 wanted the evidence to disappear that Saddam was victim of assault. Mr.

Venegavkar further argued that accused No. 13 Narpatsingh was present on 5.3.2002 alongwith accused No.14 Saiyed when the inquest panchnama Exh. 123 and spot panchnama Exh. 124 were drawn. They purposely did not protect the dead bodies due to which some of the bodies went missing and Saleha's body and body of Shamim's new born baby were lost. Further, he submitted that accused Nos.13, 14 and 16 were present at the time of drawing the inquest panchnama Exh. 123. Mr. Venegavkar relied on the evidence of PW 34 Amrutsingh Khant, who has stated in paragraph 4 of his evidence that accused Nos.13 and 14 dictated the inquest panchnama i.e., exhibit 123 which Mr. Venegavkar submitted is a defective and a manipulated document. Mr. Venegavkar further drew our attention to paragraph 4 of the evidence of PW 34 Amrutsingh, wherein, he has stated that he wrote the inquest panchnama at the instance of accused Nos. 13, 14 and 16 i.e Narpatsingh, Idris Abdul Saiyed and Ramsingh Bhabor.

336 Mr. Venegavkar further pointed out that accused No. 15 Bhikabhai Patel was the PSI in charge of the Limkheda police station when the FIR (Exh. 56) was prepared which is stated by DW 5 Jaisingh in paragraph 3 of his evidence. Mr. Venegavkar pointed out that DW5 Jaisinghbhai Patel in the crossexamination has deposed that he at the instance of accused No.15, tore off the blank pages from the FIR book i.e., article 74. Mr. Venegavkar submitted that accused No.16 Bhabhor was present during the inquest panchanama exhibit 123. He was in charge of the investigation. He did not investigate as per the contents of the statement of the prosecutrix dated 6.3.2002 (Exhibit 277) which was sent by PW 18 District Magistrate Jayanti Ravi to the police station. He did not seize the photographs and the negatives of the dead bodies (Exh.59/1 to 59/17) under seizure panchanama. He further submitted that the closure report of A summary was manipulated. This was done at the instance of accused No. 18 R.S. Bhagore Accused No.18, Dy.S.P., Limkheda, was supposed to supervise investigation

after accused No.16 Ramsingh Bhabor did not perform his duty but he purposely filed 'A' summary. He submitted it was totally faulty investigation. Thus, the role of all these police personnel was not properly considered by the Trial Court though the offence under sections 201, 217 and 218 was made out.

337 Mr.Ponda, the learned Counsel has submitted that there is no evidence against the accused, who are acquitted from the charges by the trial Court. He submitted that the visit of the police of Limkheda police station to the spot on 4.3.2002 is not proved; so also Saleha's body is not found and her death is not established by the prosecution. The effect of delay in drawing the inquest panchanama exhibit 123 is discussed by the learned Judge. However, no specific question was put by the learned Judge under Section 313 of Cr.P.C. asking explanation on delay. The learned Counsel argued that it is necessary for the Court to put specific questions u/s 313 on each and every circumstance which is

against the accused and in the event of failure to put such questions, the benefit is to be given to the accused as the circumstance remains unexplained. As far as this submission regarding not putting questions under Section 313 of Cr.P.C. is concerned, we have already dealt with the same in detail in earlier paras of this judgment and found no merit in this contention.

338 Mr. Ponda further pointed out that the learned trial Court has disbelieved the evidence of PW 2 Pinjara, who has deposed against accused No.13 & accused No.14. There is no evidence against accused Nos.13 and 14 and other accused and therefore, their acquittal from the respective charges is justified. He argued that the ingredients of sections 217 and 218 so also section 201 are not proved by the prosecution and so the requirement of law is not fulfilled.

339 Mr. Ponda submitted that it was argued by the prosecution that PW 8 Saddam was taken to Limkheda CHC

by accused No.13 Narpatsingh without yadi and he did not bring him back. The learned Counsel after referring to para 21 of the examination in chief of PW9 Dr.Mahato submitted that he did not identify Narpatsingh. He further argued that there is no charge of looting or rioting, so evidence to that effect is irrelevant. Admittedly accused no.13 Narpatsingh was attached to Limkheda Police Station. It was not his case that there was any other policeman in that police station of the same name, hence, it has to be assumed that he took Saddam to CHC Limkheda.

340 Admittedly accused no. 13 Narpatsingh Patel, accused no. 14-Saiyed, accused no. 15- Bhikabhai Patel, accused no. 16-Ramsingh Bhabhor, accused no. 17-Somabhai, accused no. 18-Ramabhai Bhagora were the police personnel attached to Limkheda Police Station at the time of the incident, i.e., on 3<sup>rd</sup> March, 2002 and thereafter when the investigation was conducted by Limkheda Police Station, PW-19 Arun Kumar Prasad and PW-20 Sangeeta Prasad were the

doctors who performed postmortem on 7 dead bodies of the victims on 5<sup>th</sup> March, 2002 near Kesharpur jungle at ravine namely "Shiv Kottar". Their respective roles in the investigation has come on record and cannot be disowned by the defence. Thus, from the documentary evidence as well as oral evidence of the witnesses, whether the duties performed or not performed by these accused persons resulted in illegality fulfilling the ingredients of the offence for which they were charged respectively and whether the commission or omission amounts to an offence especially under Sections 201, 217 and 218 of IPC is required to be scrutinized.

341 Section 217 and 218 of IPC read as under:-

**217. Public servant disobeying direction of law with intent to save person from punishment or property from forfeiture.**—Whoever, being a public servant, knowingly disobeys any direction of the law as to the way in which he is to conduct himself as such public servant, intending thereby to save, or knowing it to be likely that he will thereby save, any person from legal punishment, or subject him to a less punishment than that to which he is

liable, or with intent to save, or knowing that he is likely thereby to save, any property from forfeiture or any charge to which it is liable by law, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

**218. Public servant framing incorrect record or writing with intent to save person from punishment or property from forfeiture.—**

Whoever, being a public servant, and being as such public servant, charged with the preparation of any record or other writing, frames that record or writing in a manner which he knows to be incorrect, with intent to cause, or knowing it to be likely that he will thereby cause, loss or injury to the public or to any person, or with intent thereby to save, or knowing it to be likely that he will thereby save, any person from legal punishment, or with intent to save, or knowing that he is likely thereby to save, any property from forfeiture or other charge to which it is liable by law, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

342           The recording of the FIR - Exh. 56 is the starting point of this investigation. The prosecutrix PW-1 was taken to Limkheda police station on 4<sup>th</sup> March, 2002 and there she told

about the incident of murder and rape. Her evidence along with the evidence of other witnesses is discussed extensively earlier. There are manipulations. Briefly stated her evidence shows that though she disclosed the names of the offenders, the police of Limkheda Police Station asked her why she disclosed the names of the offenders and the facts concerning rape on her and if she would be taken to hospital for examination in that regard, she would be given poisonous injection at the hospital, so she was frightened. She has stated in her evidence that whatever was recorded by the police was not read over to her. She did not know what record was made and the police forcibly obtained her thumb impression on the record maintained by them. This evidence can be assessed on the basis of other circumstantial evidence. FIR Exhibit 56 is to be looked into. The names of the persons who moved with the prosecutrix were taken, however, name of father Abdul Sattar was wrongly mentioned but other names were rightly mentioned. It is further mentioned that mob of 500 persons carrying sticks came

abusing. They tore the clothes of the ladies Mumtaz and Shamim and committed rape on them. However, she was left out because she informed that she was pregnant and when she regained consciousness, she saw the dead bodies of her relatives and she was frightened, so she went up the hill and hid there. She stayed there for entire day and night and then she came down. She drank water at hand pump. She saw one jeep on the road and went to the jeep where she met an officer (DW 3) and told the incident to him. The officer took her to Limkheda Police Station.

343 Her statements which she gave before CBI and her statement Exhibit 277 dated 6<sup>th</sup> March, 2002, disclosed a different story. The contradictions and omissions which are brought on record from her statements dated 9<sup>th</sup> January, 2004, 13<sup>th</sup> February, 2004, 27<sup>th</sup> March, 2004 recorded by CBI which are respectively at Exhibit 434(Colly.), 439 (Colly.) and Exhibit 393 (colly.) are considered. These omissions and contradictions are insignificant when examined at the time of

submissions of learned defence counsel and learned Prosecutor. Thus, her substantive evidence is more or less consistent in all the material particulars with her previous statements recorded by CBI and her statement Exhibit 277 recorded on 6.3.2002 which can be used for the purpose of corroboration as it is at or about the time of the incident.

344 The lapses in the investigation are as follows:

(i) Accused No. 17, who attended the prosecutrix, while recording the FIR did not mention the names of accused persons disclosed by her, which she disclosed subsequently in her statement Exhibit 277 and the statements before CBI. At that time, PW 15 Bhikabhai Patel was in charge of the police station.

(ii) Though according to PW 35, Yadi (Exh. 203) was prepared on 4.3.2002 by Limkheda Police Station for sending the prosecutrix for medical examination, she was not sent on 4th but she was sent on 5.3.2002 for medical examination so as to cause disappearance of evidence.

(iii) When the prosecutrix was sent for medical

examination on 7<sup>th</sup> March, 2002, after recording of her statement Exh. 277 by PW-23 Executive Magistrate Govindbhai, yadi was not sent. Yadi was sent after about 10 days though PW-17 Dr. Rohini Katti has asked for yadi on the same day i.e. 7<sup>th</sup> March.

(iv) FIR was recorded on 4.3.2002 at 10.45 a.m. which disclosed cognizable offence of rape and murder and therefore it was registered under sections 376 and 302 of Indian Penal Code. So, immediate drawing of spot and inquest panchamas was necessary. The police visited the spot on 4<sup>th</sup> March, 2002 in the evening, however, on that day, they did not draw spot or inquest panchanama though they found dead bodies.

(v) The prosecutrix was not taken to show the spot or to identify the bodies.

(vi) Incorrect inquest panchnama was drawn. The evidence of PW 34 shows that he drew the panchnama at the instance of accused No. 16 and accused No. 13 and 14 dictated the inquest panchnama Exh. 123.

(vii) It was the duty of the investigating officer and

police personnel to take care by appointing some person or constable by way of keeping guard or for security to protect the dead bodies which were lying on the spot which was open and unprotected place, however, it was not done.

(viii) Photograph of body of Saleha was taken on 4<sup>th</sup> March, 2002 , however, her body was missing on 5<sup>th</sup> March, 2002.

(ix) Postmortem was conducted in deliberate haste without examining and noting the necessary facts with a view to suppress the material evidence on the point of Sections 376 and 302 and the bodies were hurriedly buried with sacks full of salt so that they would decompose faster and the evidence would disappear.

(x) No blood samples, nail clippings, hair sample etc and especially vaginal swabs were collected by accused Nos. 19 and 20 during postmortem though the FIR showed that it was a case of rape.

(xi) Why bodies were not handed over to the relatives when Abdul Sattar had admittedly identified body of

Haleema as mother of the prosecutrix.

(xii) Letter Exh. 233 dated 10.4.2002 by accused No. 16 Circle Police Inspector Limkheda to Forensic Science Laboratory shows that the accused gangraped Madinaben and Aminben and killed them. From where these names surfaced when according to the defence by then only one body was identified i.e of Halima. This shows the accused Nos. 13 to 18 were trying to suppress facts, however, truth has this uncanny way of surfacing.

(xiii) GFSL report Exhibit 238 dated 24.4.2002 addressed by Forensic Science Laboratory to Circle Inspector Limkheda (accused No. 16) shows the names of identification of three dead bodies i.e Akliben w/o. Yusuf Musa Patel, Aslam Abdul aged 13 years and Irfan Abdul, when as per the police, the dead bodies were not identified at all except that of Haleema. This also shows police were suppressing facts.

(xiv) Police did not seize and preserve all the articles of the deceased to facilitate their identification later on to purposely weaken the case.

(xv) FIR was ante-timed.

(xvi) Police did not arrest accused though it was a cognizable offence.

(xvii) Suppression of material facts by police accused and accused nos. 19 and 20 to screen the offenders.

345 We now proceed to chronologically assess the role played by the accused and the investigation:

346 **Exhibit 56:** Evidence of PW 35 Ranjeetsingh Patel police constable, DW1 Budhsingh Patel Writer Constable, DW 5 Jaisinghbhai Patel head constable and DW 6 Chandubhai Tariyad police constable, is to be looked into alongwith the evidence of the prosecutrix. She has stated that all the contents in Exhibit 56 are not true and there is a suppression of material facts. The names of the assailants were disclosed by her. However, they were not mentioned in the FIR deliberately by the persons, who recorded the FIR and her thumb impression was obtained forcibly. Not only that but

she was threatened that if she disclosed the names of the culprits, then she would be taken to hospital and would be given a poisonous injection.

347 Thus, there is no mention in the FIR that the prosecutrix was raped. There is no mention of a single name of any of the assailants in the FIR. False fabricated facts are stated that a mob of 500 persons attacked the prosecutrix and her group. PW 35 Ranjeetsingh Patel, DW 1 Budhsingh, DW 5 Jaisinghbhai Patel & DW 6 Chandubhai Tariyad have all stated & confirmed that a lady by name Bilkis Banoo arrived at the Limkheda police station on 4.3.2002 to give complaint and her complaint was recorded i.e., Exhibit 56 which was recorded by accused No.17 Somabhai Koyabhai Gori.

348 PW 35 Ranjeetsingh Patel in brief has stated that the contents of the FIR were stated to accused No. 17 Somabhai by the prosecutrix that a mob of 500 people attacked them and raped her relatives and killed them. He

said that he was present at the time of recording of the FIR. He identified the complaint Exh. 56. He also identified the signature of accused No.17 Somabhai on Exh. 56. He has stated that the handwriting is of one Budhsingh (DW 1). He further submitted that the yadi of the prosecutrix for medical examination was prepared and he identified the said yadi at Exhibit 203 dated 4.3.2002 bearing handwriting and signature of accused No.17 Somabhai Gori. Further, he has stated that on 5.3.2002, he alongwith accused No.13 Narpatsingh, accused No.14 Idris Saiyed and accused No.16 Ramsingh Bhabhor alongwith PW 34 Amrutsingh Khant and one Police Head Constable Mangalsingh left for Kesharpur jungle. Seven corpses were found in the jungle. As per his evidence, accused No.13 Narpatsingh dictated the inquest panchanama which was scribed by PW 34 Amrutsingh. He further stated that accused No.19 Dr.Arunkumar Ramkishan Prasad and accused No.20 Dr.Sangeeta Arunkumar Prasad conducted the post-mortem on the spot. He has further stated that a pit was dug by labourers and all the corpses

were buried therein. He prepared the case diary entry at the instance of accused No.13 Narpatsingh which bears the signature of accused No.13 Narpatsingh at the end which is marked Exhibit 204. He has further submitted that in all six garments were collected from the seven corpses. So he collected those clothes and came to Limkheda police station and handed over the same to one PSO Jaisingh at Limkheda police station, who under panchanama, seized those clothes. The said panchanama dated 5.3.2002 is marked at exhibit 205 and the said entry in the muddemal register is marked at exhibit 206. He identified the clothes, i.e., sky blue colour saree with label and seal marked Article 25 collectively, maroon brown colour petticoat with seal marked Article 26 collectively, olive green trousers with seal and wrapper and envelope marked Exhibit 27; one piece of bush shirt with label, envelope marked Exhibit 28; frock with floral design with label, envelope, seal marked Article 29; a piece of striped bush shirt with envelope, seal, wrapper marked at article 30 collectively.

349 PW 35 Ranjeetsingh Patel was contradicted by the learned Prosecutor on the basis of the statement dated 6.2.2004 recorded by CBI. These omissions are in relation to what was stated by the prosecutrix. These omissions are portion marked A and omission about taking photographs of 7 dead bodies by PW 10 Soni on 5.3.2002 is marked B in the said statement. These omissions have been proved. Though these omissions cannot be considered in the evidence of the witnesses, they are useful to assess the credit of the witness.

350 PW 34 Amruthsingh Khant was a police constable and was on patrol duty at Randhikpur on 4.3.2002 alongwith CPI Bhabhor accused No.16 and other police officers i.e., including accused No.13 Narpatsingh and accused No.14 Idris Abdul Saiyed. They all went to Panivela Kesharpur area. PW 34 has stated that the inquest was conducted on 5.3.2002 in the Kesharpur jungle. Accused No.14 drew inquest panchanama at exhibit 123 and accused No.19 Dr.Arunkumar

Ramkishan Prasad and accused No.20 Dr.Sangeeta Arunkumar Prasad conducted the post-mortem at the site. He wrote the inquest panchanama at the instance of accused No.16 Bhabhor, CPI and accused No.14 Saiyed PSI and also accused No.13 Narpatsingh. According to his evidence, accused No.14 Saiyed and accused No.13 Narpatsingh dictated the inquest panchanama at exhibit 123.

351 Regarding corpses, Amrutsingh stated that there were 7 corpses i.e of 4 ladies, 2 boys and 1 girl. On identification of corpses, PW 34 Amrutsingh Khant has stated that one Abdul Sattar had come to the spot, identified one corpse i.e., of Aminaben and after conducting the post-mortem by accused No.19 and 20, the corpses were buried at the site. He has stated that he got the labourers at the instance of accused No.13 Narpatsing. What is most important to note is that he stated that nothing from the corpses was preserved for the purpose of establishing their identity. This shows they did not want the bodies to be

identified. This shows that accused Nos. 13, 14 and 16 who were present at the spot were trying to cause disappearance of evidence of offences and had prepared incorrect record and did not conduct themselves properly as public servant with intent to save accused Nos. 1 to 12.

352 It has also come on record in the evidence of PW 35 Ranjitsingh Patel that Yadi (Exhibit 203) dated 4.3.2002 was prepared regarding sending the prosecutrix for medical examination. Though the Yadi is dated 4.3.2002 the prosecutrix was sent for medical examination to CHC Limkheda on 5.3.2002. It is clear from the evidence of PW 9 Dr. Mahto that the prosecutrix was brought on 5.3.2002 for examination. It may be noted that CHC Limkheda was situated just few yards away from Limkheda police station. The prosecutrix was purposely sent late for examination to cause disappearance of evidence.

353 DW 1 Budh Singh is a defence witness who was

attached to the Limkheda police station at the relevant time. He admitted that he was a writer constable. He admitted his hand-writing in Exhibit 56. Accused No.17 Somabhai Gori was PSO at the time when the FIR was recorded and the original of the FIR was scribed by accused No.17 Somabhai Gori. Somabhai, accused No.17 questioned the prosecutrix and he (DW 1) simultaneously recorded the replies given by the prosecutrix. He has stated that Somabhai took charge on 4.3.2002 at 11.35 am till 11.35 am on 5.3.2002. Head constable Jaisingh (DW 5) has stated that he handed over charge to accused no. 17 Somabhai on 4.3.2002 at 11.35 a.m.

354 DW 5 Jaisingh Patel was working as a head constable at Limkheda police station at the relevant time. He made the FIR entry Exhibit 485-A in FIR register (Article 74) as 10.15 am. He has stated that at that time the prosecutrix had approached accused No.15 Bhimabhai Patel, who directed her to accused No.17 Somabhai Gori, who recorded

the statement of the prosecutrix i.e. FIR Exh.56. Accused No. 15 was heading Limkheda Police Station at that time. Mr.Patel made station diary entry about the incident. Accused No.15 had made note in the station diary entry regarding riots at Sanjeli which is marked exhibits 503, 503A and while leaving police station, accused No.15 told DW 5 to leave two pages of FIR book for recording the complaint from Sanjeli and accordingly, he left two pages Nos.83, 84 and those two sheets were torn off by him. However, he kept the said sheets in the book itself on page Nos.85 and 86. DW 5 Jaisingh has stated that he handed over charge to accused No.17 Somabhai Gori on 4.3.2002 at 11.35 a.m. DW 1 has also stated that Somabhai Gori took charge on 4.3.2002 at 11.35 a.m. This also shows that FIR was ante-timed because if accused No. 17 Somabhai took charge at 11.35 a.m. on 4.3.2002, he could not have recorded the FIR Exh. 56 at 10.45 a.m. on 4.3.2002. This further shows the mischief played by the police. The police have prepared the FIR later to suit them and then antetimed it.

355 DW 6 Chandubai Tariyad has stated that he was a police constable at Limkheda police station at the relevant time. He stated that the prosecutrix was present when accused No.17 Somabhai Gori told him to record the statement. He prepared two copies of the FIR with carbon paper.

356 We have already discussed the evidence of PW 10 Mr.R.K. Soni, PW 28 Bhavinkumar Patel, PW 30 Vasudev Pandit and PW 32 Vinodbhai Prajapati at length while scrutinizing the evidence relating to photographs. We have already held that though these four witnesses did not support the prosecution, there is sufficient reliable evidence to hold that PW 10 and PW 28 went to spot on 4.3.2002 and 5.3.2002; took photographs and PW 30 Pandit was having Scanner Colour Lab at Godhra and negatives (Exh. 59/1 to 5/17) were developed in his Lab. The bill of PW 10 Soni for the photographs was raised, demand made and the payment

of photographs was also made to PW 10 Soni. Thus, the prosecution has proved its case that accused no. 17 had recorded the FIR and accused nos. 13 to 16 have visited the spot on 4.3.2002 and 5.3.2002 and there are many lapses in the investigation.

357 We have mentioned earlier that none of the police personnel from Limkheda police station, who were on duty at Limkheda police station on 4.3.2002 and 5.3.2002 supported the prosecution when they were called as witness for prosecution. However, conspicuously, the police personnel appeared as witnesses for the defence and tried to destroy the case of the prosecution at its root. However their attempts were an abortive attempt. The circumstances and the documentary evidence like yadi Exh.200; absence of material facts in the FIR; not mentioning the true facts in the yadi, not sending the prosecutrix immediately for medical examination, but sending her on the next day, so also not taking the prosecutrix to spot; not taking the prosecutrix to

identify the dead bodies; not protecting the dead bodies; disappearance of body of Saleha, etc. form concrete evidence to lead us to the only inference that the police working at Limkheda police station prepared incorrect record as they wanted to protect the interest of persons of their department i.e., accused Nos.13 to 18 as well as persons from Randikpur i.e accused Nos 1 to 12. Thus, we find that the witnesses who did not support the prosecution and who stepped in as defence witnesses, did not create any confidence in our mind that they were telling the truth but we found that they were interested only in presenting a manipulated version to mislead the Court.

### **EXHIBITS 147 TO 150**

358 As far as accused who are policemen are concerned, Mr.Ponda argued that the letters at exhibits 147 to 150 collectively, i.e., the correspondence between PW 18 Jayanti Ravi, District Magistrate and Collector, Godhra and

Shri Jadeja, SP, Dahod, disclose that the progress in the investigation was communicated by the police officers of Limkheda police station to the higher authority and Mr.Jadeja was personally supervising the entire investigation. Thus, when Superintendent of Police of Dahod was supervising the investigation, then how the police of Limkheda police station i.e., accused Nos. 13 to 18 can be held responsible for any omission or under sections 217, 218 and 201 of the Indian Penal Code.

359 In order to examine the substance in the submissions of Mr.Ponda, we carefully went through the correspondence between PW 18 Jayanti Ravi District Magistrate & Collector, District Panch Mahal Godhra and District Superintendent of Police, Dahod and the Additional Chief Secretary, Home Department, New Sachivalaya, Gandhinagar:

(i) Exhibit 147 is a letter dated 7.3.2002 written by

PW 18 Collector and District Magistrate, Panch Mahal Godhra to the District Superintendent of Police, Dahod. She has referred to her visit to the relief camp and recording of the statement of the prosecutrix by the Executive Magistrate. In the said letter, she has requested the District Superintendent of Police, Dahod to arrest the persons named in the statement (Exh. 277) recorded by the Executive Magistrate PW 23 Govindbhai Patel.

(ii) In Exh. 148A collectively, there is another letter written by PW 18 District Magistrate, Panch Mahal Godhra to the District Superintendent of Police, Dahod dated 11.3.2002 in which she has requested to inform progress in the case;

(iii) There is another letter by PW 18 District Magistrate, Godhra to District Superintendent of Police, Dahod dated 18.3.2002 which is marked exhibit 148B. This was a reminder whereby the same request was repeated.

(iv) Exh. 148C is another letter dated 3.5.2002 written by PW 18 Jayanti Ravi to Mr.A.K. Jadeja, the Superintendent of Police, Dahod, where she has referred to his report dated 11.4.2002 which showed that nobody was arrested from the persons named in the complaint and she requested that matter be taken seriously and the report of action taken by him to be sent to her and National Commission for Women, Delhi.

(v) Exh. 148D is a letter dated 27.6.2002 written by PW18 Jayanti Ravi to the District Superintendent of Police, Dahod. She informed that immediate legal action be taken against offenders as report of the proceedings is to be sent to the Government and she sent the copy of the same to the Additional Chief Secretary, Home Department. In this letter, she specifically stated "Till today no report of proceeding is received from you".

(vi) Exhibit 148E dated 29.6.2002 is a letter by PW18

Jayanti Ravi to the Superintendent of Police, Dahod, wherein she has informed that a team of 26 Members of Parliament is arriving on 2.7.2002 in connection with the incident of communal riots and hence, she asked for detailed report.

(vii) Exhibit 149 is a letter dated 8.7.2002 written by PW 18 District Magistrate, Panch Mahal, Godhra to the Additional Chief Secretary, Home Department, Sachivalaya, Gandhinagar. In the said letter, she has incorporated a report of the Superintendent of Police, Dahod dated 30.6.2002.

(viii) In the said report dated 30.6.2002, Mr.Jadeja had given a gist of the FIR and also mentioned about the complaint given by the prosecutrix dated 6.3.2002 recorded by the Tehsildar where the names of the accused i.e., accused Nos. 1 to 12 were mentioned and it was mentioned that they were from Randhikpur. In the said letter, he had forwarded the progress report of the Circle Police Inspector, i.e., the investigating police officer of this case i.e., accused

No.16 Ramsingh Bhabor. In the said report, he has informed that the complainant Bilkis has not stated in her FIR the names of the accused and that she was raped and it was mentioned by accused No. 16 i.e., the Circle Inspector that when she disclosed these three names, she knew these persons, then why she did not disclose these names when she gave FIR at the Limkheda police station? He has further reported that the complainant has stated contradictory facts and the medical officer has given NIL report and no independent evidence against the accused is available till then and therefore, it was communicated that the alleged accused were not arrested.

(ix) Exhibit 150 dated 20.3.2002 is a letter written by Mr.Jadeja, Superintendent of Police, Dahod to PW 18 District Magistrate, Panch Mahal, Godhra. (This letter was written after receipt of letter Exh 148B which was sent on 18.3.2002 by District Magistrate Godhra PW 18 Jayanti Ravi). He has informed that a violent mob of 500 attacked the prosecutrix

and her cousins and raped and killed them. However, she has stated in another statement that 25 to 30 persons attacked and assaulted the prosecutrix and her cousins. However, there are contradictions in both her statements about the number of persons and the rapists and therefore, totally neutral and judicious investigation is done and accordingly, he has instructed orally and in writing to the Circle Inspector, Limkheda police station i.e., accused No.16 to investigate meticulously and to take over investigation and he also instructed PW16 and his PSI to conduct the investigation under his guidance so that it is independent and without defect. He has also communicated that the process of daily investigation should be under his guidance and he informed that efforts are being made to arrest the accused.

360 We do agree with Mr.Ponda that in the letter i.e., Exh 150, the Dist. Supdt. of Police, Dahod has informed Dist. Magistrate PW 18 Jayanti Ravi, Panch Mahal, Godhra that he has complete supervision over the day to day investigation of

the case. Obviously, one may get the impression that Mr.Jadeja is responsible for all the loopholes and lacunae which are found in the investigation. However, we make it clear that before Mr.Jadeja has written this letter on 20.3.2002 the Limkheda police had already hushed up all the material facts and they had manipulated the FIR, spot of offence, inquest and other documents. They have taken the investigation in a wrong direction from the beginning i.e., from the day of the FIR i.e., 4.3.2002. The police i.e., accused Nos.13, 14, 15, 16 & 17 have at the initial stage deleted the names of the accused. They did not record the names of the accused and the material information furnished by the prosecutrix at the time of recording of the complaint. Accused Nos.13, 14 and 16 one after the other were in charge of the investigation or it appears they worked as a team on the initial 2 to 3 days. The case was deliberately damaged at its initial stage and therefore, though the police visited the spot on the very day of the FIR i.e., on 4.3.2002, the defence tried their level best to suppress this fact from

the Court and witnesses like PW10, PW28, PW30, and PW32 were won over by them on the point of visiting site on 4.3.2002 and taking photographs of the dead bodies on 4.3.2002 & 5.3.2002.

361 We rely on the judgment of the Supreme Court in the case of **Ramesh and others vs. State of Haryana (Criminal Appeal No. 2526 of 2014 decided on 22.11.2016)**. The Supreme Court has discussed in this case about the damage done by hostile witnesses to the law and order and judicial institution. It held thus:

“99. Witness turning hostile is a major disturbing factor faced by the criminal courts in India. Reasons are many for the witnesses turning hostile, but of late, we see, especially in high profile cases, there is a regularity in the witnesses turning hostile, either due to monetary consideration or by other tempting offers which undermine the entire criminal justice system and people carry the impression that the

mighty and powerful can always get away from the clutches of law thereby, eroding people's faith in the system.

....If a witness becomes hostile to subvert the judicial process, the Courts shall not stand as a mute spectator and every effort should be made to bring home the truth. Criminal judicial system cannot be overturned by those gullible witnesses who act under pressure, inducement or intimidation.

....When the witnesses are not able to depose correctly in the court of law, it results in low rate of conviction and many times even hardened criminals escape the conviction. It shakes public confidence in the criminal justice delivery system. It is for this reason there has been a lot of discussion on witness protection and from various quarters demand is made for the State to play a definite role in coming out with witness protection programme, at least in sensitive cases involving those in power, who have political patronage and could wield muscle and money power, to avert trial getting tainted and

derailed and truth becoming a casualty. A stern and emphatic message to this effect was given in Zahira Habibullah's case as well.

362 No statements of PW 10, PW 28, PW 30, and PW 32 were recorded by the accused police. Mr.Jadeja came in picture after 8.3.2002 i.e., after PW 18 Jayanti Ravi, the Dist. Magistrate, Godhra had written a letter dated 7.3.2002 (exh. 147) to him and requested him to arrest the accused persons. However, thereafter, she wrote two reminders asking for the report of arrest. However, reply to her letter dated 7.3.2002 was given by Mr.Jadeja, Superintendent of Police,Dahod on 20.3.2002 after collecting information from the Circle Police Inspector (accused No.16) and others, thereby he has informed that the entire investigation is under his control. However, there is no evidence to show that Mr.Jadeja had been to the spot at any point of time. He has obviously taken all the information and instructions from the accused police persons and Mr.Jadeja has completely relied on the police officers at the Limkheda police station i.e., accused Nos.13,

14, 15, 16, 17 & 18 and mainly on accused No.16. So also, the said accused have completely misled him. Mr.Jadeja was not called as a witness either by the prosecution or by the defence. It is to be noted that the defence has examined nearly 10 witnesses. The defence relied on the correspondence between PW18 Jayanti Ravi and Mr.Jadeja and thus, Mr.Jadeja is not before the Court to explain his statement in his report that he is going to supervise daily investigation. After considering the evidence before us and the suppression of facts to a great extent by the police, we are constrained to infer that Mr.Jadeja did not personally look into the matter but has completely relied on the investigation carried out and the report made by the Circle Police Inspector, Limkheda police station i.e., accused No.16. Thus, this correspondence of Mr.Jadeja does not absolve accused Nos.13 to 18 of their legal liability and their duty to investigate the matter properly. On the contrary, it highlights that though PW 18 Jayanti Ravi was pursuing the matter and has demanded the arrest of the accused, the accused i.e., the

police of Limkheda police station have deliberately avoided to arrest the accused. It was a case of section 302 and section 376 of the Indian Penal Code which are grave and serious as also cognisable offences. It is not necessary for the police to go into detail and verify whether the accused are innocent or not which is the function of the Court. The police were supposed to take action when the cognisable offence is reported to them and the names of the accused are informed to them. After arrest of the accused, if the police would have come to the conclusion that there is no evidence against them, then, they could have filed report under section 169 of the Code of Criminal Procedure. However, the omissions on the part of the police accused are so grave and so obvious that their malafides and intentions are very apparent.

363 The accused who were police personnel were aware of the role played by the other accused in this offence, yet, they incorrectly prepared the record of FIR, panchanamas and suppressed the fact of their visit to the

spot on 4.3.2002 and about taking photographs of the bodies. The bodies were left at the spot till the next day lying there unprotected with knowledge that this would damage the case and thereby intentionally tried to save the accused from legal punishment. Similarly, the police officers i.e., the accused Nos.13 , 14 and 16 who were in charge of the investigation at that time and had visited the spot did not protect the dead bodies. Even if the case of the defence is accepted that there were no bodies of 14 dead persons, however, the body of Saleha was there but they did not protect this body and the bodies were shifted from the place of the actual incident. Not writing the names of the accused and the material portion of the offence in the FIR as also causing disappearance of the evidence was clearly done with intention to screen the accused from legal punishment. Moreover, accused Nos.13 to 18 created such an information in respect of the offence which they knew was false. This shows that the police accused have committed offences under Sections 201 & 218 of IPC.

364 Accused Nos.19 and 20 are the medical officers. Prima facie, one may feel that they are not concerned with the investigation and therefore, they are innocent. However, in our considered opinion and after close scrutiny of the evidence, we could read between the lines which show that the medical officers have completely failed to perform the postmortem of all the bodies as is expected under the law. The medical officer, who is entrusted to perform the postmortem of the dead bodies, is duty bound to give all details of the injuries and the cause of death. In cases where rape is committed, then, the medical officer is required to examine the private parts of the victim carefully so also the injury marks on her body and private part carefully keeping in view history of rape and make an objective note of the observations. It is also a must for the medical officer in the case of rape to collect vaginal swab and smear or any other liquid or dried liquid which could have been a remnant of seminal discharge and thus, give a correct direction to the

investigation. The finding may be negative or positive, however, such examination is required to be done in the case of rape. In the present case, in the inquest panchanama, the Doctors have only mentioned injury to private part of one deceased. On perusal of the photographs, one can easily make out that the females were sexually abused when they were put to death. It was not one incident of rape but as per the case of prosecution, nearly 3 to 4 females were raped. 4 bodies of females were found. The incident has taken place in the afternoon of 3.3.2002 and the Doctors visited the spot two days thereafter i.e., on 5.3.2002. The postmortem reports are produced which are marked at exhibit 282A to 282G.

365 In Inquest Panchnama Exhibit 123, it is mentioned as under:

- (i) the body of Haleema was lying with a big stone on her chest. It was mentioned that her chest

portion was pressed and on examination of the private part, a white liquid was flowing and it is mentioned that no clothes were found on the body except a red colour leg wear and the remaining portion is bare.

(ii) Another female corpse was found. She was wearing a red colour blouse, cream colour red design saree and a petticoat. However, her petticoat is over the waist portion. The lower portion is naked. The corpse was lying naked on its stomach. It was the body of a young lady and blood was flowing from the mouth and no marks of cruelty were found.

(iii) One more body was found of 35 years old female. Her face was crushed and bleeding. Her abdomen was swollen and white liquid was flowing through the private part.

(iv) Then another i.e. 4<sup>th</sup> corpse which was of a 22 year old female was found. There was bleeding from her mouth and eyes. The face was swollen, the body was lying bare. However, no visible marks of injury were

found on the body. However, on examination of the private parts, marks of cruelty were seen.

366 Thus, we are convinced that the defence cannot be taken by the medical officers that they were directed by the police to conduct postmortem in such a manner. The medical officers are independent persons; they have to carry out postmortem independently as they are experts and write true and correct facts in respect of injuries and the cause of death.

367 The postmortem reports are at Exhibits 282A, 282B, 282C, 282D, 282E, 282F and 282G. The brief details of the post mortem reports are as under:

<b>Exhibit</b>	<b>Relevant Clause No</b>	<b>Particulars</b>	<b>Answer</b>
<b>282A</b>		<b>Is of Haleema, the wife of Abdul Ghanchi. The postmortem was conducted on 5.3.2002 from 5.10pm to 6.20pm.</b>	
<b>3.</b>	<b>4. 5</b>	<b>5.</b> It is in respect of substance of accompanying report from police officer or Magistrate together with	NAD (No Abnormality)

		the date of death, if known. Supposed cause of death or reason, for examination.	Detected)
	15	Pertains to external genitals. Indication of purging	Swollen external genitalia
	19 (1)	Injuries under the scalp, their nature	Posterior occipital region fracture
	19(3)	Brain	Bleeding present.
	20	Thorax	Multiple ribs fracture on both sides, lungs ruptured. Viscera ruptured, putrefaction began.
		Cause of death	Cardio Respiratory Arrest due to Haemorrhagic shock due to blunt injury
<b>282B</b>	<b>Of an unknown female of 13 years. Postmortem conducted between 12.10pm to 1.10pm.</b>		
	Cause of death	Cardio respiratory arrest due to shock due to haemorrhagic shock (head injury)	
<b>282C</b>	<b>Of an unknown male. Postmortem conducted between 1.15 pm to 2.05pm.</b>		
	Cause of Death	Cardio respiratory arrest due to head injury	
<b>282D</b>	<b>Of an unknown male person. Post-mortem conducted</b>		

	<b>between 2.12 p.m. &amp; 3.00 p.m.</b>		
	Cause of Death	Due to shock due to internal brain haemorrhage (head injury)	
<b>282E</b>	<b>Of an unknown 20 year old female with red blouse, green petticoat and green saree. Post-mortem conducted between 3.10 p.m. &amp; 3.45 p.m.</b>		
	Clause 15	Condition of private parts	Female
	Clauses 17 & 18		As per inquest panchanama
	Clause 19		Head injury fracture in posterior region
	Cause of death	Due to Cardio Respiratory Arrest due to Internal Head injury (blunt injury)	
<b>282F</b>	<b>Of a 35 year old female wearing yellow blouse, pink pyjama. Post-mortem conducted between 3.52 p.m. &amp; 4.30 p.m.</b>		
	Clause 15		Oedematous
	Cause of Death	Sudden Cardio Pulmonary Arrest due to shock due to blunt injury	
<b>282G</b>	<b>Of a 22 year old female, wearing yellow petticoat, multi colour saree. Postmortem started at 4.32 pm to 5.05pm.</b>		
	Clause 15		Oedematous thigh region. Multiple injury with stains.
	Cause of Death	Cardio Respiratory Arrest due to shock due to internal haemorrhage due to injury.	

by the police to the medical officers for conducting postmortem and postmortem notes of all the bodies are all important documents which are required to be looked into to decide how the investigation by the police and the postmortem conducted by the Doctors were perfunctory and manipulated and done in order to cause disappearance of evidence and to screen the offenders i.e. accused nos.1 to 12.

369 The police officer is supposed to send a report (as per the procedure in Gujarat) to the Doctor to conduct postmortem. As per the case of the police, they went alongwith Doctors for the first time on 5.3.2002 on the spot where 7 bodies were lying and the postmortem was conducted on the spot on the same day. Thus, the first inquest was conducted at 10 am to 12 noon on 5.3.2002. On 5.3.2002, all the medical reports were written there at 10.10 am. In all the medical reports, the clauses are filled in. Clause Nos.9, 10, 15, 16 are mentioned as per the inquest.

However, the inquest was conducted between 10 am to 12 noon. That means the reports Exh. D105(1) to D105(7) were prepared prior to inquest.

370           The inquest started at 10 am, finished at 12 noon. The report also started at 10.10 am and in all these reports, the words “as per inquest” were mentioned before inquest was completed. Thus, it was hurriedly given to the medical officers and thereafter, these medical officers conducted postmortem. In the proforma of the postmortem, specific information is required to be filled in about the injuries and the private parts especially where rape is alleged. Nowhere, in any of the postmortem reports, the Doctors have mentioned that white fluid flowing from private parts of the two bodies was noticed though it is mentioned in the inquest. Similarly, there is a clause in which the Doctor has to state about collection of any substance found on the body and nothing was mentioned by the doctors. Thus, it is evident that they were not only casual in conducting the postmortem

but suppressed the material information by way of omission. All the acts of commission and omission of the police and the medical officers cannot be examined in isolation but they are well connected with each other in a chain of suppression of facts causing disappearance of the evidence with intent to screen the offenders and save them from punishment. Hence, their acquittal deserves to be set aside. We therefore call upon Mr.Ponda to make submissions on the point of quantum of sentence. He has submitted that minimum sentence be imposed.

371 In view of the above, we set aside acquittal of accused Nos.13, 14, 15, 16, 18, 19 and 20 under Sections 201 and 218 of IPC and we hold them guilty of the offences punishable under sections 201 and 218 of the Indian Penal Code. For the offence under Section 201 of IPC, each of the accused nos. 13, 14, 15, 16, 18, 19 & 20 is sentenced to the period of imprisonment undergone by them and fine of Rs.5,000/- (Rs. Five thousand only) each i/d S.I. for two

months. For the offence under Section 218 of IPC, each of these accused is sentenced to fine of Rs.15,000/- (Rs. Fifteen thousand only) each i/d S.I. for two months. The accused nos. 13, 14, 15, 16, 18, 19 & 20 are granted time of eight weeks to deposit the fine amount. However, the ingredients u/s 217 are not established. So, we maintain the verdict of the trial Court in respect of offence u/s 217 of IPC.

372 We hereby confirm the conviction and sentence imposed on accused nos. 1, 2 & 4 to 12 as imposed by the trial Court. All the Appeals filed by accused nos. 1, 2 and 4 to 12 against their conviction and sentence i.e. Cri. Appeal Nos. 1020 of 2009 to 1023 of 2009 and 487 of 2010, are dismissed, hence, they would have to undergo the conviction and sentence as imposed by the trial Court.

373 Appeal for enhancement of sentence i.e. Cri. Appeal No. 271 of 2011 filed by the C.B.I., is dismissed.

